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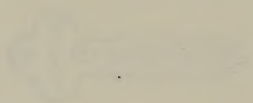
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COVERING CASES REPORTED IN

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47 P.2d — 48 P.2d

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IN VOLUME

47 PACIFIC REPORTER

SECOND SERIES

3 Cal.2d 755

STEWART v. WAGENBACH et al.**L. A. 15145.****Supreme Court of California.****June 25, 1935.****1. Appeal and error ⇐1008(1)**

Question of passenger's contributory negligence in failing to protest to driver or request to leave automobile traveling 50 miles per hour along winding road through dense fog held one of fact for trial court.

2. Appeal and error ⇐996

Trial court's determination of question of fact will not be disturbed on appeal where reasonable inferences can be drawn from evidence supporting determination.

3. Automobiles ⇐224(1)

Automobile passenger has duty to exercise due care for his own safety.

4. Trial ⇐397(1)

Findings held not defective because court did not specifically find that the deceased's negligence "proximately contributed" to the accident, where court found deceased guilty of "contributory negligence," which means negligence of injured party that contributed proximately with negligence of one charged to produce injuries complained of.

[Ed. Note.—For other definitions of "Contributory Negligence," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Rita F. Stewart against Karl C. Wagenbach, also known as Charles Wagenbach, and another. From an adverse judgment, plaintiff appeals.

Affirmed.

Prior opinion, 38 P.(2d) 424.

N. D. Papa-Dakis and C. S. Mauk, both of Los Angeles (A. P. Michael Narlian, Melvin J. Keane, B. O. Oughton, and Daniel F. McSweeney, all of Los Angeles, of counsel), for appellant.

Paul Nourse, of Los Angeles (Forrest A. Betts, of Los Angeles, of counsel), for respondents.

CURTIS, Justice.

[1,2] The petition for a hearing of this cause was granted by this court for the reason that we were in grave doubt as to the correctness of the appellate court's conclu-

sion upon the question of contributory negligence of the deceased. We have carefully studied the evidence in this case bearing upon the question of the contributory negligence of the deceased, and while it is our opinion that the trial court may well have concluded therefrom that the deceased was not guilty of contributory negligence in failing to remonstrate at the rate of speed at which the car was being driven just prior to the collision, as the time in which said remonstrance could have been made was at most only a few seconds, yet we are not prepared to say that from the evidence the trial court was not warranted in drawing the inference that deceased was in duty bound, as a reasonable person, to make such remonstrance, notwithstanding the very brief interval of time during which said car was being driven at an excessive rate of speed. This question was one of fact for the trial court, and its determination thereof, so long as a reasonable inference could be drawn from the evidence supporting its conclusion, may not be disturbed by a reviewing court. We, therefore, adopt the opinion of the District Court of Appeal, written by Mr. Justice pro tem. Hahn, as the opinion of this court. It is as follows:

This action is one wherein plaintiff sought damages for the death of her minor son, of the age of 18 years, which it is alleged was caused by the gross negligence of defendant Erwin Wagenbach, in whose automobile deceased was riding at the time he received injuries which caused his death.

Defendants, in addition to denying the allegations of negligence, in their answer set up the plea of contributory negligence on the part of the deceased. The court found in favor of plaintiff on the issue of gross negligence, and in favor of defendants on their plea of contributory negligence. From this judgment plaintiff appeals, urging that the evidence does not support the findings of contributory negligence on the part of deceased.

The accident in which deceased lost his life occurred about 1 o'clock in the morning while he and two young lady friends were returning home in a one-seated automobile driven by defendant Erwin Wagenbach. So dense was the fog which prevailed that the lighted street lamps were barely visible to the occupants of the automobile, nor could the driver see the roadway more than

30 feet ahead of his car. While driving at a speed of 50 miles per hour along this highway, which was known to be beset with curves, the car crashed into the street curb at one of these curves. Deceased was thrown from the car, striking the pavement with such force as to cause injuries which resulted in his death. At no time did deceased protest the speed at which the car was being driven, or request that he be allowed to leave the car.

Appellant's main point on her appeal is that the evidence does not support the court's finding that deceased was guilty of contributory negligence in failing to protest to the driver because of the excessive speed, or in failing to demand opportunity to leave the car. In addition to the general considerations urged in support of this contention, it is urged that deceased did not have sufficient time after the high speed was attained within which to make protest before the crash occurred.

That the driver of the car was guilty of gross negligence in driving the car at a speed of 50 miles per hour under the conditions existing is not questioned. It would be difficult to conceive of conditions more clearly fraught with danger to the occupants of a car moving at 50 miles an hour than those which affected the car in which deceased was riding on the night of the accident. Whether or not under all the circumstances deceased in the exercise of due care was required to make protest to the driver was a question to be decided by the trial court from the evidence and the inferences to be drawn therefrom. *Curran v. Earle C. Anthony, Inc.*, 77 Cal. App. 462, 247 P. 236; *Shields v. King*, 207 Cal. 275, 277 P. 1043; *Parmenter v. McDougall*, 172 Cal. 306, 156 P. 460, and cases there cited; *Bresee v. Los Angeles Traction Co.*, 149 Cal. 131, 85 P. 152, 5 L. R. A. (N. S.) 1059.

[3] The duty of a passenger in an automobile to exercise due care for his own safety is too well established to require citation of authority. The principle underlying this rule has been succinctly stated as follows: "No one can be allowed to shut his eyes to danger in blind reliance upon the unaided care of another, without assuming the consequences of the omission of such care." *Fujise v. Los Angeles Ry. Co.*, 12 Cal. App. 207, 107 P. 317, 320; *Parmenter v. McDougall*, 172 Cal. 306, 156 P. 460.

There is evidence in the record that the speed of 50 miles per hour was maintained for more than a quarter of a mile immediately before the crash. To the trial court is particularly intrusted the duty and task of weighing the evidence and determining its worth. Upon the evidence, we do not feel warranted in disturbing the findings of the court.

[4] There is no merit in appellant's point that the findings are defective because the court did not specifically find that the negligence of deceased "proximately contributed" to the accident. The court found the deceased guilty of "contributory negligence." The term contributory negligence means negligence on the part of the injured party that contributed proximately with the negligence of the one charged to produce the injuries complained of.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.; PRESTON, J.



4 Cal.2d 79

MCCUE v. STATE BAR OF CALIFORNIA.
S. F. 15351.

Supreme Court of California.
July 9, 1935.

1. Attorney and client ☞53(1)

In disciplinary proceedings against attorney for soliciting professional employment, court could consider not only present misconduct but also attorney's past record.

2. Attorney and client ☞58

Evidence that attorney solicited professional employment held to warrant four months' suspension.

In Bank.

Application by Thomas F. McCue for a writ of review directed to the State Bar of California.

Petitioner suspended from the practice of law for four months.

Thomas F. McCue, in pro. per., and Clifton Hildebrand, both of San Francisco, for appellant.

Philbrick McCoy, of Los Angeles, for respondent.

PRESTON, Justice.

In proceedings against petitioner before the State Bar of California, based upon six charges of solicitation by him of professional employment in violation of rule 2 of the Rules of Professional Conduct, or in other words of "ambulance chasing," a local administrative committee, after hearing, recommended that petitioner be suspended from the practice of law for a period of sixty days. Thereafter the case had the full consideration of the board of governors of the state bar and petitioner appeared before them and made a statement. Said board approved and adopted, as its findings, the findings of the local committee, but recommended that petitioner be suspended from practice for a period of four months. The cause is now before us upon petitioner's application for review, wherein he questions the sufficiency of the evidence to sustain the charges against him and accuses the various representatives and officials of the state bar of bias and prejudice in connection with the investigation of his activities and the prosecution of these proceedings.

We have reviewed with care this entire record. It offers no support whatsoever for petitioner's accusations of bias and prejudice, nor is there any showing that he has been treated unfairly. As to the charges against him, the evidence is not free from conflict. Moreover, petitioner was eloquent in his denial of wrongdoing and profuse in explanations of his conduct and of apparent contradictions in his own testimony, which he claimed were due largely to an unretentive memory and the long period of time between the questioned occurrences and the dates of his examination in these proceedings. We are, however, in entire accord with the findings of fact of the local committee, which embody our view of the case. They may be summarized as follows:

There is insufficient evidence to show that petitioner solicited professional employment from Cecilia Biral (charge 5), but the evidence sufficiently shows that he did willfully solicit professional employment from George Barnes (charge 1); Albert Wiget (charge 2); G. W. Tangye (charge 3); James C. Demaree (charge 4); and Dulio Gregori (charge 6). In the Wiget and Demaree cases there was

evidence of personal solicitation of employment by petitioner, although this was denied by him. Mr. Demaree testified that petitioner was present when he (Demaree) signed the contract of employment at the hospital. In all of the cases, with possible exception of the Wiget case, there was evidence that one Dean approached the respective claimants and asked that petitioner be employed to press the claims. Counsel for petitioner objected to all testimony relative to solicitation by Dean, on ground of no proper foundation laid, in that there was no showing that petitioner had authorized Dean to solicit professional employment for him. There was no direct evidence of such authority. We concur, however, in the unanimous opinion of the committee that the circumstantial evidence in the record is convincing that Dean solicited employment for petitioner with the latter's knowledge and approval. Although in the Wiget case there was no proof that the man who solicited the employment for petitioner was Dean, there was in said case evidence of personal solicitation on the part of petitioner.

[1,2] So persuasive is the showing against petitioner that we feel it unnecessary to here detail the circumstances of each instance of solicitation. We are left without the slightest doubt as to petitioner's misconduct. With this observation, we pass to a determination of the extent to which petitioner should be disciplined. In this connection it is, of course, proper that we take into consideration not only the present misconduct, but petitioner's past record as well, which, to say the least, is not unblemished and above suspicion. In re McCue, 77 Mont. 47, 248 P. 187; In re McCue, 80 Mont. 537, 261 P. 341; In re McCue, 211 Cal. 57, 293 P. 47; Marsh v. State Bar (Cal. Sup.) 39 P.(2d) 403. Having in mind these various factors, it would appear that the recommendation of the board of governors states a proper period of discipline.

It is therefore ordered that petitioner herein, Thomas F. McCue, be and he is hereby suspended from the practice of law in this state for the period of four months from and after the date of filing of this order.

We concur: WASTE, C. J.; THOMPSON, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

3 Cal.2d 759

PACIFIC EMPLOYERS INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.
L. A. 15168.

Supreme Court of California.
 June 25, 1935.

Rehearing Denied July 25, 1935.

Master and servant ☞361

Newsboy assigned to particular location by newspaper whose Sunday edition he had sold for two years, where other newsboys "checked in" with him, and where it was his duty to sell that paper exclusively, for which exclusive service he received a "bonus" in addition to commission for each paper sold, and where his work had to be satisfactory to district manager, circulation manager, and to newspaper, held "employee," and entitled to compensation for injuries received in course of employment (St. 1931, p. 2068, § 8 (a)).

[Ed. Note.—For other definitions of "Employee," see Words & Phrases.]

In Bank.

Proceeding in certiorari by the Pacific Employers Insurance Company and another to review an award of the Industrial Accident Commission granting compensation to Ross E. Davenport, employee, minor, Mrs. Laura Davenport, his guardian ad litem, and another.

Award affirmed.

Prior opinion, 38 P.(2d) 809.

F. Britton McConnell, of Los Angeles, for petitioners.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondent Industrial Accident Commission.

WASTE, Chief Justice.

Petitioners are seeking a writ of review of, and pray for an order annulling, an award of compensation made by the respondent commission for personal injuries to a newsboy selling the Los Angeles Times. The only question involved here is the application to the facts of the case of section 8 (a) of the Workmen's Compensation Act (St. 1917, p. 835, as amended by St. 1931, p. 2068) defining the term "employee." Stated concisely, the question is: Was the injured boy an employee of the newspaper at the time of his injury?

For circulation purposes, the city of Los Angeles was divided into districts, each looked after by a district manager for the

Los Angeles Times. Davenport, the employee, had been selling the Sunday edition of the Times for two years, and it is admitted he was in the course of his employment when he was struck by an automobile and received the injuries for which the award of compensation was made. There was keen sales competition between the Times and another Los Angeles paper. The city circulation manager of the Times testified before the commission that the Times was "interested and concerned with seeing that there was a boy selling [the Times] in each major location in which the [other paper] was being sold." The boys selling the Times were not allowed to sell any other paper. Davenport was one of the boys assigned to a particular location by direction of the district manager. It was his duty to sell the Sunday Times exclusively, for which he received two and a half cents for each paper sold, together with a "bonus" of fifty cents per day, paid by the Times for "selling the papers at that corner." In addition, the district manager made arrangements, as in other cases with other boys who went around the neighborhood selling Sunday papers, that they should "check in" with Davenport for papers sold by them. The "bonus" just referred to was explained by the testimony before the commission to be an amount determined by the circulation department to be paid to the boy at the corner to compensate him for being on his corner, as required, at all proper times "and [working] while he was there." This bonus when paid to a boy carried with it "the requirement of exclusive service." The boy's work must be satisfactory to the district manager, the circulation manager, and "to the Times." The hours for being at the corner were fixed by the district manager.

This brief résumé of the material facts is sufficient to demonstrate that the employee, Davenport, came squarely within the definition of the term "employee" contained in section 8 (a) of the act, supra, and was not governed by the provisions of that section excluding persons selling newspapers, the title to which has passed to the person so engaged. This court recently denied issuance of a writ of review in a case similar in facts and identical in law points. In denying a petition for rehearing, we said: "The petition for rehearing herein is denied, for the reason that the deceased employee, at the time of his death,

was performing duties arising out of a special employment; and that such special employment was distinct from his ordinary activities, in which he was an independent contractor." State Compensation Fund v. Industrial Acc. Comm. (Cal. Sup.) 39 P. (2d) 201. For a case strikingly similar to the present case in legal effect, see Associated Indemnity Corp. v. Ind. Acc. Comm., 128 Cal. App. 104, 16 P.(2d) 774.

The award of the respondent commission is affirmed.

We concur: CURTIS, J.; SHENK, J.; LANGDON, J.; PRESTON, J.; THOMPSON, J.



4 Cal.2d 51

DAVISON et al. v. FINNERAN et al.
S. F. 15049.

Supreme Court of California.
July 1, 1935.

1. Exchange of property ☞8(4)

In action on note where defendants filed cross-complaint alleging rescission of contract for exchange of real property on ground of fraudulent representation, evidence held to justify finding that defendants relied on misrepresentations.

2. Exchange of property ☞3(1)

In action on note, defendant who in cross-complaint alleged rescission of contract on ground of misrepresentation, could not be charged with unreasonable delay in rescinding, where notice of rescission was given immediately after unsuccessful attempt to make some adjustment, during which time interest was paid on note.

3. Appeal and error ☞1050(1)

In action on note where defendant sought rescission of contract for exchange of real estate on ground of misrepresentations, admission of testimony of defendant that he had handled just one other real estate transaction, and that through real estate agent, held not prejudicial error.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by George A. Davison and another against Thomas J. Finneran and another, who filed a cross-complaint. Judgment for defendants on cross-complaint, and plaintiffs appeal.

Affirmed.

T. N. Harvey and Alfred H. McAdoo, both of Bakersfield, for appellants.

Derby, Sharpe, Quinby & Tweedt, of San Francisco, for respondents.

PRESTON, Justice.

In this cause a judgment was rendered in favor of defendants and cross-complainants Finneran, from which plaintiffs and cross-defendants Davison appealed.

The appeal involves no legal question of importance. The sole issue in reality is that of sufficiency of the evidence to support the findings and judgment. This is true because, under the view of the somewhat conflicting evidence adopted by the trial court, the three points made by appellant, which might otherwise be meritorious, are untenable. The evidence points directly to the correctness of the trial court's conclusions, and, upon the record before us, we have no hesitancy at all about affirming the judgment.

On May 8, 1929, plaintiffs and defendants entered into an agreement for the exchange of real property, pursuant to which plaintiffs conveyed to defendants a ranch in Kern county, valued at \$15,250, subject to first trust deed securing an indebtedness of \$2,000. Defendants assumed the \$2,000 encumbrance; they gave plaintiffs their note for \$8,750, secured by second trust deed on the ranch; they paid plaintiffs \$500 cash, and they conveyed to plaintiffs real property in West Hollywood, subject to a \$2,000 mortgage which plaintiffs assumed.

In August, 1930, plaintiffs brought this action to recover from defendants on their \$8,750 note. Defendants answered and also filed a cross-complaint alleging rescission of the entire contract on the ground of material fraudulent representation by plaintiffs inducing the exchange. The trial court found in favor of the allegations of the cross-complaint and gave judgment accordingly, decreeing a rescission of the transaction and providing monetary substitutes to be paid in case complete rescission could not at this time be had. As above stated, plaintiffs appealed.

From the findings and the evidence, the following appears:

During the negotiations for making the exchange and prior to execution of the agreement, the encumbrances then existing on the ranch were discussed. Defendants asked plaintiff George A. Davison the date of maturity of the \$2,000 indebtedness and he positively represented and asserted to defendants that it would not mature and become due and payable for more than two years thereafter. Defendants informed him that unless this was so, they could not enter into any agreement. Plaintiff repeated the assertion several times during the negotiations. The fact was that the trust deed was mature, due, and payable at the very time said plaintiff represented that its maturity date was more than two years away.

On May 14, 1929, defendants went into possession of the ranch. In August, 1929, according to their evidence, upon visiting the bank, they discovered for the first time that within the next two months they would be required to take up said \$2,000 indebtedness. On August 8th, defendant T. J. Finneran wrote plaintiff George A. Davison about this and about other details of the exchange which had not been adjusted to his satisfaction. The following is an excerpt from said plaintiff's reply of August 13th: "In regard to the trust deed against the property it certainly is news to me that this is to fall due soon. When I bought the place I was given to understand that this paper had four years to run, this would make it come due in Mar. 1931. I wish you would look into this, if there has been any dates or anything changed on this paper it was done without my sanction. I can truthfully say I know nothing of any change made."

On August 15th said defendant again wrote said plaintiff, saying: "I have looked up the facts in connection with the \$2000 mortgage and find that it was put on the place on March 5, 1925 and expired on March 5, 1928 and the Bank is now going to recall it, so they advised me, in March 1930. You definitely assured us that this mortgage was not due for about two and one half years. We had several talks on this particular \$2000 note and you stated that if the time limit was otherwise than what you represented it to be, you would arrange to take it up and carry it. I would like to know from you at this time, just what you propose to do with it. * * *

To the above letter said plaintiff replied on August 16th: "Now in regard to the \$2000 Trust Deed. At the time I bought the place there was a first and 2nd Trust Deed on the place. In April 1927 I paid off one of the papers and paid the other one down to \$2000. I surely was under the impression that the other paper was to run to March 1931. I would like to ask if the Bank has refused to renew this loan? I would rather have them carry it if it can be arranged. I can't see where you have any worry on this as I would have to protect myself on it anyway. I would rather the Bank would carry it if it is possible. And no doubt they will if the place is kept in good shape. * * *

Thereafter, on October 23 and November 1, 1929, the bank called upon said defendant for payments on said note. On November 5th said defendant wrote them that he was unable to take it up and asked if they would consider renewing it. On November 7th the bank replied that it was unable to accommodate him; that possibly he was maintaining an account with some other bank through which he could arrange a renewal. Said defendant testified that he had no way of securing renewal of the loan, or of paying it. At this time also, to wit, on November 5th, defendant corresponded with Mr. Heyd, the real estate agent who had represented all parties to the exchange, regarding the misrepresentation and the action of the bank, but Mr. Heyd merely referred the matter back to plaintiff. Finally, on November 12th, defendants gave plaintiffs written notice of rescission of the entire contract and transaction, with offer on their part to restore everything of value received by them, based upon six charges of fraud and misrepresentation, one of which was the misrepresentation hereinabove discussed. Thereafter, the matter was placed by the parties in the hands of their respective counsel.

The bank proceeded to foreclose said \$2,000 encumbrance on the ranch and at foreclosure sale on May 13, 1930, it sold the ranch back to plaintiffs for the exact amount of said indebtedness. It will be noted, at this juncture plaintiffs, by the expenditure of said additional \$2,000, became repossessed of their valuable ranch and also retained the money and property conveyed to them by defendants, together with defendants' said note for \$8,750, on which they elected to press payment by the bringing of this action. In the light of

these circumstances, and the evidence that the maturity date of the note was misrepresented, can there be any doubt that the misrepresentation was material and was relied upon by defendants? *K. Lundeen Corp. v. Barlow*, 120 Cal. App. 391, 7 P.(2d) 1102; 66 Cor. Jur. § 135, p. 586.

[1] Plaintiffs assert that defendants are not entitled to rescission because they did not rely upon the misrepresentation, if any. But the basis for this claim is merely conflicting evidence which was resolved by the trial court in favor of defendants. In other words, plaintiffs and said real estate agent testified that during a period of about one month following execution of the original agreement, but prior to consummation of the exchange, while title reports were being secured, documents prepared for signature, etc., defendants saw title papers which set forth the date of the \$2,000 encumbrance, thus putting them on notice as to its maturity date; furthermore, that defendant T. J. Finneran accompanied said agent to the bank and not only saw the note, but appended his signature thereto. But said defendant absolutely denied visiting the bank with said agent or seeing the title report or the note prior to consummation of the transaction and recordation of the instruments evidencing it. Said defendant admitted that apparently his signature was on the note and testified that in August, 1929, when he visited the bank to learn the status of the loan, the bank clerk handed him a card or paper to sign, which he believed was an address card for mailing purposes, but which evidently was said note. The evidence relied upon by the trial court as a basis for its findings is amply sufficient.

[2] Appellants' second point is that if ground of rescission originally existed, it was lost by failure to act promptly and by ratification and waiver. So far as the record shows, this point is urged for the first time on the appeal. We need not decide whether this is permissible, as in any event there is nothing in the record which would sustain a reversal of the judgment on these grounds. Defendants not only protested promptly upon discovery of the misrepresentation, but immediately started corresponding with plaintiffs and others to see if the situation could be remedied. Finding that it could not be, they promptly rescinded. They could not be charged with unreasonable delay during the period

of their negotiations for adjustment, nor with waiver of the fraud or ratification of the transaction because, during said period, they made payments of interest on both the \$2,000 note and their \$8,750 note. *Gist v. Security Tr. & Sav. Bank*, 218 Cal. 581, 24 P.(2d) 153. It was during this period that plaintiff George A. Davison wrote: "I would like to ask if the Bank has refused to renew this loan? I would rather have them carry it if it can be arranged. I can't see where you have any worry on this as I would have to protect myself on it anyway. I would rather the Bank would carry it if it is possible."
* * *

[3] The third contention, that it was prejudicial error for the court to permit defendant T. J. Finneran to testify that he handled just one other real estate transaction prior to this one, and that through a real estate agent, scarcely merits comment. Obviously, the error, if any, was not prejudicial. No further discussion is required.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.



3 Cal.2d 740

UNION SUGAR CO. v. HOLLISTER
ESTATE CO.
L. A. 14113.

Supreme Court of California.
June 25, 1935.

Rehearing and Motion for Modification of
Opinion Denied July 25, 1935.

1. Limitation of actions ☞ 173, 175, 182(5)

Statute of limitations is special defense, personal in its nature, which may be waived, and party relying on it must affirmatively set it up in his pleading either by demurrer or answer, or it will be deemed to have been waived.

2. Limitation of actions ☞ 182(7)

Where answer to complaint sets up new matter constituting affirmative cause of action, new matter is deemed controverted so as to permit adverse party to show that de-

fense is barred by limitations without formal plea (Code Civ. Proc. § 462).

3. Limitation of actions ☞202(2)

Unless party adverse to defendant pleading new matter as counterclaim invokes plea of statute of limitations at trial and brings to attention of trial court his purpose to offer evidence in support of plea, court cannot assume that he desires to invoke plea, and he cannot invoke plea for first time on appeal (Code Civ. Proc. § 462).

4. Limitation of actions ☞182(7)

Where plea of statute of limitations was invoked at trial as defense to new matter pleaded as counterclaim and trial court made finding on plea thus presented, statute was sufficiently pleaded and properly entertained by trial court (Code Civ. Proc. § 462).

5. Limitation of actions ☞46(1)

As respects limitations, where parties did not mutually abandon or rescind executory contract upon breach or successive breaches, injured party could wait until time arrived for complete performance and then bring action for damages.

6. Limitation of actions ☞46(1)

Party to executory farming contract was not bound to treat contract as abandoned on first breach or on any particular breach, but had election to rely on contract, and statute of limitations could not begin to run until he made election (Code Civ. Proc. § 337, subd. 1).

7. Limitation of actions ☞129

Where executory farming contract could not be performed before October, 1925, commencing of action thereon in June, 1929, operated to suspend running of statute of limitations as to counterclaim existing at that date in favor of defendant, and hence counterclaim filed in December, 1929, was not barred though filed more than four years after completion of contract (Code Civ. Proc. § 337, subd. 1).

8. Limitation of actions ☞129

Statute providing that counterclaim must tend to diminish or defeat plaintiff's recovery and must exist in favor of defendant and against plaintiff between whom several judgment might be had did not affect rule that filing of complaint operated to suspend running of statute of limitations as to any counterclaim existing at that date (Code Civ. Proc. § 438).

9. Set-off and counterclaim ☞59

Statute providing that counterclaim must tend to diminish or defeat plaintiff's recovery and must exist in favor of defendant and against plaintiff between whom several judgments might be had did not reduce former statutory counterclaim to common law coun-

terclaim, which could be employed only to diminish or defeat plaintiff's claim by way of set-off to extent of such claim, but permitted award of affirmative relief (Code Civ. Proc. §§ 438, 666).

10. Appeal and error ☞717

Trial court's written opinion could be considered by reviewing court to discover process by which trial judge arrived at amount of damages, where opinion did not impeach findings of fact in sense that any statement therein was in conflict with fact found by court.

11. Appeal and error ☞1151(2)

In sugar company's action on contract whereby sugar company agreed to farm owner's land at owner's expense and to buy beets raised thereon, failure to deduct, in computing damages on counterclaim for improper husbandry, from value of beets which owner lost by reason of company's improvident farming methods, cost of topping and hauling beets had they been produced, rendered damages excessive, and judgment on counterclaim was required to be modified by such amount.

12. Evidence ☞354(19), 355(2)

Where it was doubtful whether provision for interest in farming contract applied to items in monthly statement of charges other than money advanced, books of account and monthly statements rendered could be resorted to, to determine that provision for interest was limited to money advanced (Civ. Code, § 3535).

13. Interest ☞19(2)

Where there is no contract to pay interest, law awards interest upon money from time it becomes due and payable, if such time is certain and sum is certain or can be made certain by calculation (Civ. Code, §§ 3287, 3302).

14. Interest ☞19(3)

Where credit due on farming contract at time it was completed was subject to reduction because of unliquidated claim of other party to contract, which when liquidated exceeded amount of credit, claim for credit was "unliquidated claim" on which interest was not recoverable, since claimant was only entitled to interest on amount found due after deduction of other party's claim (Civ. Code, §§ 3287, 3302).

[Ed. Note.—For other definitions of "Unliquidated Claim," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Santa Barbara County; Pat R. Parker, Judge.

Action by the Union Sugar Company against the Hollister Estate Company for damages for breach of contract, in which defendant filed a counterclaim. From an adverse judgment, plaintiff appeals.

Affirmed as modified.

Prior opinion, 39 P.(2d) 254.

Preisker, Goble & Twitchell, of Santa Maria, for appellant.

Heaney, Price & Postel, of Santa Barbara (Margaret Dunn Kamper, of Santa Barbara, of counsel), for respondent.

CURTIS, Justice.

We are in accord with the following portion of the opinion of the District Court of Appeal in the above-entitled cause and adopt the same as a part of our opinion:

"On October 1, 1924, appellant and respondent contemporaneously executed a farming contract and a beet sale contract, the latter being expressly made a part of the former, by the terms of which appellant agreed to farm certain lands of respondent in a good and husbandlike manner and in accordance with the standards and customs in the vicinity, and plant and raise thereon a crop of beets during the 1925 season, at the expense of respondent, and to buy all the beets so raised and delivered at a price to be fixed by averaging prices of sugar over a period of twelve months beginning July 1, 1925, according to a certain table set forth therein. On June 25, 1929, appellant brought suit against respondent to recover the alleged balance of \$12,071.83, with interest at 7 per cent. from October 31, 1925, unpaid on the advances and expenses of farming the lands and raising the crop of beets, after crediting the agreed price of beets produced and delivered. On December 2, 1929, respondent filed its answer and counterclaim, joining issue on the allegation of balance unpaid and pleading damages for specified breaches of the farming contract in respect to good husbandry in the sum of \$31,067.31, as 'a counterclaim and set-off against plaintiff's demand to the extent thereof,' and also praying for judgment for said amount 'or so much thereof as it may be entitled to over and above plaintiff's claim.' Trial was had, and in the lower court, prior to submission, appellant's counsel orally urged as a defense against the counterclaim the bar of the statute of limitations

under section 337, subdivision 1, of the Code of Civil Procedure. Findings and conclusions were filed and judgment entered thereon in favor of respondent for the sum of \$16,162.19, the excess of damages found to be suffered by respondent over the balance of expenses found to be due and unpaid to appellant. In its findings the court expressly found that the counterclaim was not barred by any statute of limitations.

"From the judgment this appeal is taken on the so-called alternative method, appellant setting up four main points relating to (1) the bar of the statute of limitations to the counterclaim, (2) the measure of damage adopted by the court, (3) the matter of interest on the unpaid balance found, and (4) errors in ruling on evidence.

[1-4] "Appellant contends that the counterclaim was barred by the provisions of section 337, subdivision 1, of the Code of Civil Procedure. Respondent meets this contention with the claim that appellant waived the bar of the statute by failing to plead the same. Unquestionably there is a general rule, long established in this state, that the statute of limitations is a special defense, personal in its nature, which may be waived or asserted, and that the party relying on it must affirmatively set it up in his pleading either by demurrer or answer, or it will be deemed to have been waived. *Grattan v. Wiggins*, 23 Cal. 16; *California Safe, etc., Co. v. Sierra, etc., Co.*, 158 Cal. 690, 112 P. 274, Ann. Cas. 1912A, 729; *Miller v. Parker*, 128 Cal. App. 775, 18 P.(2d) 89. There is, however, another rule which has developed in respect to the plea of the bar to counterclaims because of the provision in section 462 of the Code of Civil Procedure, which may be stated as follows: Where the answer to a complaint sets up new matter constituting an affirmative cause of action or counterclaim, such new matter is deemed controverted under the provisions of section 462 of the Code of Civil Procedure, and the adverse party may, without formal plea, show that the attempted defense is barred by the statute of limitations, that statute being deemed pleaded by operation of law. *Curtiss v. Sprague*, 49 Cal. 301; *Granger's, etc., v. Clark*, 84 Cal. 201, 23 P. 1081; *In re Garcelon's Estate*, 104 Cal. 570, 38 P. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134;

Moore v. Copp, 119 Cal. 429, 51 P. 630; Brooks v. Johnson, 122 Cal. 569, 55 P. 423; Peck v. Noee, 154 Cal. 351, 97 P. 865; Hermosa Beach, etc., Co. v. Law Credit Co., 175 Cal. 493, 166 P. 22; Pacific Improvement Co. v. Maxwell, 26 Cal. App. 265, 146 P. 900; Jones v. Peck, 63 Cal. App. 397, 218 P. 1030. However, it has been held that unless the adverse party invokes the plea of the statute at the trial, and brings to the attention of the trial court his purpose to offer evidence in support of such plea, the court cannot assume that he desires to make any such defense, and he cannot invoke the plea for the first time on appeal. In re Garcelon's Estate, supra; Bliss v. Sneath, 119 Cal. 526, 51 P. 848. Herein appellant invoked the plea at the trial and the trial court made a finding on the plea thus presented. We must therefore hold that the statute was sufficiently pleaded and that it was properly entertained by the trial court.

[5,6] "The counterclaim was not barred at the date of commencement of the action on June 25, 1929. The farming contract was an executory contract, continuing over the beet season of 1925, and could not be completed or fully performed by appellant until the end of that season, the date of which is established by evidence as the month of October, 1925. In such a contract, where the parties did not mutually abandon or rescind it upon a breach or successive breaches, the injured party could wait until the time arrived for a complete performance by the other party and then bring an action for damages for such breaches. Ross v. Tabor, 53 Cal. App. 605, 200 P. 971. Respondent was not bound to treat the contract as abandoned on the first breach of it or on any particular breach, but had his election to still rely on it, and the statute of limitations could not begin to run until he had made his election. Richter v. Union Land, etc., Co., 129 Cal. 367, 62 P. 39; Coulter v. Sausalito Bay Water Co., 122 Cal. App. 480, 10 P.(2d) 780.

[7-9] "The filing of the complaint on June 25, 1929, operated to suspend the running of the statute of limitations as to any counterclaim existing at that date in favor of respondent, and therefore the counterclaim pleaded and filed on December 2, 1929, by respondent, although more than four years after completion of the contract, was not barred. Perkins v. West

Coast Lumber Co., 120 Cal. 27, 52 P. 118; McDougald v. Hulet, 132 Cal. 154, 64 P. 278; Whittier v. Visscher, 189 Cal. 450, 209 P. 23; Maryland Casualty Co. v. Shafer, 57 Cal. App. 573, 208 P. 197. Nor did the amendment of section 438 of the Code of Civil Procedure in 1927 (St. 1927, p. 1620) affect or destroy this rule, as is claimed by appellant. This becomes manifest upon examination of the above decisions, which are predicated alike upon counterclaims on contracts and torts without distinction, and all are based on the general proposition that such counterclaims must be existing at the commencement of action. Nor did such amendment, as appellant contends, have the effect of reducing the former statutory counterclaim to the common law idea of counterclaim, that is, one that may be employed to diminish or defeat plaintiff's claim by way of set-off only to the extent of such claim. Section 666 of the Code of Civil Procedure, which must be read with section 438 as amended, provides that any excess of the counterclaim established over plaintiff's demand must be awarded to defendant by judgment. In the case of Terry Trading Corporation v. Barksy, 210 Cal. 428, 292 P. 474, 478, the court in passing upon the effect of this amendment to section 438 said: 'It is likewise perfectly proper to seek affirmative relief by way of counterclaim, which may not only defeat plaintiff's recovery but result in an affirmative judgment for defendant on his counterclaim.'

Appellant contends that in fixing respondent's damages the court applied an improper measure of damages. This attack of appellant is confined entirely to that part of the judgment rendered upon the counterclaim of respondent. No question is raised by appellant as to the amount of the judgment in its favor rendered by the court upon its cause of action set out in the complaint, except that appellant contends that the court improperly denied it interest on its claim against respondent. The question of interest will be given consideration later. The court found that respondent was indebted to appellant in the sum of \$11,414.15, which sum was set off against the amount found due respondent on its counterclaim. It further found that the amount due respondent as damages on its counterclaim was \$27,756.44. From this amount it deducted said sum of \$11,414.15, leaving a balance of \$16,162.19, for which amount

it gave judgment against appellant. The appellant contends that the court erroneously fixed respondent's damages for appellant's breach of its contract at the sum of \$27,756.44. In support of this contention appellant claims that the court in fixing the amount of respondent's damages failed to deduct from the value of the crop that should have been produced, had appellant farmed said lands in accordance with the standards prevailing in the vicinity in which said lands are located, certain costs and expenses that would necessarily have been incurred, had the required crop been produced by appellant. To put this contention concretely, appellant claims that the court, in arriving at the amount of respondent's damages, fixed the amount of the crop not produced, but which should have been produced, at 3,692 tons of beets, and the price at \$7.77 per ton, and by multiplying this tonnage by the price per ton arrived at the sum of \$27,756.44, and that no deduction was made from this aggregate amount of \$27,756.44 for the cost of topping and hauling said 3,692 tons of beets. In producing and harvesting the crop grown by appellant during said season, the appellant paid on an average \$1.15 per ton for topping, and \$1 per ton for hauling the beets grown, making a total cost for these two items of \$2.15 per ton. Multiplying 3,692 tons, the amount of the extra crop, by \$2.15, gives the sum of \$7,927.80, which sum appellant claims should have been deducted from the amount of \$27,756.44 in arriving at the respondent's damages.

The finding of the court involving the issue of damages is as follows: "By reason of the failure of plaintiff to perform said contract in accordance with the terms thereof as hereinbefore found, defendant has been damaged in the sum of Twenty-seven Thousand Seven Hundred Fifty-six and 44/100 Dollars (\$27,756.44), and is entitled to judgment in the sum of Sixteen Thousand One Hundred Sixty-two and 19/100 Dollars (\$16,162.19), said sum of Sixteen Thousand One Hundred Sixty-two and 19/100 Dollars being the excess of the damages, to-wit: Twenty-seven Thousand Seven Hundred Fifty-six and 44/100 Dollars (\$27,756.44) over and above the sum of Eleven Thousand Four Hundred Fourteen and 15/100 Dollars (\$11,414.15), due and owing from defendant to plaintiff for and on account of the expenditures made by plaintiff under said contract as hereinabove found."

There is nothing in the findings to indicate how or in what manner the court arrived at the sum of \$27,756.44 as respondent's damages for appellant's breach of its contract. There is no finding as to the number of tons of beets grown during said season, nor as to the number of tons of beets which should have been grown during said season, had appellant farmed said property in accordance with the terms of said contract; that is, in a good and workmanlike manner and in accordance with the standards and customs prevailing in the vicinity in which said lands were located. Neither is there anything in the findings indicating the price which appellants were to pay for beets produced or which should have been produced under the contract with respondent. There is evidence in the record which would have supported a finding that, had appellant farmed said lands as agreed in its contract with respondent there would have been produced during said season approximately 3,692 tons of beets in excess of what were actually produced, and it was stipulated that the average price of the beets as fixed by said contract was \$7.77 per ton. That the court based its findings as to the amount of respondent's damage upon this evidence seems apparent from the written opinion of the trial judge filed in said action shortly after the trial, which opinion is included in the record on appeal. This opinion is brief, and we quote it in its entirety, as follows:

"It is my opinion that plaintiff is entitled to credit for the expenditures claimed, leaving a balance unpaid thereunder in the sum of \$11,414.15.

"However, the evidence, even of the plaintiff's witnesses, or at least some of them, supports defendant's contention that the area involved was improvidently farmed and that the cultivation of the crop was far from being of a husbandlike character.

"The acreage, under proper husbandry, should have yielded 15 tons per acre and the net deficit in return was of a tonnage of 3692 tons. Averaging the grade of beets by those actually recovered as and of a 20% 59% sugar the price would be \$7.77 per ton. Indeed, it is fair to assume that better farming would have produced a beet much higher in sugar per cent.

"The amount that defendant should have received would accordingly be in-

creased in the amount of \$27,756.44. Deducting from this the balance due of \$11,414.15 we have a balance of \$16,162.19 due defendant on its counterclaim, for which judgment is ordered.

"Let findings be prepared by defendant and submitted to plaintiff before presentation.

"Dated May 31st, 1932."

There can hardly be a question as to the manner pursued by the trial court in measuring respondent's damage, when viewed in the light of this opinion of the trial judge.

[10] Respondent strenuously contends that the opinion of the trial court is no part of the record on appeal, and that a reviewing court is without authority to consider it in any manner in its decision of the appeal. There are authorities which hold that written opinions of the trial court though incorporated in the bill of exceptions or transcript on appeal, are no part of the record on appeal and cannot be considered by a reviewing court in determining the question whether the findings are supported by the evidence. *Goldner v. Spencer*, 163 Cal. 317, 320, 125 P. 347; *DeCou v. Howell*, 190 Cal. 741, 751, 214 P. 444; *Scholle v. Finnell*, 173 Cal. 372, 376, 159 P. 1179; *Messenkop v. Duffield*, 128 Cal. App. 541, 543, 18 P.(2d) 67. The sense in which these decisions may be taken is well illustrated by the statements of facts of these cases. We will only refer to the facts in the case of *Goldner v. Spencer* as explaining the real meaning of these decisions. In that case the finding of the trial court was that a certain note and mortgage were void because given and accepted without consideration and for the purpose of hindering and delaying the creditors of the grantor. The appellant attempted to impeach this finding by showing that the trial judge, in a written opinion filed in the action, stated that he was satisfied by the evidence that the grantee had actually loaned the grantor a substantial sum of money and that the note and mortgage were executed to secure the loan and that the parties to the transaction did not conspire to defraud the creditors of the grantor. This court held that the written opinion of the trial judge could not be considered for such purpose, as the facts as set forth in the written opinion were in direct conflict with the findings of fact. There is another line of decisions in no way inconsistent with the cases just

cited which hold that the opinion of the trial judge may be considered for the purpose of discovering the process by which the trial judge arrived at his conclusions, or when the opinion furnishes the basis of the court's action in its decision of the case. *Estate of Felton*, 176 Cal. 663, 667, 169 P. 392, 393, and *Coakley v. Ajuria*, 209 Cal. 745, 749, 290 P. 33, 34. In the *Estate of Felton*, the court uses this significant language: "Opinions of judges of trial courts are always welcomed by this court because, as a rule, they aid the justices in discovering the processes by which the judgments have been reached." In *Coakley v. Ajuria*, supra, the court held as follows: "We think the learned trial judge took an erroneous view of the law applicable to the facts, as is made apparent from an oral opinion which he delivered directing the order of nonsuit. While the reasons of a trial court so given do not in a strict sense constitute a part of the record on appeal, yet, where they furnish, as in this case, the basis of the court's action, and really constitute the only grounds upon which the judgment may be affirmed, it is proper to give them special consideration."

The written opinion of the trial judge in the instant case clearly shows the process by which judgment was reached, or the basis on which the court computed the damages of the respondent under its counterclaim. It shows that the court simply took the number of tons of beets which the respondent lost by reason of appellant's improvident farming methods, and the price these beets would have brought had they been produced, and by multiplying this tonnage by the price arrived at the loss or damage sustained by respondent. By this process the court found the damages sustained by respondent to be the precise amount which in its findings of fact it found the respondent had been damaged by appellant's improper farming methods. The opinion of the trial court does not, therefore, impeach any of its findings of fact in the sense that any statement therein is in conflict with any fact found by the court. It simply explains the formal findings and shows the basis on which the court arrived at the amount of damages as fixed.

[11] Having ascertained the manner pursued by the trial court in fixing respondent's damages, the next question presented for determination is whether it ap-

plied the correct rule in fixing said damages. Under the written contract between the parties hereto, the respondent was to pay the entire cost of producing and harvesting the crop of beets to be grown under said contract. This cost included, of course, the expense of topping said beets and the hauling of them from the field to the factory of appellant. There is practically no dispute as to the reasonable cost of topping and hauling of the beets produced under said contract. Had the full amount of beets which said lands were capable of producing by proper farming methods been raised during said season, the respondent would have been obligated under its contract to pay the expense of topping and hauling the entire crop. As only a short crop was produced, respondent has only paid the cost of topping and hauling the short crop. As to the amount of beets not produced, respondent should have been allowed the price of these beets, as fixed by the contract, less the cost of producing them had they been produced, which would have included the cost of topping and hauling. It is evident that the trial court in determining respondent's damage, failed to deduct from said price the cost which respondent would have been compelled to pay for topping and hauling said beets had they been produced. The judgment in respondent's favor was apparently excessive to the extent of \$7,927.80. Deducting this amount from \$16,162.19, the amount of the judgment would leave \$8,234.39 as the amount due respondent. But the mathematical calculations upon which this result is attained are not strictly correct. In the opinion of the trial court, the deficit of beets produced is given as 3,692 tons and the price per ton as \$7.77. Multiplying the tonnage by the price would give \$28,686.84 instead of \$27,756.44, a difference in favor of respondent of \$930.40. Taking the sum of \$28,686.84 as the correct price or value of the beets not produced and deducting from it the sum of \$7,927.80, the cost of topping and hauling the extra crop, would leave \$20,759.04 as the net loss to respondent for appellant's failure to properly plant and care for said crop of beets, and then deducting from this last-named amount said sum of \$11,414.15, the amount found to be due appellant on its complaint herein would leave \$9,344.89 as the correct amount due respondent in this action. This result may be verified by the following calculation:

Gross price of crop grown.....	\$36,918.20
Expense of producing this crop.....	48,332.35
Loss on crop grown.....	11,414.15
Gross price of crop not grown.....	28,686.84
Expense of topping and hauling crop not grown	7,927.80
Profit on crop not grown.....	20,759.04
Less loss on crop grown.....	11,414.15
Net profit on entire crop.....	\$ 9,344.89

The same result is obtained by the following calculation:

Gross price of crop grown.....	\$36,918.20
Gross price of crop not grown.....	28,686.84
Gross price of entire crop.....	65,605.04
Expense of producing crop grown \$48,332.35	
Extra expense of topping and hauling crop not grown.....	7,927.80
Total expense of producing entire crop....	56,260.15
Profit on entire crop.....	\$ 9,344.89

By this method of fixing respondent's damages respondent receives the exact amount it would have received had the appellant farmed said land in accordance with the contract under which it undertook to raise said crop of beets. To permit the judgment of the trial court to stand would be to award to respondent the sum of \$6,817.30 more than it would be entitled to, with a corresponding detriment to the appellant. The judgment should therefore be modified by deducting from the amount thereof the said sum of \$6,817.30, leaving the true amount of \$9,344.89, for which sum judgment should be given in respondent's favor. The conclusion which we have reached is in strict accord with the previous decisions of this court and those of the District Court of Appeal, as will appear by the following reported cases: *Lowe v. Yolo County, etc., Water Co.*, 157 Cal. 503, 509, 108 P. 297; *Teller v. Bay & River Dredging Co.*, 151 Cal. 209, 212, 90 P. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779; *Rystrom v. Sutter Butte Canal Co.*, 72 Cal. App. 518, 521, 249 P. 53; and *Chrisman v. Southern California Edison Co.*, 83 Cal. App. 249, 274, 256 P. 618.

The two remaining points upon which the appellant relies were given quite extended discussion by the District Court of Appeal. We agree with the conclusion reached by said court in the discussion of these points as appears from the following portion of its opinion, which we adopt

as the concluding part of the opinion of this court:

[12] "Appellant claims the court erred in failing to allow interest on the unpaid balance of expenditures from October 31, 1925, asserting interest was chargeable both by the terms of the contract and by operation of law. The court found that at the end of the harvest time in 1925 appellant was entitled to a credit of \$11,414.15 against respondent on account of farming operations under said contract, and at the trial found and liquidated the damages on the counterclaim in the sum of \$27,756.44 and gave judgment in favor of respondent for the difference between those two sums without allowing any interest during the interim on the amount of expenditures under the contract. The contract provided that: 'Any money advanced, work performed, seed furnished, or any other charges to the account of said first party [Hollister Estate Company] will be paid by first party, and the second party may deduct the same, if approved in writing by the first party, before making payments on said beets. When advances are made by second party for the purposes hereof to be charged to first party, first party shall be charged with interest thereon at seven per cent. per annum from monthly statement to payment.' It is also provided that 'second party will render monthly statement to first party, covering charges for the preceding month.' These provisions appear to render it doubtful whether interest was to be charged on any item except 'money advanced,' as distinguished from the other items in the monthly statement of 'charges.' In such case contemporaneous construction by the parties may be resorted to as the best means of solution. Civ. Code, § 3535; 6 Cal. Jur. 304, 305. The audit of the books of account kept by appellant, and the monthly statements rendered, in evidence herein, show that interest was charged only on money advanced as distinguished from other charges. This is sufficient to resolve the doubt and warrant an interpretation of the contract which would limit interest to items of money advanced and exclusive of other charges. Such interest was included in the balance found due.

[13, 14] "It is further claimed by appellant that interest thereon at the legal rate should have been added to the amount of expenditures found unpaid in October,

1925, on the ground that such amount of contract expenditures were capable of exact computation and therefore bears interest from the date the amount is due. Civ. Code, §§ 3287 and 3302. The general rule with respect to allowance of interest, when there is no contract to pay interest, is that the law awards interest upon money from the time it becomes due and payable, if such time is certain and the sum is certain or can be made certain by calculation. *Cox v. McLaughlin*, 76 Cal. 60, 18 P. 100, 9 Am. St. Rep. 164; *Gray v. Bekins*, 186 Cal. 389, 199 P. 767; *Perry v. Magneson*, 207 Cal. 617, 279 P. 650. The question whether the claim of appellant, under the tests laid down in the above cases, is, in contemplation of law, a liquidated or unliquidated demand, becomes unnecessary for decision herein, in the light of the law which applies to this case. For we hold that even though, under such tests, appellant's claim was a liquidated demand in October, 1925, it was subject to reduction by virtue of the unliquidated claim of respondent and must therefore be deemed to be an unliquidated sum upon which interest is not recoverable, under the rule that in cases such as here presented, where the deduction is for defective workmanship or defective husbandry under a contract, the court may properly allow interest only on the balance found to be due on the contract after deduction of such damages when liquidated, on the theory that the contractor is entitled to interest only on such amount, of the use of which he has been deprived during the period of default, because it is to that extent only that he has been damaged. *Hansen v. Covell*, 218 Cal. 622, 24 P.(2d) 772, 89 A. L. R. 670. As the amount of damages in the instant case exceeds appellant's demand, there remains nothing on which to compute or allow interest.

"We have examined appellant's assignments of error claimed to have occurred in ruling on the admissibility of evidence, and find no error in any of such rulings."

For the reasons expressed herein, the judgment is modified by reducing the amount thereof from the sum of \$16,162.19 to the sum of \$9,344.89, and, as so modified, said judgment is affirmed; appellant to recover its costs.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; THOMPSON, J.; PRESTON, J.; SEAWELL, J.

4 Cal.2d 73

SEAVEY v. STATE BAR OF CALIFORNIA.

S. F. 15314.

Supreme Court of California.

July 1, 1935.

Attorney and client ⚡53(2)

Evidence held to warrant disbarment of attorney alleged to have been guilty of breach of trust, and of embezzlement of money intrusted to him in settling up partnership business in neglecting to keep money in trust account separate from his personal account, in making unauthorized loan of money on questionable security, and in refusing upon demand to pay over money to either partner (Pen. Code, § 506).

In Bank.

Proceeding by Ernest L. Seavey against the State Bar of California to review action of the Board of Governors of the State Bar adopting findings of the local administrative committee and recommending disbarment of petitioner.

Petitioner ordered disbarred, and his name stricken from the roll of attorneys.

Wright, Monroe, Thomas & Glenn, of San Diego, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent State Bar of California.

PER CURIAM.

Proceeding to review action of the Board of Governors of the State Bar of California recommending disbarment of petitioner Ernest L. Seavey. It is charged that petitioner has committed acts involving moral turpitude and dishonesty in the course of his professional relations, in that he has been guilty of a breach of trust and of the embezzlement of money intrusted to him. The local administrative committee before whom the charge was heard found that the "acts, doings and omissions of the accused in the premises, amount to a violation of the provisions of section 506 of the Penal Code of the state of California," and recommended his suspension from the practice of law for three years. Section 506 of the Penal Code provides that: "Every * * * attorney * * * or person otherwise entrusted with or having in his control property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust * * * is

guilty of embezzlement." The Board of Bar Governors approved and adopted the findings of fact of the local administrative committee, but recommended that petitioner be disbarred from the practice of law.

The order to show cause was predicated upon the claim that a sum of money amounting to \$4,720.75 came into the hands of petitioner in the settling up of a partnership business and that he knowingly failed and neglected to keep the money in a trust account subject to the disposition of the proper owners separate from his personal account, and upon demand of the partners refused to pay over said money to them or either of them. This charge is substantiated by the evidence adduced at the hearing. Petitioner does not dispute that the following facts are true: Petitioner, as an attorney, drew up the papers of dissolution of a partnership in a rock crushing business consisting of H. B. Bulmer and John T. Murphy, whereby Murphy turned over to Bulmer all of the partnership property to handle and dispose of as his own, but with the provision that as between the parties the interest in the partnership property owned by Murphy should be held in trust by Bulmer until a proper division of the proceeds was made either by agreement or lawsuit. The provisions of the agreement relative to this phase of the dissolution of the partnership are as follows: "7. It is the express intent of the parties hereto that this agreement shall be interpreted as follows: (a) In any questions arising between either or both parties hereto and any third party, the property hereby transferred and conveyed by second party [Murphy] to the first party [Bulmer] shall be held and construed to be the sole and exclusive property of first party, with the absolute right to sell and transfer, mortgage, pledge or otherwise deal with the same free from any claim by second party. (b) In any question arising between the parties hereto the interest of second party in the partnership property hereby conveyed to first party shall be deemed to be held in trust for second party, but subject, nevertheless to the provisions of the preceding section (a) hereof. * * *

Petitioner, having prepared the contract, was, of course, conversant with the terms thereof. Thereafter Bulmer sold the partnership property to the Spreckels Commercial Company for the total sum of \$45,000. Of this amount \$15,000 was to be paid upon delivery of possession and the

balance to be paid in installments. Before the final payment was made the Spreckels Commercial Company became bankrupt, and thereafter the claim against Spreckels Commercial Company was compromised for a sum equal to 50 per cent. thereof, and the sum of \$4,720.75 was paid over to petitioner in full settlement. In the meantime, Murphy had filed an action in the superior court of San Diego county to recover the amount due to him from Bulmer under the terms of the dissolution agreement. On April 28, 1931, the day after petitioner received the sum of \$4,720.75, the attorney for Murphy caused to be served on petitioner an alias writ of attachment, but petitioner failed to make any return to this attachment. On the same day, after the receipt of the money, petitioner loaned to one Arbuckle the sum of \$3,275. In making the loan, petitioner took Arbuckle's 60-day note payable to H. B. Bulmer and wife in the sum of \$3,275, but instead of actually paying this amount of money over to Arbuckle, he credited Arbuckle with the amount, making a suitable entry on his ledger. At the time Arbuckle was indebted to petitioner in the sum of \$1,994.57. Thereafter and up to June 27, 1932, petitioner continued to advance to Arbuckle various sums of money aggregating in all \$2,469.79. Petitioner took from Arbuckle as security some mining stock and a deed to certain unimproved property in Berkeley, title to which had never been of record in Arbuckle's name. In fact, the value of the security taken was so questionable as to be practically worthless as security for the payment of the Arbuckle note. No November 30, 1932, judgment was entered in the lawsuit in favor of Murphy against Bulmer in the sum of \$4,082.44, together with \$106 costs. On December 12, 1932, a writ of execution was issued and served on petitioner, but he failed to make any answer to the writ.

Petitioner's defense is based upon the claim that the money received from the Spreckels Commercial Company by him was money belonging to H. B. Bulmer and not to the partnership and that although he had no direct authority from Bulmer to make the loan to Arbuckle he had transacted business for Bulmer in the past and was honestly under the impression that he was acting within his authority and for the best interest of his client in making the loan to Arbuckle. Petitioner argues that while such action might create a civil liability against him on behalf of Bulmer, it

ought not to furnish grounds for disciplinary action against him.

If we accept as true petitioner's contention that the money loaned by him was in fact the property of Bulmer and that the dissolution agreement between Bulmer and Murphy only created a debt in favor of Murphy against Bulmer for the value of Murphy's interest in the partnership property, the conduct of petitioner with reference to the loaning of the money to Arbuckle was so reprehensible as to constitute good grounds for disciplinary action against him. The evidence clearly shows that although petitioner's account at the bank was designated as a trust account, it was the only account maintained by him, and was the account from which he withdrew funds for his own personal use. In so depositing the money petitioner violated that portion of rule 9 of Rules of Professional Conduct (213 Cal. cxv), which specifically states that: "A member of the State Bar shall not commingle the money or other property of a client with his own." It is uncontradicted that petitioner never notified Bulmer of the receipt of the money by him from the Spreckels Commercial Company and the immediate loan of such money to Arbuckle but instead on June 12, 1931, wrote a letter to Bulmer in which he notified him that the money had been attached by Murphy "so we are tied up plenty for the time being." Petitioner, previous to this particular loan to Arbuckle had never been authorized to and had never made any loans for Bulmer, and the power of attorney given to petitioner to effect a compromise settlement with the Spreckels Commercial Company expressly gave petitioner power "to compromise and settle all claims made by one John T. Murphy, formerly a partner of the said H. B. Bulmer, and out of the proceeds of any moneys collected from said Spreckels Commercial Company to pay the said demands of said John T. Murphy as so compromised. * * * " Petitioner's claim that he secured express authorization to make this loan from Bulmer in a long-distance telephone conversation with him in April is refuted by the fact that subsequent to the date of the claimed authorization he wrote a letter to Bulmer in which, instead of confirming the loan, he states, as above noted, that the money had been attached by the sheriff and "we are tied up plenty for the time being." It is incredible that if he had received authorization from Bulmer to make the loan and had honestly believed

that he was acting for the best interest of his client in making the loan, he would have kept him in ignorance of the loan and have given him positive misinformation that the money was tied up by attachment and available to pay a judgment in favor of Murphy. It is significant that the note from Arbuckle to Bulmer was never turned over to Bulmer. Neither did he receive the security taken by petitioner for the payment of the note. In short, Bulmer was kept in complete ignorance of petitioner's activities and only learned of the loan and the fact that the money was not available to pay Murphy's judgment from a third person. The above brief résumé of petitioner's dealings with his client, Mr. Bulmer, clearly demonstrates that his conduct was not characterized by that high standard of honesty, integrity, and fair dealing which every client has a right to expect from the attorney to whom he intrusts his affairs. The fact, if it be true, that petitioner personally did not benefit by the loan to Arbuckle can afford little comfort to Bulmer who finds himself still liable on the judgment in favor of Murphy which could and should have been paid by the application of the money paid over to petitioner by the Spreckels Commercial Company. It follows that even if the money belonged to Bulmer personally, as claimed by petitioner, the facts are sufficient to prove petitioner's misconduct and the violation of his oath as an attorney.

However, the charge against petitioner was based upon the offense of misappropriating money to be held in trust for the payment of claims arising out of the dissolution of the partnership of Bulmer and Murphy. We do not agree with petitioner's argument that the money received by him from the Spreckels Commercial Company was money belonging to Bulmer rather than money which was to be held in trust to pay Murphy for his interest in the partnership. The agreement for the dissolution of the partnership expressly provided that the property conveyed by Murphy to Bulmer should be deemed to be held in trust for Murphy. Petitioner, as the author of said contract, could not possibly have been ignorant of the terms thereof. It follows that by the making of the unauthorized loan to Arbuckle, petitioner fraudulently appropriated said money to a use or purpose not in the due and lawful execution of his trust and was guilty of a violation of section 506 of the Penal Code.

Petitioner complains that both the order to show cause and the findings are indefinite and uncertain and do not clearly charge him with any offense. While the order to show cause and the findings are not beyond criticism, we think petitioner had no difficulty in determining the charge against him from the reading of the order to show cause, nor is there any real question as to the meaning of the findings as set forth in the record.

We are satisfied that the recommendation of the Board of Bar Governors is just and proper.

It is therefore ordered that the petitioner, Ernest L. Seavey, be and he is hereby disbarred from the further practice of law in this state from and after the first day of August, 1935, and that his name be and it is hereby stricken from the roll of attorneys of the state of California, effective from and after said first day of August, 1935.



4 Cal.2d 24

McCANN et al. v. UNION BANK & TRUST
CO. OF LOS ANGELES et al.

L. A. 15219.

Supreme Court of California.

June 28, 1935.

1. Appeal and error ⇨477

Operation of writ of supersedeas is limited to issuance of writ by appellate court in aid of its appellate jurisdiction to stay proceedings on judgment or order from which appeal is taken.

2. Appeal and error ⇨4:6, 477

Supreme Court does not possess original jurisdiction in injunction matters, and will not grant temporary injunctive relief pending appeal from orders denying injunction, or issue a supersedeas which would have effect of granting the injunction which court below refused to grant, or stay effect of self-executing judgment.

3. Appeal and error ⇨477

Supreme Court would not issue writ of supersedeas which would have effect of restraining enforcement of municipal court judgment pending determination of appeal from superior court order denying motion to

restrain enforcement of such municipal court judgment.

In Bank.

Appeal from Superior Court, Los Angeles County.

Action by Frank McCann and another against the Union Bank & Trust Company of Los Angeles and another. From an order denying plaintiffs' motion for an injunction and order restraining enforcement of judgment against plaintiffs in another action between the same parties in municipal court, the plaintiffs appeal, and apply for writ of supersedeas and order restraining enforcement of municipal court judgment.

Application for writ of supersedeas and restraining order denied.

Frank McCann, in pro per.

Loeb, Walker & Loeb, of Los Angeles, for respondents.

THOMPSON, Justice.

The plaintiffs, Frank and Corinne McCann, have made application to this court for a writ of supersedeas and an order restraining the enforcement of a judgment obtained against them in the municipal court of the city of Los Angeles by the Union Bank & Trust Company pending the determination of an appeal from an order made by the superior court in Los Angeles county in another action between the same parties.

On April 6, 1933, the bank filed a complaint in unlawful detainer in the municipal court. On January 31, 1935, pursuant to a remittitur from the appellate department of the superior court, a judgment was entered against the McCanns and in favor of the bank for restitution of the premises. From this judgment the plaintiffs attempted to appeal, but their undertaking was held insufficient.

On May 1, 1933, the plaintiffs instituted an action in the superior court to quiet title and for declaratory relief with respect to a deed of trust. The same real property is the subject of both actions and the parties are the same. The bank answered and also filed a cross-complaint in ejectment. This action was tried and submitted for decision on September 11, 1934. It is still under submission and undecided. The McCanns applied to the superior court for an injunction and an order restraining further action in the

municipal court in enforcement or execution of the judgment in the unlawful detainer action, which application was denied on February 27, 1935. From the order denying that motion an appeal has been taken and is now before this court.

[1-3] The petition under consideration seeks to obtain from this court, pending the determination of the correctness of the action of the court below, the relief denied by the superior court, a stay of execution on the judgment of the municipal court. This court has no jurisdiction to issue a writ of supersedeas in such a case. The operation of that writ is limited to the issuance thereof by an appellate court in aid of its appellate jurisdiction to stay proceedings on the judgment or order from which the appeal is taken. *Rosenfeld v. Miller*, 216 Cal. 560, 15 P.(2d) 161; *Dulin v. Pacific Wood & Coal Co.*, 98 Cal. 304, 33 P. 123. This petition does not seek restraint of the process of the court the action of which is under review in the appeal pending before us.

Relying upon *Martin v. Rosen*, 2 Cal. App.(2d) 450, 38 P.(2d) 855, petitioners ask this court, in the exercise of its inherent power to preserve the fruits of an appeal, to interfere by injunction with the enforcement of the judgment of the municipal court. Such relief was granted by the District Court of Appeal in *Martin v. Rosen*, supra, on the theory that an injunction is one of the unenumerated writs which an appellate court has jurisdiction to issue, under article 6, § 4b of the California Constitution, when necessary and proper to the complete exercise of its appellate jurisdiction. In *Mascot Pictures Corp. v. Municipal Court* (Cal. App.) 40 P.(2d) 272, the court refused to follow *Martin v. Rosen* on the ground that such relief was not necessary and proper to the exercise of its appellate jurisdiction. In *Martin v. Rosen* the relief sought and granted was an injunction restraining respondent from proceeding further in an action for the balance due under a contract, then pending in the municipal court, during the pendency of an appeal in the district court, taken from an order of the superior court sustaining without leave to amend a demurrer to petitioner's complaint in an action for recovery of the money paid over under the same contract on the ground of its illegality, petitioner having set up the illegality as a defense to the municipal

court action. In *Mascot Pictures Corp. v. Municipal Court* the petitioner appealed to the superior court from an order of the municipal court vacating an order for a new trial, the order was affirmed and the petitioner then sought a writ of review in the superior court, which sustained a demurrer to his petition for such writ, at the same time denying a motion to continue in effect a temporary restraining order against enforcement of the municipal court judgment, pending appeal from the judgment and order in the writ of review proceeding. The district court was then asked to stay proceedings on the municipal court judgment by writ of supersedeas or injunction and the application was denied. These facts more closely parallel the situation in the instant case than do the facts in *Martin v. Rosen*. However, in neither of these cases was the temporary relief sought identical with the issue to be decided on the pending appeal, as it is in the instant case where the appeal is from the order of the superior court refusing to enjoin proceedings on the municipal court judgment.

This court has repeatedly denied the existence of original jurisdiction in injunction matters, refusing on that ground to grant temporary injunctive relief pending appeals from orders denying an injunction (*Hicks v. Michael*, 15 Cal. 107; *Southern Pacific Co. v. Smith*, 171 Cal. 8, 151 P. 426; *Napa Valley Elec. Co. v. Calistoga Elec. Co.*, 174 Cal. 411, 163 P. 497); to issue a supersedeas where the "effect would be that this court would grant the injunction which the court below refused to grant" (*Wollenshlager v. Riegel*, 186 Cal. 622, 200 P. 726); or to stay the effect of a self-executing judgment (In re *Imperial Water Co.*, No. 3, 199 Cal. 556, 250 P. 394; *Rogers v. Superior Court*, 126 Cal. 183, 58 P. 452; *Dulin v. Pacific Wood & Coal Co.*, supra; *Tyler v. Presley*, 72 Cal. 290, 13 P. 856; In re *Graves*, 62 Cal. App. 168, 216 P. 386.) These cases we consider to be determinative of the petition before us. The distinction attempted to be made in the opinion in *Martin v. Rosen*, supra, that the requested relief was not addressed to securing for the appellant the fruits of victory on appeal, is not a valid one. In the early case of *Hicks v. Michael*, supra, the argument of counsel was based on the inherent power of appellate courts to preserve the prop-

erty which is the subject of the litigation before them from destruction and thus make effectual the right of appeal. The facts in the case of *Napa Valley Elec. Co. v. Calistoga Elec. Co.*, supra, clearly disclose a similar object, to prevent the disposal of real property pending an appeal in an action to enforce specific performance of a contract of sale. The cases cited by the court in *Martin v. Rosen*, in support of its action, involve the discretionary power of appellate courts to grant writs of supersedeas in cases where for some reason the statutory supersedeas has not operated. In so far as it is inconsistent herewith, *Martin v. Rosen*, supra, is overruled.

The petition for the writ of supersedeas and restraining order is denied.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.



BRUTON v. TEARLE, *
Civ. 9661.

District Court of Appeal, First District,
Division 2, California.
June 19, 1935.

Rehearing Granted July 19, 1935.

1. Appeal and error ⇨870(4)

Jurisdiction of trial court to issue restraining order and order granting injunction on application for appointment of receiver in aid of execution would not be considered where no appeal was taken from such orders (Code Civ. Proc. § 564, subd. 4; § 963).

2. Execution ⇨405

Appointment of receiver in aid of execution held proper where judgment-debtor refused to apply earnings to satisfaction of judgment, had entered into conspiracy with employer to defeat collection of judgment, and execution had been returned only partially satisfied (Code Civ. Proc. § 564, subd. 4).

3. Execution ⇨405

Appointment of receiver in aid of execution held proper as against objection that judgment-debtor was denied opportunity to

be heard on claim for exemption of money to be collected by receiver, where debtor's exemption claim was made issue before trial court and he had full opportunity to be heard thereon, and earnings were not necessary for support of debtor's family (Code Civ. Proc. § 564, subd. 4; § 690, subd. 10).

4. Execution ⇨405

Nonexempt property acquired by judgment-debtor between issuance of order of examination for order to show cause in proceeding for appointment of receiver in aid of execution and time of hearing thereon *held* reachable in such proceedings (Code Civ. Proc. § 564, subd. 4).

5. Execution ⇨410

Order directing receiver appointed in supplemental proceeding in aid of execution to collect money representing salary earned by judgment-creditor up to time of appointment of receiver, which was not exempt from execution, *held* not error (Code Civ. Proc. § 564, subd. 4).

6. Execution ⇨410

Order directing receiver appointed in supplemental proceeding in aid of execution to collect salary earned after date of appointment of receiver *held* error (Code Civ. Proc. § 564, subd. 4).

7. Execution ⇨405

Appointment of receiver in aid of execution *held* proper notwithstanding deed of trust furnished as security for agreement of forbearance had not been exhausted, since judgment was not merged in forbearance agreement, which expressly provided judgment-creditor would refrain from enforcing judgment only so long as judgment-debtor performed his promise to pay judgment (Code Civ. Proc. § 564, subd. 4).

Appeal from Superior Court, City and County of San Francisco; T. I. Fitz-judge.

Action by Martin P. Bruton, Administrator of the estate of Josephine Park Tearle, deceased, against Conway Tearle. From an order appointing a receiver in aid of execution, the defendant appeals.

Order affirmed as modified.

Gavin McNab and Schmulowitz, Wyman, Aikins & Brune, all of San Francisco, Milton M. Cohen, of Los Angeles, Albert A. Kidder, Jr., of Hollywood, and Edward E. McCullough, of Los Angeles, for appellant.

Marcel E. Cerf and Henry Robinson, both of San Francisco, for respondent.

SPENCE, Justice.

This is an appeal by defendant from an "Order Appointing Receiver in Aid of Execution."

The action was originally brought by Josephine Park Tearle to recover a judgment for unpaid alimony due her under the terms of a New York decree. She recovered judgment in excess of \$9,000 and defendant appealed. During the pendency of the appeal said Josephine Park Tearle died. Her administrator was substituted and the judgment was thereafter affirmed. *Bruton v. Tearle*, 117 Cal. App. 696, 4 P. (2d) 623. It is unnecessary to set forth the various efforts made to obtain satisfaction of said judgment. Suffice it to state that despite all of these efforts the judgment was only partially satisfied in the sum of approximately \$5,000. When defendant returned from an extended trip abroad, he was served with an order of examination. He was also served with summons in an action brought by Josephine Park Tearle in her lifetime in Los Angeles county, in which action judgment was sought for the alimony accruing under the New York decree after the period covered by the judgment in this action. It was also sought by said action to set aside certain alleged fraudulent conveyances. Thereafter a written agreement was entered into in 1932, whereby defendant and his present wife acknowledged that defendant was indebted upon the judgment herein and for alimony subsequently accrued in a total sum in excess of \$13,000. They agreed to pay said sum by the payment of 10 per cent. of the earnings of either or both of them and they further agreed that, if their earnings in any semi-annual period should exceed \$3,000, they would pay one-half of said earnings in excess of \$3,000. There were numerous provisions in said agreement, but only a few of them need be mentioned here. The defendant and his wife further agreed to procure the execution of a deed of trust by the record owner of certain real property in Los Angeles county to secure their promises. It was also agreed that as long as said parties performed all of the covenants of said agreement, the Los Angeles action would not be brought to trial and that no steps would be taken in

the present action to execute the judgment herein or to institute proceedings supplemental to execution.

Thereafter defendant Tearle engaged in theatrical work in New York and earned in excess of \$24,000 up to the end of 1933. He made the payments required only for a short time after the agreement was made, said payments totaling the sum of \$1,560. He ceased making payments in February, 1933. He was in default at the end of 1933 under the terms of the agreement in the sum of approximately \$8,500, and no payments were forthcoming. In February, 1934, defendant made a contract with RKO Studios to appear in a picture in which he worked for twenty-seven days at \$250 per day, or a total of \$6,750. He started work on February 14. On February 20, pursuant to a writ of execution issued in the present action, a notice of garnishment was served upon RKO Studios, in response to which the garnishee answered that it was indebted to defendant in the sum of \$1,243.75. On February 23, defendant was examined in proceedings supplemental to execution and it appeared that he had made an arrangement with RKO Studios after the above-mentioned garnishment whereby he was to receive his salary each day in advance, thereby making it impossible for his earnings to be levied upon. It also appeared that defendant had withdrawn his money in the bank in order to prevent a levy thereon. While notice of garnishment had been served on RKO Studios each morning from February 20 to March 1, these services proved futile, as there was no money due. Defendant collected the sum of \$2,250 from RKO Studios during this period.

On February 28, 1934, application was made in the present action for the appointment of a receiver in aid of execution and also for a restraining order. An affidavit was filed with said application setting forth the facts and showing that execution had been returned only partially satisfied and that said defendant refused to apply his earnings to the satisfaction of said judgment. It was alleged therein that defendant, his manager, and RKO Studios had entered into a conspiracy to defeat the collection of said judgment and that defendant had stated to counsel for respondent that he would not apply any of his earnings to the payment of said judgment. The trial court issued an order to show cause and a restraining order. The hearing was had on March 9, 1934, and other

affidavits were filed by the parties. Testimony was taken and the transcript of the testimony on supplementary proceedings was admitted in evidence pursuant to stipulation. On said date, the trial court made an order granting injunction, but continued the hearing of the application for a receiver until March 12. On the last-named date the matter was submitted and on March 16 the trial court made its "Order Appointing Receiver in Aid of Execution," from which order this appeal was taken.

[1] Appellant contends "that said court was without jurisdiction in making the orders of February 28, 1934, March 9, 1934 and March 16, 1934 and that the showing made by said plaintiff did not entitle him to any of said orders." We find no merit in this contention. The order of February 28 was the restraining order and order to show cause. The order of March 9 was the order granting injunction. Appellant argues that the trial court was without jurisdiction to issue either the restraining order on February 28 or the order granting injunction on March 9, but we are not called upon to pass upon these questions. These orders were appealable orders (Code Civ. Proc. § 963; 14 Cal. Jur. 294) and no appeal was taken therefrom. The only appeal before us is the appeal from the order of March 16, which was an "Order Appointing Receiver in Aid of Execution" and we shall therefore confine our discussion to the points raised with respect to the last-mentioned order.

[2] In our opinion, the trial court had jurisdiction to make the order of March 16 appointing a receiver. Section 564, subdivision 4, of the Code of Civil Procedure, provides that a receiver may be appointed, "after judgment * * * in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment." See, also, *Habenicht v. Lissak*, 78 Cal. 351, 20 P. 874, 5 L. R. A. 713, 12 Am. St. Rep. 63; *Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am. Rep. 120, 11 Cal. Jur. 155, 156. Appellant cites numerous authorities, but we find none of them in point. This was not an attempt to bring an independent action in the nature of a creditor's bill, but respondent here proceeded strictly in accordance with the statutory provisions for proceedings supplemental to execution. That the trial court had jurisdiction to appoint a receiver in such proceedings is clearly in-

licated in one of the authorities cited and relied upon by appellant. *McCutcheon v. Superior Court*, 134 Cal. App. 5, 24 P.(2d) 911. We further believe it clear, from a reading of the Code section above quoted and the recital of the facts above set forth, that the showing made by respondent was sufficient to justify the making of the order in question.

[3-6] Appellant further contends that he was denied the opportunity to be heard on his claim for exemption of the money to be collected by the receiver and also contends that the trial court erred in ordering the receiver to collect so-called "future earnings" as well as those already earned. The first of these contentions is wholly without merit. Appellant's claim of exemption was made an issue before the trial court and appellant had a full opportunity to be heard thereon. There was ample evidence to show that the earnings affected by the order as hereinafter modified were not necessary for the support of appellant's family and the trial court properly concluded that said earnings were not exempt. Code Civ. Proc. § 690, subd. 10. The second of said contentions arises out of the fact that the order purported to affect "any earnings now due or to become due" to appellant under his agreement with RKO Studios. In this connection, appellant contends that the receiver should not have been authorized to collect any salary earned after the issuance of the order to show cause on February 28 and particularly should not have been authorized to collect any salary which had not been earned at the time of the appointment of the receiver on March 16. In support of his contention, he cites certain authorities, which hold that a garnishment does not serve to impound "future earnings." We are here concerned, however, not with the question of what may be reached by garnishment, but what may be reached by proceedings supplemental to execution. Appellant also cites certain authorities from other jurisdictions, most of which deal with exempt earnings, and in some of which it is indicated that no salary earned or other property acquired after the issuance of the order of examination or order to show cause may be reached in such supplementary proceedings. We believe that the rule indicated by such authorities is not based upon sound reason in the light of the obvious purpose of the statutory provisions for proceedings supplemental to execution. If the judgment debtor ac-

quires nonexempt property of any kind between the time of the issuance of the order of examination or order to show cause and the time of the hearing thereof, we know of no reason why such property should not be held to be reachable in the proceedings then pending. We therefore conclude that the trial court did not err in ordering the receiver to collect the money representing the salary of the judgment debtor earned up to the time of the appointment of the receiver on March 16, which money had been found by the court to be not exempt from execution. The receiver was also directed, however, to collect any earnings "to become due" under appellant's agreement with RKO Studios. This, we believe, was error, in so far as it affected salary not earned at the time the receiver was appointed. While there are statutory provisions in some states under which a portion of the future earnings of a judgment debtor may be subjected to the satisfaction of the judgment (23 C. J. 902, § 1099½), our attention has not been called to any statute in this state dealing with this subject. Future wages may or may not be earned, and, if earned, they may or may not be exempt. Such future earnings do not ordinarily vest in the receiver (23 C. J. 882, § 1052), and any rule which would permit the trial court to direct the receiver to collect the entire earnings of the judgment debtor as they become due would be against public policy. We are, therefore, of the opinion that the order should be modified so as to eliminate therefrom the directions to the receiver to collect the earnings "to become due" to appellant after the date of the appointment of the receiver.

[7] Lastly, appellant apparently contends that the judgment could not be enforced against him until the security furnished pursuant to the agreement of 1932 by way of a deed of trust had been exhausted. He cites and relies upon *Bank of Italy, etc., Ass'n v. Bentley*, 217 Cal. 644, 20 P.(2d) 940. In our opinion, this contention is without merit. The agreement made in 1932 was clearly an agreement of forbearance and the judgment was not merged therein. The deed of trust was not given to secure the judgment as such, but was given to secure the promises made by appellant and his wife in said agreement. By the express terms of the agreement, the promise to refrain from enforcing the judgment was to be binding only "as long as the said Tearles shall per-

form all of the covenants herein provided to be performed by them." Upon their failure to keep their promises made in said agreement, we believe that respondent was entitled to proceed with the enforcement of the judgment and that the rule set forth in *Bank of Italy, etc., Ass'n v. Bentley*, supra, has no application to the facts before us.

The order appealed from is modified by eliminating therefrom all portions thereof referring to earnings of the judgment debtor "to become due" to the judgment debtor after the time of the making of said order on March 16, 1934, and, as so modified, said order is affirmed. The parties will bear their own costs on this appeal.

We concur: NOURSE, P. J.;
STURTEVANT, J.



8 Cal.App.2d 50

NEWMAN v. SOLT et al.

Civ. 10235.

District Court of Appeal, Second District,
Division 2, California.

June 25, 1935.

1. Automobiles ⇨244(4)

Evidence held insufficient to establish willful misconduct of driver who, when traveling at rate of 63 miles an hour and requested to slow down by guest, reduced speed to 58 miles an hour, following which guest made no comment until automobile approached curve, thereafter leaving highway and overturning, injuring guest, who therefore could not recover damages (St. 1931, p. 1693, § 141¼).

"Willful misconduct," within Automobile Guest Statute, St. 1931, p. 1693, § 141¼, means intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result; to constitute such misconduct there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure

to act to the end of averting injury; such misconduct involves a positive intent actually to harm another or to do an act with a positive, active, and absolute disregard of its consequences.

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

2. Automobiles ⇨181(1)

Owner of automobile held not liable for damages suffered by guest of driver operating automobile negligently but without willful misconduct (St. 1931, p. 1693, § 141¼; Civ. Code, § 1714¼).

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by Fred K. Newman against Margaret Solt and another. Verdict for defendants. From an order granting a new trial, defendants appeal.

Reversed and remanded, with directions.

Lasher B. Gallagher, of Los Angeles, for appellants.

Euler & Subith, of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Respondent was injured while riding as a guest of appellant Earl M. Ross in an automobile belonging to appellant Margaret Solt. The complaint alleged that the injuries sustained were caused by the negligence and careless operation of the automobile and the willful misconduct of appellant Ross. The trial court directed a verdict in favor of Margaret Solt and the jury returned a verdict in favor of both appellants. Thereafter the court granted a motion for new trial as to both appellants, from which order this appeal is taken.

According to the testimony of respondent, on the night of February 24, 1934, he and appellant Ross left a dance and, in the automobile of Miss Solt driven by Ross, went to Montrose where each purchased a pint of whisky to take back to the dance. As they entered the car Ross said he would like to see how fast the car would go, to which Newman replied merely that there was no hurry. After driving three-quarters of a mile, respondent observed that they were traveling at the rate of 63 miles an hour, and thereupon requested Ross to slow down, whereupon the latter reduced

the speed of the car to 58 miles an hour. Nothing further was said by Newman concerning the operation of the automobile until, according to his testimony, the car was 35 feet from a corner to the beginning of a gradual curve in the road, when he yelled to Ross to look out. The witness Newman is erroneously quoted in respondent's brief as giving the distance from the corner as 350 feet and the witness in making a diagram placed the car as being at a point about 120 feet from the corner. Instead of making the turn Ross drove more nearly in a straight line, leaving the macadam portion of the road and passing on the unpaved portion of the highway at a point approximately 60 feet beyond the corner. The machine traveled about 125 feet on this unpaved portion of the highway, struck a post, ran about 85 feet further, struck several trees, and overturned. It appears that the skidding of the wheels in the sand forming the unpaved portion of the road prevented the driver from turning the car back to the macadamized central part of the highway. When Newman observed that Ross was driving nearly straight ahead instead of following the curve in the road, he grabbed the steering wheel and tried to turn it, but for some reason not disclosed was unable to do so.

In view of the opinion hereinafter expressed it is immaterial whether at the time of the accident Ross was driving with the consent of the owner.

[1] Appellants contend that the evidence is insufficient to establish a case of willful misconduct under section 141¾ of the California Vehicle Act (St. 1923, p. 517, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693), without which respondent, who was riding as a guest, cannot recover. Since the taking of this appeal the Supreme Court, in *Meek v. Fowler* (Cal. Sup.) 45 P.(2d) 194, 197, has approved the definition in *Turner v. Standard Oil Co.*, 134 Cal. App. 622, 626, 25 P.(2d) 988, wherein it is said: "Willful misconduct," within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result." The Supreme Court also quotes with approval from *Howard v. Howard*, 132 Cal. App. 124, 128, 22 P.(2d) 279, 281, as fol-

lows: "'To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury.' While the line between gross negligence and willful misconduct may not always be easy to draw, a distinction appears from the definition given in that gross negligence is merely such a lack of care as may be presumed to indicate a passive and indifferent attitude towards results, while willful misconduct involves a more positive intent actually to harm another or to do an act with a positive, active, and absolute disregard of its consequences." The facts in the *Howard Case* are in many respects similar to the case at bar. There also the driving at a rate of speed excessive under the existing physical conditions, which included a wet road, caused the driver to lose control over the movement of the car, and it got off the highway and overturned.

The facts in the case before us fall distinctly short of showing the doing of an act with a wanton and reckless disregard of possible consequences, and display neither the intention of doing an act which would cause physical injury nor an attitude of mind of indifference to the probable results. It is significant, in considering the apparent danger, that respondent though requesting, when the car was proceeding at a speed of 63 miles an hour, that the driver slow down, made no request or comment when the speed had been reduced to 58 miles an hour until the car approached the curve, at which time he yelled to the driver to "look out"; an exclamation indicating the need for circumspection because of the curve in the road ahead rather than any disapproval of the speed or manner of driving. The evidence fails to establish willful misconduct, the necessary basis for a recovery of damages by respondent, the guest of the driver.

[2] The other basic point on this appeal presents the question: Is the owner of an automobile responsible for damages suffered by a person riding in an automobile as a guest of a driver operating the vehicle negligently but without willful misconduct? Section 141¾ of the California Vehicle Act provides that a person riding as a guest in any vehicle moving upon a public highway shall have no right of recovery for injuries against the owner or driver or person responsible for the operation of such vehicle. To this rule the section makes the exception

that it shall not be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability for death or injury of such guest proximately resulting from the intoxication or willful misconduct of such owner, driver, or person responsible for the operation of the vehicle. The plain effect of the section is that while a guest may, in spite of the first portion of the section, maintain a right of action for personal injuries, such action cannot be maintained unless the additional prescribed element, either intoxication or willful misconduct, is present. Section 1714 $\frac{1}{4}$ of the Civil Code, relied upon by respondent, declares the owner of an automobile liable for damages resulting from the negligent operation of a motor vehicle by a person operating the same with the permission of such owner. That section, general in its nature, is, however, limited by the provisions of section 141 $\frac{3}{4}$ of the California Vehicle Act, and the latter section controls and governs in those cases in which the injured party was a guest, i. e., riding in the vehicle without giving compensation therefor.

The order granting a new trial is reversed, and the cause remanded, with directions to enter judgment in accordance with the verdicts.

We concur: STEPHENS, P. J.;
CRAIL, J.



7 Cal.App.2d 726

SILMAN v. REGHETTI.

Civ. 5361.

**District Court of Appeal, Third District,
California.**

June 21, 1935.

**Hearing Denied by Supreme Court
Aug. 19, 1935.**

1. Jury ☞56

Person claiming exemption from jury service upon statutory grounds of exemption is not competent thereafter to act as juror in any case for succeeding year (Code Civ. Proc. § 199, subd. 3; § 200, subd. 13).

2. Jury ☞56

In counties with population of less than 300,000, discharge of juror within year prior to being again called is ground of exemption only, to be exercised as privilege, and is not ground of incompetency (Code Civ. Proc. § 199, subd. 3; § 200, subd. 13).

3. Jury ☞56

Three jurors who had served as trial jurors in county of population of less than 300,000 and had thereafter been discharged from jury duty held competent to act as jurors within year following discharge where jurors did not claim their exemption (Code Civ. Proc. § 199, subd. 3; § 200, subd. 13).

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by A. L. Silman, as administrator of the estate of Hazel Katheryn De Graff, deceased, against E. V. Reghetti. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Chester O. Hansen, of Fresno, and Hugh H. Griswold, of Merced, for appellant.

C. Ray Robinson and James D. Garibaldi, both of Merced, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal by the defendant from a judgment in favor of plaintiff, as administrator of the estate of Hazel Katheryn De Graff, deceased.

The action grew out of an automobile collision in which Hazel Katheryn De Graff sustained injuries resulting in her almost immediate death. It is not necessary to detail with more particularity the facts surrounding the accident, as the only issue presented on this appeal is whether a person who has served as a trial juror and has been discharged from jury duty following such jury service is incompetent to again act as a trial juror within the year following such discharge. Three of the twelve jurors impaneled to try this case had served as trial jurors in the court where the present action was tried within a year prior thereto.

Some six or eight months prior to the trial of the instant case, Mrs. Doran, Miss Bauman, and Mrs. Figeroid were summoned on a special venire and were chosen and sworn as jurors in that case. They served throughout the trial of the cause, and upon its completion were discharged. They were again summoned as jurors upon a special venire to try the issues raised in the case now before us. They were called into the box, and were ultimately sworn as jurors in this cause, al-

though challenges were interposed, and the court disallowed, to each of the three jurors above named as provided under the provisions of subdivision 3 of section 199 of the Code of Civil Procedure, and subdivision 13 of section 200 of the Code of Civil Procedure. When Mrs. Figeroide took her place in the box, appellant had already exhausted his four peremptory challenges allowed by law. He asked that he be granted an additional challenge, which the court refused.

At the conclusion of the trial, and upon the jury being polled, it was ascertained that the verdict stood ten in favor of plaintiff to two in favor of defendant, and that each of the three jurors named voted for plaintiff and respondent herein.

Subdivision 3 of section 199 of the Code of Civil Procedure reads in part as follows: "A person is not competent to act as a juror: * * * 3. Who has been discharged as a juror by any court of record in this state within a year, as provided in section 200 of this code, or who has been drawn as a grand juror in any such court and served as such within a year and been discharged; or who, in a county or city and county containing a population of not less than three hundred thousand as ascertained by the last preceding census taken under the authority of the congress of the United States, or the legislature of the state of California, during the preceding two years shall have actually served on twenty days as a trial juror in the trial of cases in a court of record in this state; but a juror must in any event complete his service as such juror in the trial of a case in which he may be actually engaged. The clerk shall immediately remove from the jury list the name of any juror who becomes disqualified under this section. * * *"

Subdivision 13, § 200, of the Code of Civil Procedure, states:

"A person is exempt from liability to act as a juror if he be: * * *

"13. A person drawn as a juror in any court of record in this state, upon a regular panel, who has served as such within a year, or a person drawn or summoned as a juror in any such court, who has been discharged as a juror within a year as hereinafter provided; or a person who is incompetent under subdivision three of the preceding section; provided, however, that in counties having less than five

thousand population the exemption provided by this subdivision shall not apply."

[1] That portion of section 199 here material provides that a person is not competent to act as a juror " * * * who has been discharged as a juror by any court of record in this state * * * as provided in section 200 of this code. * * *" Section 200 of the Code of Civil Procedure provides for exemption from jury duty. It would therefore appear that the Legislature intended that any one claiming his exemption upon any of the grounds stipulated in section 200 of the Code of Civil Procedure was not competent thereafter to act as a juror in any case for the succeeding year. Whether the purpose of this provision is to protect a person who has and claims a valid exemption from being harassed from frequent summons to appear for jury duty, or to penalize one who claims exemption by denying him the privilege of hereafter serving until one year has elapsed, or perhaps to prevent one from responding to each summons, collecting the per diem as provided by law and claiming his exemption from duty, or to prevent a person from avoiding a particular case and still retain the privilege of remaining upon the panel for the trial of other causes, is not clear. The language itself, however, appears too plain for other construction.

Respondent cites the case of *White v. United States*, from the Ninth Circuit Court of Appeals and reported in 16 F. (2d) 870, 871. There apparently the identical question was presented and reference made to the sections of the codes here under consideration. The court said: "Reference is made to California statutes which it is claimed have provided that jurors, who have served as such within a year and have been discharged within a year, are not competent to continue to serve as trial jurors thereafter. But the provision of the Code of Civil Procedure relied upon provides only that a person drawn as a juror in any court of record upon a regular panel, who has served as such within a year, or a person who has been discharged as a juror within a year, is exempt from liability to act as a juror. The word 'discharged' thus used clearly means one who is discharged from the panel or for the term, and not one who is discharged from a case at the close of a trial, and the statute provides only for an exemption which may be invoked by the

juror at his option. This is made clear by section 1075 of the Penal Code, which provides that an exemption from service on a jury is not a cause of challenge, but is a privilege of the person exempted."

While, of course, this decision is not by a court of last resort in California, the opinion is entitled to great persuasive authority.

Appellant has referred to the case of *People v. Quijada*, 154 Cal. 243, 97 P. 689. The case concerns a grand juror who had been discharged as a trial juror within the year. The court held there was nothing in section 199 of the Code of Civil Procedure nor section 200 of the Code of Civil Procedure which would prevent one who had been discharged from a trial jury from acting as a grand juror. The converse is prohibited by section 199 of the Code of Civil Procedure, for it obviously would be improper for a member of a grand jury to subsequently pass upon the guilt or innocence of one who might, either directly or indirectly, have been under investigation by a grand jury of which the trial juror was a member. No such reason would apply, however, if a trial juror was later summoned as a grand juror.

The next case called to our attention is *Livesey v. Stock*, 208 Cal. 315, 281 P. 70. The court there refused to pass upon the qualifications of a juror because defendant had failed to interpose a challenge upon an appropriate ground. However, that case arose in the county of Los Angeles, and the provisions of subdivision 3, section 199, of the Code of Civil Procedure, which contains a special provision relating to counties containing a population of over 300,000, would apparently be applicable.

[2] The case of *People v. Gilmore*, 17 Cal. App. 737, 121 P. 697, does not discuss the question here presented. We therefore are of the opinion that in counties with a population of less than 300,000 the discharge of a juror within a year prior to being again called is a ground of exemption only, to be exercised as a privilege and not a ground of incompetency.

Appellant suggests that the section was enacted to prevent the continuous service of so-called "professional jurors." We take it, however, that the Legislature found such abuses to exist only in counties of

over 300,000, for section 199 of the Code of Civil Procedure quoted above provides that in such counties one who had actually served twenty days as a trial juror in a court of record during the preceding two years shall not be competent to act as a juror.

[3] The three jurors in the instant case, not having claimed their exemption, were competent jurors.

No other objections having been urged to the proceedings or to the qualifications of the jurors, the judgment should be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.



8 Cal.App.2d 138

CITY OF LOS ANGELES v. HOPPENYAN'S, INC.

Civ. 10267.

District Court of Appeal, Second District,
Division 2, California.

June 27, 1935.

Rehearing Denied July 26, 1935.

1. Municipal corporations ☞43

Surety on bond required by city to secure construction of subdivision pavement and curb to satisfaction of board of public works held liable for amount which it would cost city to install gutters joining pavement and curb, which were not constructed, though installation of gutters was not included in bond, where surety knew that streets were being paved and curbs installed for drainage purposes and to keep down maintenance charges to city (Civ. Code, § 2837).

2. Principal and surety ☞59

While surety cannot be held beyond express terms of his contract, in interpreting terms of suretyship contract, same rules are to be observed as in case of other contracts, which means that contract shall be fairly construed, with view to effect object for which it was given, and to accomplish purpose for which it was designed (Civ. Code, § 2837).

3. Principal and surety ☞59

Old rule of strictissimi juris applies to suretyship contract only to extent that no

implication shall be indulged in to impose burden not clearly inferable from language of contract, but does not apply so as to hold that contract shall not be reasonably interpreted as other contracts are (Civ. Code, § 2837).

4. Principal and surety ☞66(2)

To ascertain nature and extent of liability to which sureties have bound themselves, court must examine undertaking by light of agreement terms of which bond guarantees faithful performance.

5. Principal and surety ☞66(1)

Surety is not hedged by any sanctity which prevents application of same rules to construction of its agreements as are used to admeasure obligations arising under other contracts, and extent of surety's liability must be gathered from language used when read in light of circumstances attending transaction.

6. Municipal corporations ☞43

Bond given in consideration of extension of time to complete subdivision paving and curb construction, which was done under bond given to city by subdivider guaranteeing performance in manner satisfactory to board of public works, held not unenforceable for uncertainty as to obligation assumed (Civ. Code, § 2837).

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by the City of Los Angeles against Hoppenyan's, Incorporated, and the Fidelity & Deposit Company of Maryland. From a judgment for plaintiff, second-named defendant appeals.

Affirmed.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Deputy City Atty., and Thatcher J. Kemp, all of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Defendant Fidelity & Deposit Company of Maryland appeals from a judgment against it as surety on a bond which it executed to guarantee certain street work to be done by the principal, its codefendant, in subdividing a tract of land.

The principal had offered to the plaintiff city a subdivision map of the tract. Before filing the map the city required and

appellant furnished a bond for \$6,000 which was in part as follows: "Whereas, the City of Los Angeles, for the purpose of securing means whereby drainage which affects said tract will be properly cared for, street maintenance cost to the City will be as far as possible eliminated and the public will be protected from accidents, demands that all of the streets now offered for dedication in said Tract shall be provided with a pavement having surface sloped toward the hill side, and a concrete curb on the hill side of the roadway, satisfactory to the Board of Public Works of said City. Now therefore, if the work outlined above is completed to the satisfaction of said Board of Public Works before June 1st, 1929, then the obligation of this bond shall be null and void, otherwise it shall remain in full force and effect." The bond was executed June 2, 1927.

Two years later the work had been only partially completed, so the same defendants, as principal and surety, executed a further bond for \$6,000 in part as follows: "Whereas said Hoppenyan's Incorporated, in May, 1927, submitted for record a map of a subdivision of land known as Tract No. 9970, located in the City of Los Angeles, and on June 2d, 1927, as Principal, with said Fidelity and Deposit Company of Maryland, as Surety, executed Bond No. 2188, on file in the office of the Bureau of Engineering of said City, guaranteeing to perform work described in said bond before June 1, 1929, in a manner satisfactory to the Board of Public Works of said city; and whereas for certain justifiable reasons only a small portion of said work has been performed and said Principal has requested that the time specified in said Bond No. 2188 within which said work was to be completed be extended to June 30th, 1930; which work includes curbing and paving all of the streets in said tract in a manner satisfactory to said Board. Now therefore, if said Principal obtains from said Board, as prescribed in Ordinance No. 57971 of said City, a permit to construct the work described and deposits the fee and files the faithful performance bond required by said ordinance in time to complete said work before June 1, 1930, or before the end of any additional extension of time for completing the work that may be granted by said Board, then the obligation of this bond shall become null and void at the time said fee is de-

posited and said faithful performance bond is filed. However, in case said Principal fails to obtain such a permit in time to complete said work within the period of time allowed, the obligation of this bond shall remain in full force and effect."

The trial court found that "the amount which the city of Los Angeles will be obligated to expend to perform and complete the work mentioned in said bond, to the satisfaction of said Board of Public Works," was \$562.50 for curbing, \$250 for gutters, and \$3,070.60 for pavement, plus \$582.46 for engineering, superintendents' and contractors' fees and contingencies.

Appellant urges that the bond in question is unenforceable for uncertainty.

[1] It is not suggested that appellant executed either obligation without receiving adequate consideration therefor, nor is it established that it was unaware of the general nature and extent of the work contemplated. We may assume that it had executed other bonds, knew the general limits as to requirements for such street work and that the city by ordinance and through its board of public works would determine what work should be done and how it should be done, and was satisfied to obligate itself as surety to the amount fixed to assure the city that the improvements contemplated would be made. It does not appear that the type of street work which could be done for the amount awarded by the trial court would be unreasonable, nor that the amount of the judgment was excessive. We find no merit in appellant's suggestion that certain evidence which was introduced to furnish a basis for the trial court's determination as to the nature and cost of the work required should have been excluded. We likewise approve the inclusion in the judgment of an amount to pay for gutters, as well as pavement and curbing. Appellant knew that the streets were being paved and the curbs installed for drainage purposes and to keep down maintenance charges to the city. To say that this primary purpose of the work thus promised would be accomplished without a gutter joining the pavement and curb to carry off the water would be contrary to the ordinary experience and observation.

[2-4] "While it is true that a surety cannot be held beyond the express terms of his contract, yet, in interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other

contracts. Such construction does not mean that words are to be distorted out of their natural meaning, or that, by implication, something can be read into the contract that it will not reasonably bear; but it means that the contract shall be fairly construed, with a view to effect the object for which it was given and to accomplish the purpose for which it was designed. The old rule of *strictissimi juris* applies only to the extent that no implication shall be indulged in to impose a burden not clearly inferable from the language of the contract, but does not apply so as to hold that the contract shall not be reasonably interpreted as other contracts are. Civ. Code, § 2837." *Sather Banking Co. v. Briggs Co.*, 138 Cal. 724, 72 P. 352, 354. "We must, in order to ascertain the nature and extent of the liability to which the sureties have bound themselves, examine the undertaking by the light of the agreement of whose terms it guarantees the faithful performance." *W. P. Fuller & Co. v. Alturas School District*, 28 Cal. App. 609, at page 613, 153 P. 743, 745.

[5, 6] In the instant case we note that during the two years elapsing between the execution of the two bonds some work had been done as agreed, and we are not told that the cost of the work remaining to be done and for which judgment was recovered on the bond was disproportionate to the cost of this earlier improvement. When language is used as in this case, we must hold that "a surety is not hedged by any sanctity which prevents the application of the same rules to the construction of its agreements as are used to admeasure the obligations arising under other contracts. The extent of the surety's liability must be gathered from the language used when read in the light of the circumstances attending the transaction." *Hollenbeck-Bush Mill Co. v. Amweg*, 177 Cal. 159, at page 162, 170 P. 148, 149. See, also, *Roberts v. Security Trust & Savings Bank*, 196 Cal. 557, 238 P. 673.

Reading the obligations of appellant in the light of the circumstances, we find no uncertainty as to the obligation assumed by it and no unreasonableness in the determination of the trial court as to amount of the award.

Judgment affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.

8 Cal.App.2d 173

**BANK OF AMERICA NAT. TRUST & SAV-
INGS ASS'N v. DENNISON et al.**
Civ. 9978.

District Court of Appeal, Second District,
Division 2, California.

June 28, 1935.

Hearing Denied by Supreme Court
Aug. 26, 1935.

1. Constitutional law $\S$ 107

One does not have vested right in statute of limitations until it has run in his favor, and, if cause of action is not barred, Legislature may shorten or extend time within which it may be asserted, provided adequate means of enforcing right still remain.

2. Statutes $\S$ 263

Statutes will be construed to operate prospectively unless legislative intent to contrary is clearly expressed, especially where retroactive operation would impair obligation of contracts or interfere with vested rights.

3. Mortgages $\S$ 561

Action brought March 20, 1934, to recover balance due on note after sale under trust deed on August 15, 1932, held not barred by statutes effective August 21, 1933, which limited actions to recover deficiencies to three months after foreclosure sale, since statutes were not retroactive (Code Civ. Proc. $\S$ 3, 339; $\S$ 337, as amended by St. 1933, p. 2116; $\S$ 580a, as added by St. 1933, p. 1672).

4. Mortgages $\S$ 282(2)

Grantee assuming payment of mortgage or note secured by trust deed as part of purchase price becomes, as to mortgagor or trustor, principal debtor, and mortgagor or trustor becomes surety.

5. Mortgages $\S$ 558

Liability of grantee who assumes payment of mortgage or trust deed must be enforced by foreclosure of mortgage or by sale under trust deed, and deficiency judgment may be entered against grantee only on security becoming exhausted (Code Civ. Proc. $\S$ 726).

6. Limitation of actions $\S$ 27

Action against grantee who assumed payment of note secured by trust deed held not barred by two-year limitation as to actions on oral contracts, since grantee's liability was on trust deed obligation and not on promise to pay note secured by trust deed as new and independent agreement (Code Civ. Proc. $\S$ 337, 339, 726).

Action by the Bank of America National Trust & Savings Association against Marcus P. Dennison, also known as M. P. Dennison, and others. From judgments of dismissal, plaintiff appeals.

Reversed and remanded, with directions.

Prior opinion, 44 P.(2d) 1053.

Hearing denied by Supreme Court;
CURTIS, J., dissenting.

Louis Ferrari, of San Francisco, and Edmund Nelson, John E. Walter, and O'Melveny, Tuller & Myers, all of Los Angeles, for appellant.

Scott McReynolds, of Los Angeles, and Samuel F. Hollins, of Fresno, for respondents.

Farrand & Slosson and Edward W. Tuttle, all of Los Angeles, amici curiæ.

WILLIS, Justice pro tem.

A rehearing was granted in this case, and arguments both written and oral have been presented by counsel for the respective parties and by amici curiæ, to which we have given careful consideration. As a result we find ourselves confirmed in the belief that our views expressed in the first decision were and are correct and not in conflict with any previous decisions of our state appellate courts, excepting that in *Re Estate of Clark*, 117 Cal. App. 64, 3 P.(2d) 330. While our views previously expressed appear out of harmony with those found in *Crothers v. Edison Electric Co.* (C. C.) 149 F. 606; *In re Estate of Whiting*, 110 Cal. App. 399, 294 P. 502; and *In re Estate of Venners*, 119 Cal. App. 417, 6 P.(2d) 544, cited and relied upon by respondents and amici curiæ, nevertheless the decisions in those cases are not in conflict with the decision herein announced and do not interpose any obstacle to a decision in this case in conformity to our original views. The case of *In re Estate of Clark*, supra, embodies in its decision a doubt as to its correctness, and we now choose to resolve that doubt in again giving expression to what we firmly believe to be the true and correct interpretation of the statutes in question and the applicability thereof to the facts of this case.

Plaintiff commenced this action on March 20, 1934, to recover the balance due on a promissory note, executed by respondents Marcus P. Dennison and Emma Dennison, on May 1, 1929, payable May 1, 1930, and which had been secured originally by a trust deed of certain real property and a

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

chattel mortgage on certain personal property executed by the makers contemporaneously with the note, a sale having been had under such trust deed on August 15, 1932, and under the chattel mortgage on February 13, 1934. On February 3, 1931, respondent Mariana V. De Topete accepted a deed of the real property described in the trust deed and assumed and agreed to pay the above-described note secured thereby, and at the same time executed and delivered to M. P. Dennison a chattel mortgage on certain personal property as additional security for \$1,000 of the principal of said note, which chattel mortgage was, on July 20, 1932, assigned to appellant, and a sale was likewise had thereunder on February 13, 1934.

To the complaint setting forth the above facts, respondent Mariana V. De Topete, filed a separate demurrer alleging that the action was barred by the provisions of section 337 of the Code of Civil Procedure, as amended by St. 1933, p. 2116, more than three months having expired since the time of sale under the trust deed, and also that it was barred by the provisions of section 339 of the same Code. Respondents Marcus P. Dennison and Emma Dennison filed a separate demurrer, stating the general ground of failure to state sufficient facts, and the further ground that it appeared from the facts stated that the action was not commenced within the time limited by sections 337 and 581a of the Code of Civil Procedure. It is conceded by the parties herein that section 580a as added by St. 1933, p. 1672, was intended instead of 581a, and we will consider this case on the assumption that section 580a was pleaded. Both demurrers were sustained without leave to amend, and separate judgments of dismissal were entered, from which this appeal is prosecuted.

Other than as affected by the plea of the statute of limitations, the complaint stated facts sufficient to constitute a cause of action against all the respondents. We must presume, therefore, that the demurrer of the Dennisons was sustained on the ground that the action was barred by the provisions of section 337 of the Code of Civil Procedure, as amended, and section 580a, as added by St. 1933, p. 1672.

At its session of 1933, the Legislature amended subdivision 1 of section 337, which fixed a 4-year limitation to bringing an action upon a contract, obliga-

tion, or liability founded upon an instrument in writing, by adding a proviso that the time within which any action may be brought for a money judgment for the balance due upon an obligation, for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of such power of sale, shall not extend beyond three months after the time of sale under such trust deed or mortgage. At the same session, section 580a was added as a new section to the Code of Civil Procedure, wherein it is provided, among other things, that any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of such power of sale, must be brought within three months of the time of sale under such trust deed or mortgage. Both these acts went into effect at the same date, August 21, 1933. As the sale under the trust deed herein occurred on August 15, 1932, nearly one year prior to such effective date, it is obvious that appellant could not comply with these new statutes after they became effective as laws.

[1,2] It is recognized as a fixed rule that no one has a vested right in the statute of limitations until it has run in his favor, and that if a cause of action is not barred the Legislature may shorten or extend the time within which it may be asserted, provided, however, adequate means of enforcing the right still remain. Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead, 85 Cal. 80, 24 P. 648; Doehla v. Phillips, 151 Cal. 488, 91 P. 330; Steinbauer v. Bondesen, 125 Cal. App. 419, 14 P.(2d) 106. By section 3 of the Code of Civil Procedure it is provided that no part of that Code is retroactive, unless expressly so declared. "It is settled that every statute will be construed to operate prospectively unless the legislative intent to the contrary is clearly expressed. * * * The rule that a statute is presumed to operate prospectively only, unless an intent to the contrary clearly appears, is especially applicable to cases where retroactive operation of the statute would impair the obligations of contracts or interfere with vested rights." Jones v. Union Oil Co., 218 Cal. 775, 25

P.(2d) 5, 6. "It is not disputed that the law of the forum can regulate the remedy, which, generally speaking, forms no part of the contract, and thus is not within the constitutional interdict. But it is just as well settled that the Legislature has no right so to regulate the remedy as that it shall destroy the contract by denying all means of enforcement. A right without a remedy is, practically, no obligation at all. A contract is just as much impaired by a prohibition to sue upon it, as it is by direct legislative action declaring it void. It is the same thing for the Legislature to say that a promissory note, now due and collectable, shall not be sued on if it has been due for a year, as to say that all promissory notes overdue that length of time, shall be void." *Scarborough v. Dugan*, 10 Cal. 305. In the case last cited, it was held that an amendment to the former statute of limitations, which provided that actions on any judgment, contract, obligation, or liability, for the payment of money or damages obtained, executed, or made out of this state, could only be commenced within five years from the time the action has accrued, whereby the period was reduced to two years, could only be construed to apply to judgments not in esse at the time of the passage of the amendatory act, or as giving two years from the passage of the act within which to sue upon such as were not already barred by the former act. In *Pignaz v. Burnett*, 119 Cal. 157, 51 P. 48, 49, the court had under consideration a motion to dismiss an appeal which raised the question of the effect of an amendment of section 939 of the Code of Civil Procedure regulating time for appeal from judgments of the superior court. The amendment reduced the former period of twelve months to six months after entry thereof, and the judgment involved in that case was more than six months old at the date the amendment went into effect. The court said: "It is quite obvious that great hardship is likely to result if a retroactive effect is given to this statute. One may be presumed to know the laws of the land, but the very instant this amendment took effect, if it be retroactive, the right of appeal was cut off at once. No time whatever was given to appeal in those cases in which judgments had been entered six months or more previously. Unless it is absolutely necessary, we should not impute such an intention to the Leg-

islature. In view of the construction which has almost invariably been given to statutes of this character, I feel sure that the Legislature intended that its operation should be limited to judgments thereafter entered." This case was cited with approval in the case of *San Francisco, etc., Rys. v. Superior Court*, 172 Cal. 541, 157 P. 604, 605, wherein the court construed and applied the amendment of section 660 of the Code of Civil Procedure enacted in 1915 (St. 1915, p. 202), whereby the power of the superior court to pass on a motion for new trial was expressly limited to three months after the verdict of the jury or service of notice of decision of the court, instead of at the earliest practicable time as provided theretofore. No express saving clause as to proceedings on motion for a new trial initiated before the taking effect of the amendment was continued in the section as amended. The court said: "We do not think this provision may fairly be construed * * * as authorizing a trial court to pass on a motion for new trial pending at the time it went into effect, at any time within three months after it so went into effect, or at any time within three months after the record on which such motion was to be heard is finally settled. The only time expressed in the provision is 'within three months after the verdict of the jury or service on the moving party of notice of the decision of the court.'" Citing the *Pignaz Case*, the court then said: "The court squarely held that to apply the statute to judgments entered before it went into effect would give it a retroactive effect, and that the statute gave 'no time whatever * * * to appeal in those cases in which judgments had been entered six months or more previously,' and, in view of this construction and the consequent cutting off of the right of appeal if the law were construed as retroactive, it was held that the Legislature intended that the operation of the law should be limited to 'judgments thereafter entered.' * * * We are here dealing with a provision of law which deprives a court of power to pass on a motion for new trial unless such power is exercised within a specified time after verdict or notice of decision. The time is designated in clear and unequivocal terms, and, if the provision is applicable at all to proceedings pending at the time it became operative, its terms are such, in our opinion, as to

preclude a construction to the effect that it did not absolutely take away from a trial court the power to pass on the motion for a new trial after the expiration of three months from the rendition of the verdict or service on the moving party of the notice of the decision of the court, regardless of all other circumstances. This being the construction that must be given to the provision, we have no doubt that it should not be construed as applicable to proceedings on motion for new trial pending at the time it became operative. *Pignaz v. Burnett*, supra [119 Cal. 157, 51 P. 48], is practically controlling as to this."

[3] Applying the rule clearly reflected in all the foregoing cases, and expressed in definite terms in the case of *Pignaz v. Burnett*, supra, and approved and applied in *San Francisco, etc., Rys. v. Superior Court*, supra, we are constrained to hold that the amendment to section 337, and the terms of the new section 580a of the Code of Civil Procedure, were not intended by the Legislature to operate upon an action for money judgment for the balance due upon an obligation secured by a trust deed after sale thereunder where such sale had occurred before the act went into effect. We are satisfied that the Legislature intended that the operation of these practically duplicate laws should be limited to cases where the sale took place after their effective date. And for the reasons given in the case of *San Francisco, etc., Rys. v. Superior Court*, supra, we are equally convinced that these new laws may not fairly be construed as compelling action to be commenced within three months after such effective dates in cases where the sale has previously been made, for both these acts expressly require that action be brought within three months after the time of sale. To so construe them would in effect be judicial legislation rather than interpretation. In view of the rather extended quotations of such pertinent expressions of our appellate courts embodying the rules and creating authentic precedent for guidance and determination of the law question arising under the record herein, it is unnecessary to add further comment. The decisions quoted declare the law, and we apply it to the case at bar, and hold that it was error to sustain the demurrer of the respondents *Marcus P. Dennison* and *Emma Dennison*.

The separate demurrer of respondent *Mariana V. De Topete*, in so far as section 337 of the Code of Civil Procedure is concerned, was, for the same reasons as above given, erroneously sustained. But in that demurrer there was also pleaded the bar of section 339 of the Code of Civil Procedure, embracing the 2-year limitation as to actions upon a contract, obligation, or liability not founded upon an instrument in writing with certain exceptions not pertinent herein. This plea is predicated on the proposition that *Mariana V. De Topete*, on February 3, 1931, accepted a deed of the real property, encumbered by the trust deed here in question, in which it was stated that she assumed and agreed to pay the note secured thereby.

[4-6] It is the settled rule in this state that where the grantee of the mortgagor or trustor in a deed of trust assumes the payment of the mortgage or note secured by the trust deed as part of the purchase price, he becomes, as to the mortgagor or trustor, the principal debtor, and the mortgagor or trustor the surety. *Essey v. Phillips*, 136 Cal. App. 3, 28 P.(2d) 38; *Tompkins v. Powers*, 106 Cal. App. 464, 289 P. 685. The liability of the grantee in such a case is the indebtedness secured to be paid by the mortgage or trust deed. It must, however, be enforced by foreclosure of the mortgage in the one instance or by sale under the trust deed in the other, and a deficiency judgment may be entered against him only upon the security becoming exhausted. Section 726, Code Civ. Proc.; *Newhall v. Bank of Livermore*, 136 Cal. 533, 69 P. 248; *Bank of Italy, etc., Ass'n v. Bentley*, 217 Cal. 644, 20 P.(2d) 940. It necessarily results in the case at bar that the statute of limitations must run against the trust deed obligation—the note secured thereby—for that is the grantee's liability, and not against the promise to pay the trust deed note as a new and independent agreement. *Roberts v. Fitzallen*, 120 Cal. 482, 52 P. 818. It therefore follows as a matter of law that section 339 of the Code of Civil Procedure is not applicable to the obligation of *Mariana V. De Topete*, but that the action against her must be tested by the provisions of section 337 of the same Code as it existed prior to the amendment of 1933. The earliest date on which this statute could begin to run under the facts alleged in the complaint

was May 1, 1930. As this action was commenced on March 20, 1934, the 4-year statute of limitations had not ripened into a bar. The foregoing conclusions render it unnecessary herein to consider and determine the point raised by appellant that it was the legislative intent to limit the application of these new provisions to actions of the character here involved where a trust deed was the sole security for payment of the note, and not to apply to notes secured by security additional to that of a trust deed. Nor is it necessary to pass upon appellant's claim that the acts in question were violative of the constitutional inhibition against special legislation. Const. art. 4, § 25.

The judgments are and each of them is reversed and the cause remanded, with directions to overrule the demurrers and each of them.

We concur: STEPHENS, P. J.;
CRAIL, J.



8 Cal.App.2d 275

Ex parte JACINTO.

Cr. 185.

District Court of Appeal, Fourth District,
California.

July 2, 1935.

1. Habeas corpus ☞

Purpose of writ of "habeas corpus" is to test validity of process on which person is restrained and jurisdiction of issuing court.

[Ed. Note.—For other definitions of "Habeas Corpus," see Words & Phrases.]

2. Criminal law ☞217

Class B justice's court had no jurisdiction to issue warrant of arrest for crime committed in another township (Penal Code, § 1425, as amended by St. 1933, p. 1454).

3. Constitutional law ☞46(1)

On application for habeas corpus, questions respecting constitutionality of sections of Agricultural Code and of county ordinance regarding eradication of bovine tuberculosis could not be considered where petitioner was required to be released from custody because of lack of jurisdiction of justice's court issuing warrant of arrest.

Petition by Louis Jacinto for a writ of habeas corpus to obtain release from restraint under warrant of arrest.

Petitioner discharged from custody and his bail exonerated.

Thomas F. Lopez and G. L. Aynesworth, both of Fresno, for petitioner.

Whitehurst & Logan, of Patterson, and Hawkins & Hawkins, of Modesto, amici curiæ for petitioner.

Roger R. Walch, District Attorney, of Hanford, for respondent.

MARKS, Justice.

In his petition for a writ of habeas corpus Louis Jacinto seeks to be released from restraint under a warrant of arrest issued by the justice of the peace of Hanford township on an offense alleged to have been committed in Lemoore township in Kings county. The justice's courts of both townships are class B.

[1] The purpose of a writ of habeas corpus is to test the validity of the process upon which a person is restrained and the jurisdiction of the court issuing such process. Ex parte Long, 114 Cal. 159, 45 P. 1057.

[2] Section 1425 of the Penal Code as now in effect (St. 1933, p. 1454) confines the jurisdiction of class B "Justices' courts in criminal causes to the township wherein the offense was committed." *Antilla v. Justice's Court*, 209 Cal. 621, 290 P. 43, 45. See, also, *In re Cohen*, 107 Cal. App. 288, 290 P. 512; *In re Bridwell*, 112 Cal. App. 19, 296 P. 312; *In re Giruado*, 114 Cal. App. 348, 299 P. 740; *In re Wyatt*, 114 Cal. App. 557, 300 P. 132; *Fueller v. Justice's Court*, 134 Cal. App. 305, 25 P.(2d) 248. It follows that as the justice's court of Hanford township was a class B justice's court and the crime had been committed in another township, the justice's court of Hanford township had no jurisdiction and petitioner should be discharged.

[3] The question of the territorial jurisdiction of the justice's court of Hanford township is not raised in the briefs of counsel or of amici curiæ. It is desired that we pass on the constitutionality of certain sections of the Agricultural Code, and of an ordinance of Kings county having for its purpose the eradication of bovine tuberculosis in that county. As

petitioner must be released from custody because of lack of jurisdiction of the justice's court of Hanford township over the offense charged in the complaint, it is apparent that it is unnecessary, if not improper, for us to consider the constitutional questions raised in the briefs.

Petitioner is discharged from custody and his bail is exonerated.

We concur: BARNARD, P. J.; HARDEN, Justice pro tem.



8 Cal.App.2d 157

Ex parte TANTLINGER.

Cr. 2677.

District Court of Appeal, Second District,
Division 2, California.

June 27, 1935.

1. Criminal law ☞982

Where defendant pleaded guilty to charge of statutory rape, court's order requiring defendant to serve first 18 months of probationary period at county road camp held valid, since defendant stood convicted of a "felony" (Pen. Code, § 17, and § 19a, as added by St. 1933, p. 2217).

[Ed. Note.—For other definitions of "Felony," see Words & Phrases.]

2. Habeas corpus ☞111(1)

Where order erroneously discharging petitioner from county road camp was sought for and procured on theory that petitioner's detention was unlawful, order could not be sustained on theory that it was a modification of terms of petitioner's probation (Pen. Code, § 17; § 19a, as added by St. 1933, p. 2217; and § 1203, subd. 3).

3. Habeas corpus ☞1

"Habeas corpus" lies only to enforce "rights," and is a proceeding to test legality of restraint of a person or to secure his release on bail, and will not lie to secure modification of probation order, since modification is not a "right" of person detained but rests in discretion of the court (Pen. Code, § 17, and § 19a, as added by St. 1933, p. 2217).

[Ed. Note.—For other definitions of "Habeas Corpus" and "Right; Rights," see Words & Phrases.]

4. Criminal law ☞982

Modification of probation order rests entirely within discretion of court (Pen. Code, § 17; § 19a, as added by St. 1933, p. 2217; and § 1203, subd. 3).

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Proceeding in the matter of the application of John Tantlinger for a writ of habeas corpus. From an order discharging applicant, the people appeal.

Order reversed, and cause remanded, with directions.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

Gladys Towles Root, of Los Angeles, for respondent.

FRICKE, Justice pro tem.

[1] Petitioner pleaded guilty in the superior court to a charge of statutory rape and was placed on probation for a period of fifteen years, one of the conditions being that the defendant serve the first eighteen months of his probationary period at a county road camp. A little over a year later petitioner sought his release by proceedings in habeas corpus upon the ground that section 19a of the Penal Code (as added by St. 1933, p. 2217) precluded the trial court from imposing, as a condition of probation, a period of detention exceeding one year. Upon the hearing defendant was by order of the superior court discharged, and the people have appealed from such order.

The decision of Ex parte Marquez (Cal. Sup.) 45 P.(2d) 342, 344, is determinative of the question here. It was there held that section 19a has no application to felony cases, and that where a defendant has been convicted of a felony and granted probation "the power of the court to place defendant in a road camp was limited, as to period of confinement, only by the maximum possible term of his sentence." By his plea of guilty to the charge of statutory rape, that offense being punishable by imprisonment in either the county jail or the state prison, defendant stood convicted of a felony [section 17, Pen. Code; Doble v. Superior Court, 197 Cal. 556, 241 P. 852; People v. Lippner, 219 Cal. 395, 405, 26 P.(2d) 457] punishable by a maximum possible term of fifty years.

[2-4] Respondent argues that the superior court has power to modify the terms of probation and that the release of petitioner herein was no more than a modification of probation. The record clearly disproves any such intent on the part of the judge before whom the writ was made returnable, and it is evident also from the record that petitioner was not seeking or requesting a modification of the probation order but was directly attacking the order as being in part void. Habeas corpus is a proceeding to test the legality of the restraint of a person or to secure his release on bail, and will not lie as a remedy to secure a modification of probation. Habeas corpus is a remedy to enforce rights; but no right exists to a modification of a probation order, such modification being a matter entirely within the discretion of the court. It may also be noted, with respect to either a modification or revocation of probation, that "no such order shall be made without written notice first given by the court or the clerk thereof to the proper probation officer of the intention to revoke or modify its order." Pen. Code, § 1203, subd. 3. No such notice was given in this case, for the quite obvious reason that the proceeding was never intended to be an application for modification of the probation order.

The order discharging defendant from custody is reversed, and the cause remanded, with directions to discharge the writ and remand petitioner to custody.

We concur: STEPHENS, P. J.;
CRAIL, J.



8 Cal.App.2d 27

PLATT v. PHILBRICK.

Civ. 9817.

District Court of Appeal, First District,
Division 2, California.

June 25, 1935.

1. Game ☞4

Fish and Game Code providing for refuges and suspending open season therein *held* within constitutional authorization for the protection of fish and game and not invalid on ground that regulations do not apply uni-

formly to all districts, since Constitution expressly authorizes such lack of uniformity (St. 1933, p. 439, § 451; Const. art. 4, § 25½, adopted in 1902).

2. Constitutional law ☞42

Contention that Fish and Game Code discriminated against aliens or nonoccupants of game refuges because it provided that any lawful occupant of privately-owned lands, or employee of such occupant might kill, take, or hunt, on such lands, predatory or destructive birds, or mammals, could not be raised by lawful occupant of lands in game refuge (St. 1933, p. 431, § 282; Const. art. 4, § 25½, adopted in 1902).

3. Constitutional law ☞42, 46(1)

A charge of unconstitutional discrimination can be raised in a case only where such issue is involved in the determination of the action, and then only by the person or a member of the class of persons discriminated against (Const. art. 4, § 25½, adopted in 1902).

4. Constitutional law ☞46(1)

Contention that provision of Fish and Game Code was unconstitutional because providing for issuance of permits by Fish and Game Commission at its discretion to take birds and mammals within refuges without providing a reasonable guide and limitation on the exercise of the power conferred must be overruled, where plaintiff does not allege that commission had issued, or threatened to issue, or to refuse issuance of, such permits (St. 1933, p. 429, § 251).

5. Game ☞4

Fish and Game Code providing for refuges and suspending open season therein *held* not unconstitutional because it might permit an injury to property of owners located within a refuge, since all private property within the state is subject to general police power and any incidental damage arising from establishment of fish and game refuges must be borne by property owners in the interest of the public welfare (St. 1933, pp. 398, 407, 426, 431, 439, §§ 60, 130, 170, 282, 451; Const. art. 4, § 25½, adopted in 1902).

6. Game ☞4

Fish and Game Code *held* not discriminatory because it authorizes Fish and Game Commission to purchase private lands to be used in the propagation of fish and game, on ground that purchase of lands of others for such purpose might result in the taking without compensation of property owner's land in such refuge if such land should not be purchased (St. 1933, pp. 398, 407, 426, 431, 439, §§ 60, 130, 170, 282, 451; Const. art. 4, § 25½, adopted in 1902).

7. Constitutional law §70(3)

Courts are without authority to pass on the wisdom of Fish and Game Code passed pursuant to constitutional authorization (St. 1933, pp. 398, 407, 426, 431, 439, §§ 60, 130, 170, 282, 451; Const. art. 4, § 25½, adopted in 1902).

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Julia B. Platt against Orben Philbrick. From a judgment for defendant, plaintiff appeals.

Affirmed.

Rosendale, Scott & Thomas, of Salinas, for appellant.

U. S. Webb, Atty. Gen., Darwin Bryan and Ralph O. Marron, Deputy Attys. Gen., for respondent.

NOURSE, Presiding Justice.

This is an appeal from a judgment of the superior court of Monterey county sustaining defendant's demurrer and refusing to grant plaintiff an injunction against defendant.

Appellant is the owner and occupant of certain real property in Pacific Grove which is within the "Monterey Peninsula Game Refuge" and she seeks to enjoin respondent, a deputy fish and game commissioner, from enforcing the provisions of the Fish and Game Code relating to this area. She contends that the provisions of the Code are unconstitutional because not uniform in operation; that it takes and damages her property without due process of law and without compensation; and that it unreasonably discriminates against her. Respondent answers that appellant has no right to attack the constitutionality of the Code because she does not allege any act done or threatened which would injure her or her property and because the only discrimination alleged is in her favor.

Appellant also argues that, since division 3, chapter 4, of the Code (St. 1933, p. 432, § 325 et seq.) authorizes the purchase of land by the state for fish and game refuges, the fact that the property owners in this district have not been compensated or have not given their written consent is discriminatory. But respondent argues that the provision for compensation controls only in cases where an interest is taken in the land by the state in which case the officers have

the right to occupy the property to propagate, feed, and protect the fish and game.

The gravamen of appellant's complaint is that the protection afforded wild game by the statute might result in such an increase thereof that her garden might be injured by the invasion of predatory birds and wild animals.

Section 25½ of article 4 of the Constitution reads: "The Legislature may provide for the division of the State into fish and game districts, and may enact such laws for the protection of fish and game therein as it may deem appropriate to the respective districts."

Acting under this authority the Legislature enacted the Fish and Game Code (St. 1933, p. 394). Section 60 of that Code provides that: "For the protection of fish and game, the State of California is divided into fish and game districts to be known and designed as provided in this division." Section 130, which is a part of this division of the Code, reads: "The following districts are game refuges." Section 170 defines the boundaries of the Monterey Peninsula Game Refuge.

[1] The primary purpose of these game refuges is expressed in section 451 of the Code which suspends the operation of the "open season" in all such districts, thus prohibiting the hunting of wild game within the refuge throughout the year. The creation of these refuges by the Legislature is clearly responsive to the constitutional authorization for the "protection of fish and game," and no criticism of the legislation can be made on the ground that the regulations do not apply uniformly to all the districts because the Constitution expressly authorizes such lack of uniformity.

[2, 3] The appellant directs her attack to section 282 which applies to the Monterey Peninsula Game Refuge alone and which provides that "any lawful occupant of privately owned lands, or any employee of such occupant, may take, hunt, or kill on such lands predatory or destructive birds or mammals * * * and it shall be lawful for any such occupant, or any employee thereof, to possess firearms within the boundaries of such refuge, and to carry and transport the same. * * *" It is argued that this section discriminates in favor of the lawful occupants, of which the appellant is one, and against the nonoccupants, or aliens, from whom no complaint is heard. The ar-

gument is an apt illustration of the wisdom of the rule followed in *People v. Globe Grain & Mill. Co.*, 211 Cal. 121, 127, 294 P. 3, 5, where the Supreme Court said: "It is well established that a charge of unconstitutional discrimination can only be raised in a case where this issue is involved in the determination of the action, and then only by the person or a member of the class of persons discriminated against. *Estabrook Co. v. Ind. Acc. Com.*, 177 Cal. 767, 177 P. 848; 5 Cal. Jur. 622, §§ 52, 53; 6 R. C. L. 89, §§ 87, 88, 89; 12 C. J. 768, § 189."

The purpose of this exception to the general rule of a "closed season" within these refuges is apparent. The Legislature sought to meet the objection which appellant makes to the legislation as a whole—that the effect of the "closed season" would be that predatory game would be permitted to roam within the refuge at will and cause damage to the gardens and crops of private landowners. In giving permission to the lawful occupant of lands within the refuge to protect his property against such invasion, the section is a reasonable exercise of the legislative authority to regulate the protection of game within the respective districts. The section does not permit such persons to hunt and kill game at will throughout the refuge as argued by appellant. The privilege is limited to the "privately owned lands" upon which each lawful occupant, or his employees, may take, hunt, or kill "predatory or destructive birds or mammals."

[4] Criticism is made of section 251 of the Code which authorizes the fish and game commission to issue permits at its discretion to persons to take birds and mammals within the refuge and, for that purpose, to use and possess firearms, traps, and other contrivances. The reason for the exception is to permit the taking of such game for scientific purposes, but the appellant complains that the power given the commission is too broad and unrestricted, citing the accepted rule that a statute which authorizes an administrative officer to grant or withhold a permit or license to engage in a lawful business must provide a reasonable guide and limitation upon the exercise of the power conferred. The point would require some consideration if raised in a proper case. Here there is no allegation that the

commission has issued such permits or that it has threatened to issue or to refuse any. As the basis of appellant's complaint is the possible injury to her property from the "protected" game, it is reasonable to assume that she would derive more benefit than injury from the issuance of such permits.

[5] The complaint that the statute as a whole is unconstitutional because it might permit an injury to appellant's property without compensation is without any foundation. All private property within the state is held subject to the general police powers. *Gray v. Rec. Dist. No. 1500*, 174 Cal. 622, 636, 163 P. 1024. It is conceivable that private property in every fish and game district in the state might suffer some damage through the restrictions of the Fish and Game Code generally, but this is a damage which the property owner must bear in the interest of the public welfare.

[6] There is less foundation for the complaint that the statute is discriminatory because it authorizes the commission to purchase private lands to be used in the propagation of fish and game and authorizes the "taking" of appellant's land without compensation. If this argument were sound, then the state would have to acquire all private property within the state before it could acquire any property for governmental purposes on the theory that there is a discrimination between the owner of the property taken and the owner of the property not taken.

[7] Running through the briefs of appellant is the clear intimation that the appellant is not in accord with the views of the Legislature in setting aside this particular territory as a game refuge. Frequently arguments are made that the statute is unconstitutional for one reason or another when the real complaint is that it showed poor judgment on the part of the Legislature. The wisdom of the legislation is not before us. The power of the Legislature to enact the statute cannot be controverted. If, through its operation, any of appellant's constitutional rights are invaded, it will be time then to seek relief in the courts.

The judgment is affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.

8 Cal.App.2d 61

TAYLOR v. RUSSELL et al.
Civ. 9267.District Court of Appeal, Second District,
Division 1, California.
June 26, 1935.

Rehearing Denied July 23, 1935.

Hearing Denied by Supreme Court
Aug. 22, 1935.

1. Fraudulent conveyances ⇨172(1)

Deed, though set aside as fraudulent by creditors, is valid as between the parties thereto.

2. Fraudulent conveyances ⇨181(1)

Where defendant recovered from plaintiff's assignors and judgment was later reduced and conveyance by plaintiff's assignors was held void as to creditors, a levy and sale of assignors' equity in the property and its credit to original judgment of defendant cannot be attacked by assignee where it was not shown assignors acquired title to the property after the conveyance.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by D. O. Taylor against Clarence H. Russell and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

J. E. Stillwell, of South Pasadena, and Robert E. Austin and John N. Helmick, both of Los Angeles, for appellants.

John Dennison and George H. P. Shaw, both of Los Angeles, for respondents.

John H. Foley, of Los Angeles, in pro. per.

HOUSER, Justice.

As far as are material to this appeal, in substance the facts appear to be as follows: Prior to the date when the instant action was commenced in the lower court, in another action theretofore instituted the defendants in the instant action had recovered a judgment for approximately \$43,000 against the assignors of plaintiff herein; from which judgment an appeal was taken, with the result that said judgment was reduced to the sum of \$3,500. *Russell v. Stillwell*, 106 Cal. App. 88, 288 P. 785. In the meantime, in a third action, as the result of a cross-complaint that was filed therein by the defendants herein, it was decreed that a certain sale of real property made by the assignors of plaintiff herein was void as to creditors of said assignors. Thereupon

the plaintiffs in the first action (defendants herein) levied upon and sold under execution sale all the right, title, and interest of the defendants in said first action in and to said property (which right consisted of an equity over a prior trust deed) for the sum of \$25,000; the said plaintiffs being the purchasers at said sale of said property, and thereafter causing the original judgment of \$43,000 in said first action to be credited with said sum of \$25,000. Thereafter the assignee of the defendants in said first action commenced the instant action against the plaintiffs in the first action (defendants herein) to recover a judgment against them for the difference between the ultimate judgment of \$3,500 recovered by plaintiffs in the first action against the defendants therein (plaintiff's assignors herein) and the sum of \$25,000, for which the said property of the said defendants in said first action had been sold on execution sale. On the trial thereof a judgment of nonsuit was rendered, and it is from said judgment that the instant appeal is taken

[1, 2] It is contended by respondents that "a deed in fraud of creditors, even when set aside as fraudulent by the creditors, is valid as between the parties thereto."

In 14 American & English Encyclopedia of Law, p. 273, the rule (supported by numerous authorities) is thus stated: "No rule of law is more firmly established than that a transfer of property made in fraud of creditors, while void as to them, is binding upon the parties and those in privity with them. The statutes against fraudulent conveyances are designed merely to protect the interests of creditors, and their provisions do not in any manner affect the rights of the parties to the conveyance, and these must therefore be determined by the principles of the common law."

And in 2 Moore on Fraudulent Conveyances, p. 1025, it is said: "A decree avoiding a deed as to creditors of the grantor leaves the deed operative inter partes. The legal effect of a judgment declaring a conveyance void as against a judgment creditor is not to restore the title to the debtor, but to make the property subject in the hands of the grantee to the judgment lien and clear the way for the judgment creditor to sell in satisfaction thereof. A decree adjudging a conveyance void as being in fraud of creditors is a decree sub modo, and binding only as to such creditors.
* * *

It is apparent that if the deed made by one of the plaintiff's assignors was binding as between him and his grantee, and if, as conceded by the plaintiff in the instant action, plaintiff's said assignor never acquired any additional title to the property subsequent to the conveyance by him in question—at the time of the trial of the instant action, notwithstanding the oral testimony of plaintiff's assignor to the effect that he was the "owner" of the property at the time it was sold on execution of the former judgment,—from that situation plaintiff had no standing in court that would entitle him to maintain the action. Nor did the other of plaintiff's assignors make any showing to the effect that he was the owner of the said property.

It is unnecessary to consider any other point raised by the parties to this appeal.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.



8 Cal.App.2d 113

NEWHOUSE v. GETZ et al.

Civ. 9575.

District Court of Appeal, First District,
Division 2, California.

June 27, 1935.

1. Appeal and error ⇨173(2)

Where alleged agreement by mortgagee to accept assignment of rents was not specially pleaded by indorser of note, who claimed that agreement released him from liability because agreement was in consideration of promise to forbear foreclosure, and was made without his knowledge or consent, defense could not be raised on appeal (Civ. Code, § 2819).

2. Appeal and error ⇨931(1)

Where evidence of alteration of liability of indorser of notes was conflicting, District Court of Appeal would assume in support of judgment that if findings had been made on issue, they would have been adverse to appellant (Civ. Code, § 2819).

3. Guaranty ⇨53(1)

Alteration of guarantor's liability effects an exoneration only if made without guarantor's knowledge or consent (Civ. Code, § 2819).

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Suit by Arthur A. Newhouse against B. Getz, Benjamin Boas, and others. From a judgment for plaintiff, last-named defendant appeals.

Affirmed.

Harold J. Abraham, of San Francisco, for appellant.

Russell P. Tyler, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to collect a deficiency on a \$15,000 note after sale of property described in a deed of trust which was given as security for the note. Judgment went against the defendants for \$8,806.78. The defendant Boas, who was an indorser on the note, has appealed from the judgment.

The note was executed in January, 1926, and was due three years later. In July, 1929, the interest was about one year in arrears and the defendant corporation and one of the trustees made an oral agreement whereby plaintiff was to receive an assignment of rents from the property in payment of this interest.

Appellant's argument is that this agreement releases him from liability as an indorser of the note because it was in consideration of a promise to forbear foreclosure and was made without the knowledge of the appellant.

Respondent's answer is that this defense was not pleaded in the lower court and therefore cannot be here presented for the first time. Appellant replies that the reason that this defense was not specially pleaded is that appellant did not learn of the agreement until during the trial. Some evidence was received over respondent's objection tending to prove an agreement to forbear. Other evidence directly denied the agreement.

[1] The judgment must be affirmed for three reasons, all of which rest on elementary principles and require no citation of authorities: (1) The discharge of a guarantor under section 2819 of the Civil Code is a special defense to the suit on the note. This defense was not pleaded and was not tried. When an issue has not been raised nor heard in the trial court it cannot be raised for the first time on appeal.

2 Cal. Jur. p. 234. This is not a case of an issue which, though inaptly pleaded, has been heard and determined in the trial court. It is a case where the issue was not raised, heard, nor determined.

[2] (2) Alteration of the obligation or of the remedies is the essential element of the defense of exoneration under the Code section. Here the evidence of alteration is in direct conflict and we must therefore assume, in support of the judgment, that if findings had been made on this issue, they would have been adverse to the appellant. 2 Cal. Jur. p. 881.

[3] (3) Such alteration effects an exoneration only if made without the knowledge and consent of the guarantor. This element was left unproved.

The judgment is affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.



8 Cal.App.2d 48

NATIONAL AUTOMOBILE INS. CO. v. INDUSTRIAL ACC. COMMISSION et al.
Civ. 10171.

District Court of Appeal, Second District,
Division 2, California.

June 25, 1935.

1. Insurance 435

Policy covering injuries to employees engaged in business of wine making held to cover employment in the preparation of the plant for wine making, even though insured had not yet commenced making wine at the plant where injury to claimant occurred.

2. Master and servant 416

Failure of Industrial Commission to make specific finding of fact that petitioner was insurance carrier for the employer held not to invalidate award made against petitioner which was designated as defendant in proceedings before the commission, and as insurance carrier in the answer of the employer, and which participated in the hearing as such without filing an answer disclaiming interest (Gen. Laws 1931, Act 4749, § 18).

opposed by the National Automobile Insurance Company, insurance carrier. To review an order of the Industrial Accident Commission, petitioner brings writ of review.

Affirmed.

C. W. Bowers, of Los Angeles, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondent Commission.

FRICKE, Justice pro tem.

Petition for review of an award made by respondent commission. Petitioner claims that there is no evidence to support the finding of the commission that the injured workman, H. R. Browne, was in the employ of respondent corporation as "maintenance man" and was injured in the course of such employment. While there may be room for a difference of opinion, the testimony of the president of the employer company, as well as that of the injured workman, is more than ample to sustain the finding. *Ledson v. Pacific Indemnity Co. and Industrial Accident Commission*, 105 Cal. App. 328, 330, 287 P. 566. The fact that the applicant was engaged in painting at the time of his injury does not prevent the conclusion that he was employed as a maintenance man.

[1] Petitioner also contends that its policy does not cover the work in which applicant was engaged. Apparently petitioner is contending that since the business covered by its policy was that of wine making, no liability attached because the insured had not yet begun wine making at the plant where the accident occurred. Even without the evidence that the making of wine had begun in a small way, it is evident that the applicant was engaged in preparing the place for the active operations of wine making, and such employment was covered by petitioner's insurance policy. *Hendrickson v. Industrial Accident Commission*, 215 Cal. 82, 8 P.(2d) 833.

[2] The remaining point is that the award is not valid because there was no specific finding that petitioner was the insurance carrier for the employer. The findings and award recite the appearance of petitioner, its joinder as a defendant and its representation by counsel, and includes findings showing the applicant to

Proceedings under the Workmen's Compensation Act by H. R. Browne, claimant,

be entitled to compensation and that the employer was insured against liability for compensation. No specific finding is made as to the identity of the insurance carrier, but the award is made against petitioner and the employer is relieved from liability. Respondent Prima Vista Wine Company in its answer to the application for adjustment of claim sets forth that its liability for compensation is covered by petitioner. In this state of the pleadings petitioner appeared and through its counsel participated in the hearing, at no time filing any denial of its capacity as insurance carrier, but, on the contrary, urging before the commission and in these proceedings that it was the insurance carrier. Petitioner was made a defendant in the proceedings before the commission. If any defendant desires to disclaim any interest in the subject-matter of the claim in controversy, he may under the law (Act 4749, § 18, Gen. Laws 1931), file an answer. Petitioner chose not to avail itself of this opportunity of denying interest, and by so doing failed to raise an issue on this point. While the findings, apart from the award, should have designated the insurance carrier, the clerical error of omitting a finding upon a matter not in issue but necessarily implied upon the face of the record as a whole does not warrant any adverse action by this court.

The award is affirmed.

We concur: CRAIN, J.; STEPHENS, P. J.



7 Cal.App.2d 715

PEOPLE v. FANNING.
Cr. 2729.

District Court of Appeal, Second District,
Division 2, California.

June 21, 1935.

Homicide ☞ 253(1)

Evidence held sufficient to sustain conviction of first-degree murder (Pen. Code, §§ 187-189).

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Powell Fanning was convicted of first-degree murder, and he appeals.

Affirmed.

Stanley Visel, of Los Angeles, and J. D. Willard, of Redwood City, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Defendant was convicted by a jury of first-degree murder, with recommendation of life imprisonment. He appeals on the ground that the evidence is insufficient to support the judgment of conviction.

For some time defendant and decedent had been living together as husband and wife, although not married to each other. The night prior to the death of decedent defendant had beaten her with a stick, and it is conceded that a long series of quarrels had occurred between the two covering a period of months. On the night in question, defendant obtained a gun from the house where they had been living and went in search of decedent. Arriving at the house of a friend, defendant found decedent there. She asked him if she could have a drink, and he told her she could have all she wanted, and if that was not enough he would give her some money to buy more, because she would need it when he got through with her. Decedent said she was not going with defendant, whereupon he grabbed her by the arm and out of her chair and had her put her coat on. He later carried her to the front door, and as she resisted he struck her on the head with his hand. When his hostess told defendant he could not beat decedent in her home he replied: "I won't raise no sand in the house but there will be hell to pay when I get her out of here." The gun was seen in possession of defendant at that time. The two went out and across the street to the automobile of a friend of defendant and entered the rear seat. Here they struggled, the deceased saying to the driver, "Sammy, don't let Powell hurt me." Defendant claims he was hitting decedent over the head with the gun when it went off accidentally. At the inquest the county autopsy surgeon attributed the death to a bullet wound in the head, and said he had discovered recent bruises over the right eye and over various parts of the body. From testimony of a ballistic ex-

pert, it appears that the gun must have been fired by a definite hard pressure on the trigger.

The affectionate relations existing between the parties, the excessive indulgence of decedent in liquor and the prompt insistence of appellant after the shooting that they go at once with the body to the police station, were doubtless considered by the jury before arriving at a verdict. They reached their conclusion after listening to appellant's story and seeing him dramatize the occurrence as he recalled it. Their determination that appellant had committed the crime of murder as defined by sections 187, 188, and 189 of the Penal Code is supported by the record before us, and is therefore final.

Judgment affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.



8 Cal.App.2d 136

**COUNTY OF LOS ANGELES v. L. A.
JUNK CO.
Civ. 10246.**

District Court of Appeal, Second District,
Division 2, California.

June 27, 1935.

Hearing Denied by Supreme Court
Aug. 26, 1935.

Limitation of actions §58(6)

Cause of action to recover taxes on personal property accrued not later than last date for filing taxable property statement, and not on date when assessment was entered in assessment book, and action was barred where county filed amended complaint on which county relied about four years after cause accrued (Gen. Laws 1931, Act 8471; Code Civ. Proc. §§ 312, 338, subd. 1; Pol. Code § 3746).

Appeal from Superior Court, Los Angeles County; George L. Greer, Judge.

Action by the County of Los Angeles against the L. A. Junk Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

Hearing denied by Supreme Court;
SHENK, J., dissenting.

Everett W. Mattoon, Co. Counsel, and
Beach Vasey, Deputy Co. Counsel, both of
Los Angeles, for appellant.

Abe Richman, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff sued to recover taxes on personal property of defendant (Act 8471, Deering's Gen. Laws, 1931, p. 4752). The trial court held that recovery was barred by the statute of limitations, and plaintiff appeals.

The findings of fact are not in dispute, and show that on the first Monday in March, 1930, defendant owned certain personal property; that between that date and the first Monday in July of that year the assessor attempted to assess said property and taxes were levied thereon; that although the facts at any time could have been learned by defendant from the assessment book and papers in the assessor's office, the assessment of the property was not actually entered on the assessment roll of the county until, pursuant to suitable notice to defendant of the correction of the error, it was so entered on January 5, 1932. The amended complaint was filed May 21, 1934, and appellant relies upon this date rather than the date of filing of original complaint. The trial court as a conclusion of law declared that upon the facts found the action was barred by the provisions of section 338, subdivision 1, Code of Civil Procedure. The section cited is conceded to be applicable to a situation such as here presented, the sole question being as to the date when the statute begins to run.

Appellant contends that it had no cause of action until the entry of the assessment in the assessment book, and that the statute of limitation began to run from that date. With this contention we are unable to agree. As in any case, the time must be calculated from the date when the cause of action accrues. Section 312, Code Civ. Proc. The entry of the assessment upon the assessment roll does not fix the date when the cause of action accrues, and delay in that regard would not toll the running of the statute. The cause of action must be held to have accrued not later than the first Monday in July, 1930, and was delinquent not later than December 5, 1930. Pol. Code, § 3746. The action was therefore barred. See 37 Cyc. 1247, V, and cases cited.

Judgment affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.

8 Cal.App.2d 1

WILFERT v. PETERS et al.

Civ. 9409.

District Court of Appeal, First District,
Division 1, California.

June 24, 1935.

Rehearing Denied July 24, 1935.

Hearing Denied by Supreme Court
Aug. 22, 1935.**1. Appeal and error** ⇐799

On motion to dismiss appeal upon ground that no proper transcript of the record on appeal had been filed, evidence held insufficient to show that trial judge had disqualified himself from certifying transcript.

2. Appeal and error ⇐436

Order by a trial judge terminating proceedings after a transcript has been certified to by another trial judge is voidable and of no effect, since power of trial judge is exhausted.

3. Appeal and error ⇐801(1), 1127

Motion to dismiss appeal or affirm judgment was denied, where appellant in opening brief raised objections to instructions requiring further argument.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Alwin Wilfert against Harry E. Peters. Judgment for defendant, and plaintiff appeals. On motion to dismiss appeal or affirm judgment.

Motions denied.

Alfred Nelson, Rupert R. Ryan, and Joseph J. Yovino-Young, all of Oakland, for appellant.

Hartley F. Peart and Gus L. Baraty, both of San Francisco, and Tinning & De Lap, of Martinez, for respondents.

TYLER, Presiding Justice.

[1,2] Action for malpractice. Plaintiff alleged negligence of respondent in the treatment of his left foot and that by reason thereof he lost his leg. Respondent denied the alleged negligence, and as an affirmative defense set up contributory negligence of the plaintiff. The jury returned a verdict for the defendant. Judgment followed accordingly. Plaintiff moved for a new trial, which was denied. Respondent now moves to dismiss the appeal or affirm the judgment. The motion to dismiss is based upon the ground that no proper transcript of the record on appeal has been filed

as required by law; that all proceedings to prepare a transcript have been terminated by order of the superior court. The ground upon which the motion to affirm the judgment is based is that the appeal is frivolous, and the questions raised are so unsubstantial as not to need further argument. The question as to whether or not a duly certified reporter's transcript is on file with the clerk of this court presents a confusing situation. This confusion arises from the fact that the judge who tried the case certified to a reporter's transcript after having, so it is claimed, disqualified himself, and at a time when a motion was pending before another judge for an order terminating proceedings for the preparation of a transcript, which motion was granted after the trial court had certified to the transcript.

The facts as they appear from the record show that Hon. W. T. O'Donnell, judge of the superior court of Solano county, was assigned by the judicial council to sit as a judge of the superior court of Contra Costa county beginning January 2, 1933, and thereafter to act until all matters heard by him were completed and disposed of, and also for the purpose of hearing and determining any motion after judgment in a case decided by him. Under this assignment Judge O'Donnell heard and took under advisement a motion of respondent in the instant case to terminate proceedings for the preparation of a transcript. Thereafter the attorneys for plaintiff filed with the clerk of the court, and gave notice to the attorneys for defendant, that such transcript would be presented to Judge McKenzie, the judge who tried the cause, for his approval. The attorneys for defendant appeared at the time and place set for the hearing, and objected to the certification of the transcript upon the grounds that Judge McKenzie had disqualified himself, and there was pending and undecided and under submission to Judge O'Donnell a motion to terminate proceedings for the settlement of a transcript. Judge McKenzie overruled the objections, and made an order certifying to the transcript which is on file in this court. Notwithstanding this fact, Judge O'Donnell subsequently made an order terminating the proceedings for the preparation of a transcript. In support of the motion to dismiss for the reason no proper transcript is on file herein, respondent has filed an affidavit to the effect that

Judge McKenzie at a former hearing had stated he felt disqualified to hear the motion for the settlement of a transcript, and that a judge of another county would be called in to hear and determine the same. That Judge McKenzie had so expressed himself at any time is vigorously denied by the attorneys for appellant by affidavit and upon the hearing of the motion to dismiss. They have also presented an affidavit by the secretary of the judicial council to the effect that Judge O'Donnell was assigned to sit in Contra Costa county for the purpose of hearing causes and also to hear motions after judgments in causes so heard, and that he was not assigned to hear the motion in question on account of any disqualification of Judge McKenzie. The clerk's certificate also recited that at no time did Judge McKenzie disqualify himself, nor was he disqualified by any other judge. Under all these circumstances, we are of the opinion that there is insufficient evidence to show that Judge McKenzie had ever disqualified himself. No reason whatever is given for his disqualification. He had tried the case and was best qualified to act. An order made terminating proceedings after a transcript has been certified to by the trial judge is voidable and of no effect, for the reason that the power of the lower court is exhausted. Such a motion is effective only where the transcript has not been certified. *Edgar v. Citraro*, 102 Cal. App. 545, 283 P. 123; *People v. Center*, 54 Cal. 236. Moreover, respondent has waited over a year after the filing of the transcript, and after appellant's brief is on file, before making his motion to dismiss. We conclude upon this objection that there is a proper transcript on appeal with the clerk of this court, and the motion to dismiss is therefore denied. The motion to dismiss the appeal or affirm the judgment upon the ground that the appeal is taken for delay and is frivolous is without merit.

[3] In their opening brief counsel for appellant rely upon a reversal of the judgment by reason of the fact that prejudicial error occurred in the giving of certain instructions relating to the question of contributory negligence. We have read the instructions, and there can be no question that some of them are subject to the objections of counsel for appellant. Whether there was error in the giving of these instructions, when the instructions as a whole

are considered, presents a very serious question which requires further argument. For this reason, the motion to affirm or dismiss is denied.

From what we have said, both motions should be denied. It is so ordered.

We concur: KNIGHT, J.; CASHIN, J.



8 Cal.App.2d 70
ASBURY et al. v. GOLDBERG et al.
Civ. 10121.

District Court of Appeal, Second District,
Division 2, California.

June 26, 1935.

Hearing Denied by Supreme Court
Aug. 22, 1935.

1. Automobiles ⇨245(1)

In action for death in automobile collision, jury was sole judge of credibility of witnesses, and to determine it could take into consideration conduct of witness, character as shown by evidence, manner on stand, interest in case, if any, degree of intelligence, reasonableness or unreasonableness of statements, and strength or weakness of his recollection.

2. Automobiles ⇨244(11)

In action for death in collision of automobiles on a foggy morning at street intersection, evidence of defendant truck driver's excessive speed and that automobile deceased was driving was almost across intersection before it was struck by defendant's truck held to support judgment for plaintiff.

3. Evidence ⇨86

Legal presumption is "evidence," and may outweigh positive evidence adduced against it.

[Ed. Note.—For other definitions of "Evidence," see Words & Phrases.]

4. Automobiles ⇨245(82)

Whether deceased driver of automobile which had almost completed crossing of through street when it was struck by defendant's truck which was moving rapidly on a foggy morning was contributorily negligent held for jury.

5. Appeal and error ⇨1046(1)

In action for death, where counsel placed widow of deceased upon stand, that widow wept in view of jury held not prejudicial mis-

conduct, where court instructed jury not to be influenced by sympathy in their verdict.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Helen M. Asbury and others against Benjamin S. Goldberg and another, doing business under the fictitious firm name and style of the Goldberg Film Delivery. Judgment for plaintiffs. Defendants' motion for judgment notwithstanding the verdict was denied, and defendants appeal.

Affirmed.

Charles W. Rollinson and Phil Jacobson, both of Los Angeles, Huntington P. Bledsoe, of Hollywood, and John L. Flynn, of Los Angeles, for appellants.

S. S. Hahn and W. O. Graf, both of Los Angeles, for respondents.

CRAIL, Justice.

This action grew out of a collision between a motortruck and a Ford automobile, resulting in the death of Francis Asbury, the driver of the Ford automobile. The plaintiffs are the widow and sons of the deceased, and the defendants are the driver of the motortruck and its owners. The accident occurred about 8 a. m. on February 28, 1934, at the intersection of Olive and Maple streets in the county of Los Angeles. Olive street is a "through boulevard," running east and west, paved with concrete and divided by painted lines into three lanes. Maple street runs north and south, crossing Olive street at right angles, and is paved with macadam. There were stop signs at the northwest and southeast corners of the intersection, and under an ordinance of the county of Los Angeles it was unlawful for the operator of any vehicle traversing any "through boulevard" to fail, before entering upon such boulevard, to bring such vehicle to a complete stop at the place where such highway is crossed by the continuation of the nearest side line of such boulevard. The intersection is neither in a business nor a residential zone, and the northeast and southeast corners are unobstructed.

At the time of the accident the weather was extremely foggy and the highways were wet and slippery. Visibility of an object without lights was about 25 feet and of an object with lights about 30 yards. The truck weighed about 6,000 pounds, was

equipped with dual tires on the rear wheels, and had four-wheel mechanical brakes. The truck had headlights, side clearance lights, and a taillight. There was evidence that all of them were lit prior to and at the time of the accident. At the time of the accident the deceased was driving his Ford north on Maple street and defendant Groff was driving the truck west on Olive street.

Judgment was entered in favor of the plaintiffs and against the defendants in the sum of \$4,000 on the verdict of the jury which heard the case. The defendants appealed from the judgment and from the order of the trial court denying their motion for a judgment notwithstanding the verdict.

[1,2] As grounds for reversal of the judgment, appellants urge six specifications of error. Among them are, first, that the evidence is insufficient to justify the verdict; third, that there was no conflict in the evidence, and therefore the question of appellants' liability was a question of law for the court and not one of fact for the jury; sixth, that the court erred in denying appellants' motion for a directed verdict and for a judgment notwithstanding the verdict, and in denying appellants' motion for a new trial. These may all be considered at once and will not be separately discussed.

Defendant Groff, the driver of the truck, and the only eyewitness to the accident, testified that at the time of the accident he was returning from San Diego to Los Angeles in the course of his employment; that he was going west on Olive at about 17 miles an hour when he reached the intersection of Olive and Maple streets; that the weather was very foggy and that vision was limited to 30-35 feet, or perhaps 20-25 feet; that the truck lights were burning and the Ford lights were not; that he was familiar with the intersection, and knew that there were stop signs facing vehicles entering Olive street from Maple street, and he relied upon the fact that he was traveling upon a through boulevard; that he did not see the Ford car before it entered the intersection; that when he first saw the Ford the front end of his truck was past the property line of the intersection; that the Ford did not stop at the stop sign, but was moving when he first saw it and it did not decrease its speed before the impact; that, when he first saw the Ford, he applied his brakes

and traveled about 12 or 14 feet to the point of impact, which was about in the center of Maple street and in the north traffic line of Olive street; that the Ford traveled about 23 feet from the place he first saw it to the point of impact; that the left front bumper of the truck came in contact with the right fender of the Ford back of the right front wheel; that the Ford turned west and the right rear side of the Ford was thrown into the left front of the truck; that the Ford kept on turning, describing a semicircle, and turned over on its right side on the northwest corner, facing south; that the truck traveled about 30 or 32 feet from the place the brakes were first applied to the place the truck came to rest; that it was not possible to stop the truck upon the damp pavement as quickly as upon a dry pavement; that the distance between the Ford and the truck when he first saw the Ford was about 25 feet.

Appellants' contention is that, as there was only one eyewitness to the accident and as his testimony stands uncontradicted by that of any other eyewitness, it must be taken as true, and therefore the judgment cannot stand. The one eyewitness to the case was the driver of the truck. He is one of the defendants against whom the judgment was entered. The jury was the sole judge of the credibility of the witnesses. This witness was before the jury, and the jury had the right to take into consideration, for the purpose of determining his credibility, the conduct of the witness, his character as shown by the evidence, his manner on the stand, his interest in the case, his bias and prejudice, if any, his degree of intelligence, the reasonableness or unreasonableness of his statements, and the strength or weakness of his recollection. According to the testimony of defendant Groff, he was free from any negligence in the matter, and the driver of the Ford car, who never regained consciousness, was guilty of negligence proximately contributing to the injury. But it is very evident from the verdict rendered that the jury did not believe defendant Groff, for, if his testimony were taken as true, the verdict should have gone for the appellants. The question which confronts us, therefore, is whether the verdict and judgment find support in the evidence and whether the action of the jury in rejecting the evidence given by defendant Groff is justifiable. Evidence of physical facts and of the conditions and circumstances sur-

rounding a collision is sometimes more convincing than oral evidence to the contrary. There was evidence in this case from which the jury might have concluded that the Ford had almost crossed the intersection at the time of the collision; that the truck skidded 40 feet or more before it struck the Ford; that the truck hit the rear end of the Ford on the right side, completely demolishing the right rear wheel of the Ford, knocking off the right door, and dragging the Ford sideways for a distance of 22 feet before both vehicles came to a stop in the northwest corner of the intersection. Skid marks and photographs of the Ford car were relied upon to substantiate this testimony. All of this evidence can be reasonably construed as directly contradicting the evidence of defendant Groff and as supporting plaintiffs' claim that the truck was not traveling at a reasonable and prudent speed, having due regard for the visibility and the wet slippery condition of the surface of the highway caused by the dense fog. In our opinion, it is sufficient to support the verdict and the judgment. "In many instances evidence of the conditions surrounding a collision between motor vehicles is of controlling force. In many cases, when accepted as true by a jury or trial judge, it has been permitted to overcome positive contrary oral evidence." *Kerner v. Peacock Dairies, Inc.*, 129 Cal. App. 686, 19 P. (2d) 283, 285, and cases cited.

[3, 4] Appellants' second specification of error is that the evidence showed deceased to have been guilty of contributory negligence as a matter of law. Appellants contend that the legal presumption that the deceased exercised due care for his own safety has been overcome as a matter of law by the testimony of defendant Groff which was positive to the contrary. But a legal presumption is evidence and may outweigh positive evidence adduced against it. Whether or not the deceased was guilty of contributory negligence was clearly a question for the jury to determine under all of the evidence. For a well-considered case and a clear opinion involving this very question see *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529.

[5] Appellants' fourth specification of error is that counsel for respondent was guilty of prejudicial misconduct in placing the widow, dressed in mourning, upon the witness stand and permitting her to remain thereon weeping in full view of the jury.

The widow was a party to the action, and it was proper to use her as a witness. Appellant does not say how counsel for plaintiff could have foreseen that she would begin weeping or how they could have prevented her from weeping after she took the stand. The court properly instructed the jury not to permit sympathy for the plaintiff to influence their verdict. Appellants do not cite a case in which weeping by a witness on the stand has been held to be, or has been claimed to be, misconduct on the part of counsel calling the witness. We find no misconduct in this instance.

Appellants also specify as reversible errors four separate instructions given by the court. But we find no reversible error in these instructions.

The judgment and order are affirmed.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.



8 Cal.App.2d 164

PEOPLE v. GONZALES.

Cr. 2550.

District Court of Appeal, Second District,
Division 2, California.

June 28, 1935.

Hearing Denied by Supreme Court

July 25, 1935.

Criminal law §1104(6)

Failure of appellant to comply with rule requiring statement of grounds of appeal and points upon which he relied *held* to warrant dismissal of appeal, as against appellant's contention that judicial council was without jurisdiction to deprive court of its discretion to determine appeal on the merits (Rules of the Supreme Court and District Courts of Appeal, rule 2, § 7).

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Pedro Gonzales was convicted of an offense, and he appeals.

Appeal dismissed.

Hearing denied by Supreme Court; LANGDON, J., dissenting.

Henry C. Huntington, of Los Angeles (Jerry Giesler and Anna Zacsek, both of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

STEPHENS, Presiding Justice.

Motion to dismiss appeal on the ground that the transcript contains no statement of the grounds of appeal or the points upon which appellant relies, as required by section 7, rule II, of the Rules of the Supreme Court and District Courts of Appeal of the State of California.

No further statement of fact need be made, as the matter is fully set out in *Gonzales v. Superior Court* (Cal. Sup.) 44 P.(2d) 320, which opinion followed a hearing after our decision in this same cause. Since such decision the appellant has presented the point that the judicial council is without jurisdiction to deprive this court of discretion vested in it to hear and determine the appeal on its merits. We are sympathetic with the idea that the right of review should not be denied one convicted of a serious offense through the negligence of an attorney, or through employees of an attorney, unless such action is necessary. In the instant case the grounds of appeal and appellant's points are tendered, and we would accept them and proceed to a disposal of the appeal upon its merits if we felt ourselves free to do so. The granting of the very same kind of motion has, however, been held mandatory upon appellate courts in *People v. McClellan*, 88 Cal. App. 415, 263 P. 841, and *People v. Pierce*, 89 Cal. App. 290, 264 P. 519. They have been followed in other cases and the Supreme Court has refused petitions for hearing. It may be that the point here raised has not been as specifically raised in the other cases as here, although it is a necessary element in all such cases. In the circumstances we feel that nothing short of practical certainty that constitutional requirements have been abridged should move us to depart from the rule of decision so established. We do not hesitate to say that we would welcome a departure from the harsh rule, but it should come, if it should come at all, from the Supreme Court.

The appeal is dismissed.

I concur: CRAIL, J.

8 Cal.App.2d 758

PEOPLE of State of California, Plaintiff and Respondent, v. Howard L. POTTER, Defendant and Appellant.
Cr. 2628

District Court of Appeal, Second District,
Division 2, California.
June 28, 1935.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Charles S. McKelvey, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

STEPHENS, Presiding Justice.

Motion to dismiss appeal on the ground that the transcript contains no statement of the grounds of appeal or the points upon which appellant relies, as required by section 7, rule II, of the Rules of the Supreme Court and District Courts of Appeal of the State of California.

The point for decision herein is practically the same as in *People v. Gonzales*, 8 Cal. App. (2d) 164, 47 P.(2d) 314, this day decided, and our ruling follows our expressions therein made.

The appeal is dismissed.

I concur: CRAIN, J.



8 Cal.App.2d 759

PEOPLE of State of California, Plaintiff and Respondent, v. Milo C. KERR, Defendant and Appellant.
Cr. 2646.

District Court of Appeal, Second District,
Division 2, California.
June 28, 1935.

Hearing Denied by Supreme Court
July 25, 1935.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Hearing denied by Supreme Court; LANGDON, J., dissenting.

George E. Cloud, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

STEPHENS, Presiding Justice.

Motion to dismiss appeal on the ground that the transcript contains no statement of the grounds of appeal or the points upon which appellant relies, as required by section 7, rule II, of the Rules of the Supreme Court and District Court of Appeal of the State of California.

The point for decision herein is practically the same as in *People v. Gonzales*, 8 Cal. App. (2d) 164, 47 P.(2d) 314, this day decided, and our ruling follows our expressions therein made.

The appeal is dismissed.

I concur: CRAIN, J.



8 Cal.App.2d 64

WIETHOFF v. REFINING PROPERTIES, Limited, et al.
Civ. 10195.

District Court of Appeal, Second District,
Division 2, California.
June 26, 1935.

Rehearing Denied July 26, 1935.

Hearing Denied by Supreme Court
Aug. 22, 1935.

1. Appeal and error ⇨1010(1)

Reviewing court need not speculate on possible basis for trial court's finding when finding is supported by ample and convincing evidence.

2. Landlord and tenant ⇨208(2)

Assignees of lease of service station property held liable for rent thereof where it was shown that assignees definitely assumed all obligations under lease, that they were actually subsidiaries of assignors, and that corporate entities were not considered separate but as incidents for furthering single purpose.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by Anna W. Wiethoff against the Refining Properties, Limited, Signal Oil & Gas Company, and others. Judge

ment for plaintiff, and Signal Oil & Gas Company and others appeal.

Affirmed.

H. J. March, of Los Angeles, W. F. Osterlander, of Oakland, and Harold F. Clary and C. LaV. Larzelere, both of Los Angeles, for appellants.

Frank J. Barry, of Los Angeles (J. B. Joujon-Roche, of Los Angeles, of counsel), for respondent.

SCOTT, Justice pro tem.

Plaintiff and her husband (now deceased) leased to defendant Refining Properties, Ltd., for a period of ten years commencing December, 1929, certain real property for use as a service station. This suit was brought to collect rent for five months commencing November 20, 1933, and at the trial plaintiff was permitted to amend her complaint to include rents up to the time of trial. Recovery against defendant Signal Oil & Gas Company of California, Signal Oil & Gas Company, and Pacific Service Stations, as assignees, is protested by them on this appeal on the theory that they assumed no obligation to pay the rent except when actually occupying the premises, that they were not occupying the station when the rents accrued for which judgment was rendered, and that they cannot be held liable therefor.

The trial court found that a written lease had been entered into by and between lessors and defendant Refining Properties, Ltd., on or about October 18, 1929, the lease being for ten years at \$550 per month rental for the first five years and \$650 per month for the last five years; that defendant Signal Oil & Gas Company of California at all times has been a subsidiary of and an instrumentality of the Signal Oil & Gas Company, a Delaware corporation; that defendant Pacific Service Stations, Inc., was organized September, 1931, became the agent of the Signal Oil & Gas Companies in March of 1932 to manage their service station operations, and so operated until it became their wholly owned subsidiary in October, 1932, in which relationship it has since remained. These findings are amply supported by the evidence.

It was further found that defendant Refining Properties, Ltd., entered into possession and paid rent under the lease until February, 1931, when it assigned the lease to Signal Oil & Gas Company of Cali-

fornia, the latter acting for itself and as an instrumentality and agent of the Signal Oil & Gas Company, a Delaware corporation, and that it agreed to fulfill and discharge all the obligations of the lease, including payment of the rent, and entered into possession of the premises. This assignment of the lease was incidental to the transfer of a major portion of the assets of defendant Refining Properties, Ltd., to the Signal Oil & Gas Company of California by a written agreement executed by four parties, including the two above-mentioned companies, the Delaware corporation, and a group of individuals. The transfer included all service stations and leases, including specifically this Wiethoff lease, and the agreement recited: "Signal Oil and Gas Company of California hereby expressly assumes and agrees to pay the debts and obligations, other than the debts and obligations which may now or hereafter be owing on the properties and assets which are retained by Refining Properties, Ltd., as shown by the aforesaid statement of Haskins & Sells as of December 31, 1930."

Contrary to the contention of appellants, there is no other language in the contract which would negative this unequivocal assumption by the Signal Oil & Gas Company of California of the obligation to pay the rentals under the lease.

About May 31, 1932, defendant Pacific Service Stations, Inc., wrote to plaintiff, at the bottom of a letter from her reducing the rent for a period of eight months: "For and in consideration of the above reduction of rent we promise and agree to pay the rental above specified, at the time stated, and promise and agree to perform each and all of the covenants and conditions of the lease, except as herein modified." This agreement affords basis for the finding that Pacific Service Stations, Inc., promised and agreed to perform all the covenants of the lease.

[1,2] The findings that Pacific Service Stations, Inc., was acting not only on its own behalf but also as an agency and instrumentality of the Signal Oil & Gas companies, and that the acts of the California company were both for itself and for the Delaware corporation, are likewise supported by evidence of detailed transactions. It is not incumbent upon a reviewing court to speculate upon the possible basis for a finding of a trial court when that finding is supported, as in

this case, by evidence which is ample and convincing. Examining the record in the light of those cases which indicate the essential elements which a trial court must find before it can hold that there is a practical identity of corporations, and that one is the instrumentality—the alter ego—of the other, we deem it sufficient to say that the evidence, much of it documentary, is sufficient. Among such cases are *Erkenbrecher v. Grant*, 187 Cal. 7, 200 P. 641; *Continental Securities v. Rawson*, 208 Cal. 228, 280 P. 954, and *Wood Estate Co. v. Chanslor*, 209 Cal. 241, 286 P. 1001. The directing personnel and operations of appellants are inextricably involved, and warrant the conclusion that the corporate entities were not considered by the group of individuals who controlled them as separate and distinct, but were viewed rather as incidents for furthering a single purpose, and that this control and conduct of the corporations may well have been intended to and actually did mislead persons dealing with them.

“While it is the general rule that a corporation is an entity separate and distinct from its stockholders, with separate, distinct liabilities and obligations, nevertheless there is a well-recognized and firmly settled exception to this general rule, that, when necessary to redress fraud, protect the rights of third persons or prevent a palpable injustice, the law and equity will intervene and cast aside the legal fiction of independent corporate existence, as distinguished from those who hold and own the corporate capital stock, and deal with the corporation and stockholders as identical entities with identical duties and obligations.” *Wenban Estate, Inc., v. Hewlett*, 193 Cal. 675, at page 696, 227 P. 723, 731. “The fiction of corporate entity may be disregarded, where one corporation is so organized and controlled and its affairs are so conducted that it is, in fact, a mere instrumentality or adjunct of another corporation.” *Industrial Research Corp. v. General Motors Corp.* (D. C.) 29 F.(2d) 623, 625. See, also, *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, and cases collated at page 214, 155 P. 986, 987.

The transactions herein relating to the lease culminated with a purported assignment of the lease to an insolvent individual

not a party to this action, and who described himself as a commission salesman selling gasoline for the Signal Oil & Gas Company exclusively. The evidence shows that appellants were continuing to occupy the premises and operate the service station up to the time of trial, and this assignment was to avoid liability on the lease.

In view of our conclusion that appellants have occupied the premises in question up to the time of trial; that privity of estate, as well as the express agreements above quoted, so definitely establishes the correctness of the trial court's determination that they are liable that we deem it needless to discuss the other points raised.

The judgment is affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.



8 Cal.App.2d 17

BURDETTE et al. v. MARYLAND CASUALTY CO.
Clv. 9473.

District Court of Appeal, First District,
Division 1, California.

June 25, 1935.

Hearing Denied by Supreme Court
Aug. 22, 1935.

Brokers ⇐4

Evidence of broker's acts and methods, including defalcations resulting in broker's bankruptcy, which broker knew at time broker entered into defaulted contracts with plaintiffs, rendered broker unable to perform contracts, and, including carrying of securities purchased for plaintiffs with member of stock exchange on margin account without segregation, authorized recovery on broker's bond conditioned on honest application of all funds received and faithful performance of all obligations (St. 1917, p. 673, as amended).

Appeal from Superior Court, San Francisco County; George H. Cabaniss, Judge.

Action by J. W. Burdette and another against the Maryland Casualty Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

John Ralph Wilson, of San Francisco, for appellant.

Jacobs, Blanckenburg & May and Thomas C. Nelson, all of San Francisco, for respondents.

PER CURIAM.

This is an appeal by the defendant from a judgment in favor of the plaintiffs in an action brought upon a statutory bond executed by defendant under the Corporate Securities Act (St. 1917, p. 673, as amended) covering Paul E. Williams Company, of Washington, during the year 1930. The contention of the appellant is that the evidence is not sufficient to support the judgment in favor of the respondents.

The evidence shows that Paul E. Williams Company, a Washington corporation, was doing business in California in 1930, and defendant, Maryland Casualty Company, on March 4, 1930, executed a bond in its behalf in compliance with the California Corporate Securities Act; the bond covering the balance of the calendar year 1930 and terminating December 31, 1930. It was conditioned that the principal should strictly comply with the provisions of the Corporate Securities Act and should "honestly and faithfully apply all funds received and faithfully and honestly perform all obligations and undertakings in the purchase or sale of securities by said broker, his agents and employees; and further shall pay all damages suffered by any person damaged or defrauded by reason of the violation of any of the provisions of said Act, and acts amendatory thereof and supplemental thereto, now and hereafter enacted."

The evidence further shows that Paul E. Williams Company, a Washington corporation, was engaged in a brokerage business in San Francisco, and in August, 1930, made written contracts with the respondents to purchase securities for the account of respondents, payable part in cash and the balance in installments, the securities to be held as collateral for the balance of the purchase price; that the Paul E. Williams Company was not a member of the stock exchange, and carried marginal accounts in its own name with stock exchange members. There was no segregation of its customers' accounts in its dealings with stock exchange members. The evidence shows that the respondent J. W. Burdette entered into a written contract at San Francisco, Cal., with Paul E. Williams Company, a

Washington corporation, August 6, 1930, for the purchase of certain securities by the Paul E. Williams Company, payable part in cash and the balance in twenty equal monthly installments thereafter. Under the terms of the contract J. W. Burdette paid to Paul E. Williams Company, a corporation, the sum of \$2,052.58 in cash. The evidence further shows that respondent Agnes Beattie made a written contract at San Francisco, Cal., with Paul E. Williams Company, a Washington corporation, on August 7, 1930, and another on August 14, 1930, under the terms of which contracts said plaintiff Agnes Beattie delivered to the Paul E. Williams Company certain securities for resale, the proceeds to be applied on the account of the purchase of securities as set forth in the aforesaid contracts. The Paul E. Williams Company thereafter sold these securities for \$3,295.77 and credited her account with this amount. Thereafter Paul E. Williams Company advised the respondents that the purchases of securities had been made as agreed. The contracts of purchase, among other things, provided: "* * * That the securities and collateral, if any, may be pledged by the broker, either separately or together with other securities or property, without reference to the specific amount at any time owing by the customer, and that the broker need not return the identical securities, securities of like kind being sufficient."

The evidence also shows that the securities purchased, together with securities of other customers, were carried with a member of the stock exchange on margin account. There was at no time a segregation or distinction as to the securities of any individual customer; the account of such broker with the Paul E. Williams Company indicating only the number of shares of each particular stock carried in such margin account. It was therefore impossible at any time to segregate or identify the stock purchased for the account of these individual customers. Shortly after the purchase of the stock called for by the contracts of the respondents with Paul E. Williams Company, the Paul E. Williams Company, a Washington corporation, transferred its business, property, assets, and good will in California to a California corporation known as the Paul E. Williams Company of California. The Paul E. Williams Company, a Washington corporation, continued its business in California as heretofore in its office at 485 California

street, San Francisco, and the California corporation used the same office. The employees of both companies were the same; a joint auditor and bookkeeper had charge of the books and records of both companies. An Oregon corporation of the same name was organized some time in the year 1931. This company also had headquarters at the same office in San Francisco and used the same employees to keep its books and do its work. Both respondents testified that they had no information from this Paul E. Williams Company, a Washington corporation, or otherwise, of any transfer of the assets of the Washington corporation to the California corporation, nor were they advised of any act or change in the affairs of Paul E. Williams Company, a Washington corporation, nor did they consent thereto. It was only some time subsequent to April 15, 1931, following the financial crash and bankruptcies of both said Paul E. Williams Companies, that they received notice.

The testimony of a special agent of the United States Bureau of Investigation of the Department of Justice, who had previously spent twelve months investigating the various Paul E. Williams Companies, was in substance that on December 31, 1929, the Washington corporation was short 21,672 shares, having a value of \$582,343.95; as of June 30, 1930, the Washington corporation was short 49,647 shares, having a value of \$1,419,745.36; as of October 13, 1930, the Washington corporation was short 74,940 shares, having a value of \$1,435,749.22; as of December 31, 1930, the Washington corporation was short 59,771 shares, having a value of \$897,993.65; as of December 31, 1930, the approximate combined shortage was \$1,180,803. This evidence was undisputed; the appellant having offered no evidence to the contrary, nor in fact any testimony whatever.

The case of *Bridges v. Price*, 95 Cal. App. 394, 273 P. 72, distinguishes between the Corporate Securities Act as originally enacted (St. 1917, p. 673) and as amended in 1925 (St. 1925, p. 962). The following excerpt from the opinion not only differentiates as to the liability now existing under the provisions of the act, but prior to the amendment referred to, and also emphasizes the strict enforcement of the penalty for breach of its provisions. In 95 Cal. App. 394, at page 398, 273 P. 72, 73, the court says: "Paragraph 3 of section 5 of the Corporate Securities Act provided, be-

fore its amendment in 1925, that 'said bond shall be conditioned upon the faithful compliance with the provisions of law by said applicant and by all agents representing the said applicant.' This language was construed in *Blumenthal v. Larson*, supra [79 Cal. App. 726, 251 P. 241], and *Mitchell v. Smith*, supra [204 Cal. 197, 267 P. 540], to limit the liability on the bond to cases where the broker was guilty of fraud in the sale of securities as defined by section 14 of the act. The 1925 amendment added to the language above quoted the following: 'And the honest and faithful application of all funds received and the faithful and honest performance of all obligations and undertakings in the purchase or sale of securities.' The purpose and effect of this amendment was obviously to extend the liability upon such bonds beyond that which was imposed by the statute before the amendment. Whatever may be meant by the word 'honest,' the 'faithful performance of all obligations and undertakings' means no more than performance of those obligations and undertakings according to their terms. Bonds conditioned for the 'faithful performance' of a contract have always been construed as being breached by any failure of performance in the principal contract. *Garrett v. Dodson* (Tex. Civ. App.) 199 S. W. 675, 682; *General Bonding, etc., Co. v. Hill* (Tex. Civ. App.) 195 S. W. 873."

The evidence further shows that the Paul E. Williams Company, a Washington corporation, had consistently engaged in a program of defalcations commencing a long time prior to its transactions with these respondents. Its defalcations had reached such magnitude that, prior to August 30, 1930, the company was actually bankrupt, and, when it dealt with these respondents, it knew of its inability to perform these contracts as well as any other of the contracts previously entered into with other customers. This condition did not improve as time went along but continued to become worse. These acts and methods of the principal, established by the evidence without a conflict, show that the principal did not "honestly and faithfully apply all funds received and faithfully and honestly perform all obligations and undertakings in the purchase or sale of securities" as provided for in the bond in controversy. They constitute violations of such bond and entitle the respondents to recover thereunder from the appellant.

Judgment affirmed, and it is so ordered.

7 Cal.App.2d 743

PEOPLE v. ADAMS.

Cr. 1435.

District Court of Appeal, Third District,
California.

June 22, 1935.

Hearing Denied by Supreme Court

July 27, 1935.

1. Infants ☞20

Evidence sustained conviction for lascivious conduct toward minor girls (Pen. Code, § 288).

2. Infants ☞20

Evidence not showing that child was under 14 when alleged offense was committed held insufficient to sustain conviction for committing lascivious conduct against child, notwithstanding that child stated on the witness stand when being qualified that she was but nine years of age, since such testimony furnished no competent proof of her age on the merits (Pen. Code, § 288).

3. Criminal law ☞564(4)

Evidence that defendant charged with lascivious conduct toward children admitted playing hide-and-seek with them at his home and that his home was in city wherein act was committed held to establish locus delicti of offense (Pen. Code, § 288).

4. Criminal law ☞829(3)

Refusal of instruction based on statute punishing lascivious conduct held harmless, where jury was clearly instructed regarding lewd acts punished by statute and evidence was ample to sustain conviction (Pen. Code, § 288a).

5. Criminal law ☞783(1)

Instruction that lewd act was only admissible to show defendant's moral character and probability that he might have committed act charged held properly refused, since fact that lewd conduct may show defendant guilty of another crime does not limit proof to mere establishing of moral character or probability that defendant committed offense, but is entitled to be considered as part of the *res gestæ* (Pen. Code, § 288a).

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Julian McNeil Adams was convicted of violation of section 288 of the Penal Code, and he appeals.

Affirmed in part, reversed in part, and order denying motion for new trial affirmed.

Robert A. Zarick and Thomas O'Hara, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

THOMPSON, Justice.

The defendant was convicted on three counts under section 288 of the Penal Code of lascivious conduct toward three minor girls. From this judgment and the order denying motion for new trial he has appealed. It is contended the evidence fails to support the several verdicts which were returned as to each count, and that the court erred in refusing to give an instruction which was based on the provisions of section 288a of the Penal Code.

[1] The evidence adequately supports the judgment of conviction of the first and second counts of the information. There is satisfactory evidence of the defendant's lascivious conduct toward each of the girls involved in these first two counts. These girls were respectively nine and ten years of age, and possessed ordinary intelligence. Their testimony does not appear to have been unreasonable nor to have been prompted by any one. Under three counts the defendant was found guilty of similar lewd acts toward the three little girls on different occasions within the period of a few days, perpetrated by the defendant in the course of the playing of games of hide-and-seek. The stories of these girls are similar and are without substantial conflict. There can be little doubt of the intention with which these acts were performed, for the reason that each of the girls testified to at least two different occasions when the defendant exercised improper conduct toward each of them. The testimony of one infant child of alleged licentious acts, perpetrated on one occasion, and given under circumstances indicating that she had been prompted by her parents or teacher or others, might be subject to doubt, particularly if the story is inherently improbable. But, when three children testify to similar acts on different occasions, and there is no indication that their stories have been prompted by others, the evidence of intentional lewd conduct is very convincing. Moreover, there are some corroborating circumstances in the present case. The defendant was fifty-four years of age. His wife and

children lived in Nevada. For about six months prior to the alleged offenses he was living in the household of Mr. and Mrs. Hittenberger in Sacramento. The improper conduct occurred in the Hittenberger home while the owners thereof were absent. Nor were the Hittenberger children present on any of these occasions. The three children who were involved in these affairs were induced to play hide-and-seek with the defendant in and about the Hittenberger home when the owners were absent. The income of Mr. Adams was very slight. He had no means with which to bring his family from Nevada; yet he admitted unusual interest in these three girls by taking them to the state fair and spending some \$14 for their entertainment. He was seen by the teacher of one of the girls in their company at the fair. This led to an investigation and to his subsequent arrest. The effort of the defendant to establish a former good reputation was a failure. While both Mr. and Mrs. Hittenberger testified that he had always treated their children with due consideration, neither of them had known him more than a few months, and had talked with no one regarding his reputation. We are therefore of the opinion the judgment is adequately supported with respect to the first and second counts.

[2] The evidence fails to support the judgment with respect to the third count, for the reason that there is no competent evidence that the child who is involved in that count was under the age of fourteen years when that alleged offense was committed. In determining her qualifications to testify as a witness, she did state that she was but nine years of age. The prosecution failed to prove her age by the introduction of any evidence on that subject after she was sworn as a witness. It has been definitely held that the statement of a child as to her age, elicited on examination regarding her qualifications to be sworn as a witness, furnishes, on the merits of the cause, no competent evidence of her age, as is required by section 288 of the Penal Code. *People v. Levoy*, 49 Cal. App. 770, 194 P. 524.

[3] There is no merit in the defendant's contention that the prosecution failed to establish the locus delicti. He admitted that he played hide-and-seek with the girls at the home of Herman G. Hittenberger. The evidence conclusively shows that the Hittenberger home was then in

Sacramento. One witness testified directly that the licentious acts with which the defendant was charged occurred in Sacramento. The location of the scene of the crime was therefore definitely established.

[4, 5] It was not error for the court to refuse to give to the jury an instruction based on the provisions of section 288a of the Penal Code, for the reasons that the offered instruction was erroneous, and because the jury was clearly instructed with regard to the specific lewd acts constituting the offense prohibited by section 288 of that Code, and the evidence is ample to support his conviction of the offenses with which he was charged in the first and second counts. The information containing specific statements of the very acts with which the defendant was charged was read to the jury. A definition of the offenses with which he was charged, in the very language of section 288 of the Penal Code, was read to the jury. They were told that it was necessary for the prosecution to establish every essential element of the crime beyond a reasonable doubt, and to prove that "the said defendant is guilty of the crime charged against him in the information." The defendant may not complain that the evidence may also have shown that he was guilty of another offense which is defined in section 288a of the Penal Code. He was not injured by the refusal to give that instruction. Moreover, the proposed instruction charged that, if the evidence proved that the defendant performed the act prohibited by the last-mentioned section, "that act in itself is only admissible to show the moral character of the defendant, and the probability that he might have committed the act charged." The preceding language is an incorrect statement of the law under the circumstances of this case. The offense defined in section 288a of the Penal Code certainly constitutes lewd and lascivious conduct which is also prohibited by the preceding section. The fact that proof of lewd and lascivious conduct may also show that the accused is guilty of another distinct crime does not limit that proof to the mere establishing of moral character or the probability that the offense with which the defendant is accused was committed by him. Such evidence is entitled to be considered as a part of the *res gestæ* for all purposes, even though it may incidentally show that the accused is also guilty of another offense. 8 Cal. Jur. 60, § 168; *Peo-*

ple v. Morani, 196 Cal. 154, 236 P. 135; People v. Craig, 152 Cal. 42, 46, 91 P. 997. The offered instruction was erroneous and it was properly refused.

That portion of the judgment as to the third count of the information is reversed and that portion of the judgment as to the first and second counts is affirmed, and the order denying motion for new trial is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



7 Cal.App.2d 731

Ex parte DOWNING.

Cr. 2649.

District Court of Appeal, Second District,
Division 1, California.

June 22, 1935.

Habeas corpus ☞32

Petitioner in habeas corpus proceedings was discharged from custody where both state and national recovery acts under which petitioner was convicted were, after petitioner's arrest, pronounced unconstitutional (St. 1933, p. 2637, § 2; National Industrial Recovery Act, 48 Stat. 195).

Application of John H. Burke for writ of habeas corpus on behalf of Glenn Downing.

Petitioner discharged from custody and bond exonerated.

John H. Burke, of Long Beach, for petitioner.

Call & Murphey, Alex. W. Davis, and Hanna & Morton, all of Los Angeles, amici curiæ in support of petitioner.

Buron Fitts, Dist. Atty., and Tracy Chatfield Becker and Harry M. Hunt, Deputy Dist. Attys., all of Los Angeles, for respondent sheriff.

Gibson, Dunn & Crutcher, Homer D. Crotty, George D. Jagels, and David P. Evans, all of Los Angeles, amici curiæ in support of respondent.

ROTH, Justice pro tem.

One Glenn Downing is here charged with a violation of section 2, chapter 1039, page 2637, Statutes of 1933 (commonly referred to as the California Recovery Act), in that on November 1, 1934, as a person engaged in intrastate commerce in a business and transaction affecting intrastate commerce, subject to the provisions of the Code of Fair Competition for the Petroleum Industry, approved by the President of the United States by a purported authority conferred by the National Industrial Recovery Act, passed June 16, 1933 (48 Stat. 195), he did violate the provisions of such Code of Fair Competition by producing oil from Wil-Daw No. 1 oil well in excess of the quota assigned to him by order of the administrator of said Code of Fair Competition for the Petroleum Industry, and specifically a violation of section 5 of article III of said code. He was tried on November 23, 1934, found guilty, sentenced to pay a fine or go to jail, and elected to do the latter. On the same day that he was delivered to the custody of the sheriff, a petition for a writ of habeas corpus was filed, a writ issued, and Downing was released on \$500 bail.

The decisive question is the validity of the statutes, both state and national, and the effect of the codes promulgated pursuant thereto, and the orders issued by the administrator pursuant to the codes.

Since the arrest of petitioner, the cases of *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 S. Ct. 241, 79 L. Ed. 446; *Darweger v. Staats et al.* (April 26, 1935) 267 N. Y. 290, 196 N. E. 61, and *Schechter v. U. S.* (May 27, 1935) 55 S. Ct. 837, 79 L. Ed. 1570, have been decided. All of said cases deal with the identical statutes, questions, and principles involved in the instant case, the *Darweger Case* treating specifically the relation of a State Recovery Act to the National Industrial Recovery Act, and the effect of all of said cases is to hold that the statutes involved are unconstitutional, and that the codes promulgated pursuant thereto are nullities.

Accordingly, it is ordered that petitioner be and he is hereby discharged from custody and his bond exonerated.

We concur: HOUSER, Acting P. J.; YORK, J.

WALSH v. AMERICAN TRUST CO.**Civ. 9489.**District Court of Appeal, First District,
Division 1, California.

June 19, 1935.

Rehearing Denied July 19, 1935.

Hearing Denied by Supreme Court
Aug. 16, 1935.**1. Banks and banking** ⇨148(2)

Bank cashing check on unauthorized indorsement of corporation payee and collecting proceeds from drawee bank was liable to payee for such proceeds (Civ. Code, § 3104).

2. Bills and notes ⇨279

One who acts on indorsement of negotiable paper must ascertain its genuineness at his peril.

3. Corporations ⇨432(5)

Burden of proving authority of payee's secretary to indorse check rested on collecting bank.

4. Corporations ⇨414(4)

Secretary of corporation had no implied authority to indorse check payable to corporation.

5. Evidence ⇨54

Even if presumption existed that secretary of payee corporation was not guilty of forgery in indorsing check, such presumption did not give rise to further presumption that secretary had authority to indorse such check, since presumption cannot be based on presumption (Code Civ. Proc. § 1963, subs. 1, 19, 33).

6. Banks and banking ⇨227(1)

Where check was payable to general insurance agency and secretary of broker, working under agency, indorsed check, difference between payee and indorsee and act of secretary in depositing proceeds of check to broker's account raised presumption that transaction was irregular so as to render collecting bank liable to payee for amount of check (Code Civ. Proc. § 1963, subs. 1, 19, 33).

7. Principal and agent ⇨19

It will be presumed that person is acting for himself and not as agent for another (Code Civ. Proc. § 1963, subs. 1, 19, 33).

8. Evidence ⇨88

Code presumptions, being general, and presumptions as to use of corporate paper and agency being special, special presumptions prevail over Code presumptions (Code Civ. Proc. § 1963, subs. 1, 19, 33).

9. Principal and agent ⇨137(1)

Person whose check is indorsed without authority may be estopped to deny such want

of authority by its negligence in allowing another to clothe himself with apparent authority to indorse check (Civ. Code, §§ 2298, 2317, 3104).

10. Banks and banking ⇨148(2)

Where payee of check had never carried account with collecting bank and had done nothing to cause bank to believe that indorsee had authority to indorse for payee and open account, collecting bank was liable to payee for proceeds of check carrying unauthorized indorsement of payee (Civ. Code, §§ 2298, 2317, 3104).

11. Banks and banking ⇨148(2)

Authority of broker working under general insurance agency to collect insurance premiums payable to agency, and broker's right to commissions thereon and its practice of collecting premiums with knowledge and consent of agency did not authorize broker's secretary to indorse premium check payable to agency and deposit proceeds to broker's account, and collecting bank was liable to agency for proceeds of such check (Civ. Code, §§ 2298, 2317, 3104).

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Suit by Francis P. Walsh, as trustee of the estate and effects of the Mullin-Acton Company, bankrupt, substituted in the place and stead of Raymond A. Burr, against the American Trust Company. From a judgment for defendant, plaintiff appeals.

Reversed.

Torregano & Stark and Ernest J. Torregano, all of San Francisco (August B. Rothschild, of San Francisco, of counsel), for appellant.

Brobeck, Phleger & Harrison and Thomas E. Davis, all of San Francisco, for respondent.

GRAY, Justice pro tem.

Appellant, as trustee of a bankrupt corporation, sued the respondent bank to recover the proceeds of a check, payable to the corporation, which respondent had collected from the drawee bank upon an unauthorized indorsement and paid to such indorsee. After a trial in which appellant alone had presented evidence, the court made its findings and thereon rendered judgment in favor of respondent. Appellant in this appeal claims that certain

findings, vital to the judgment, are unsupported by the evidence.

The following facts, as found by the court, are unchallenged: The Mullin-Acton Company was a corporation, acting as general agent for insurance companies, until January 22, 1932, when it filed a voluntary petition in bankruptcy. The Mullin-Johnson Company, formerly Mullin-Acton Company, Brokerage Department, was, also, a corporation, conducting, however, an insurance brokerage business and had acted as broker on policies executed by companies represented by Mullin-Acton Company. G. H. Mullin was the president of each company and owned 66⅔ per cent. of the stock of the first company and 60 per cent. of the stock of the second. S. J. Johnson was secretary of both companies. The Mullin-Johnson Company had, as broker, procured for various persons, including Fruit Growers' Supply Company, policies, of which some were written by companies represented by Mullin-Acton Company, and prior to the check in question had collected the premiums due thereon with the authority of the latter corporation. On January 21, 1932, Fruit Growers' Supply Company owed \$8,070.03 for premiums on policies procured by Mullin-Johnson Company, as broker, and written by companies represented by Mullin-Acton Company. On that day Fruit Growers' Supply Company, in payment of such premiums, issued the present check, drawn on Crocker First National Bank and payable to the order of Mullin-Acton Company. It delivered the check to S. J. Johnson, who indorsed thereon in three successive lines, "Mullin-Acton Co., Mullin-Johnson Co., S. J. Johnson,," and deposited it to the credit of Mullin-Johnson Company with respondent, who collected its amount from the drawee. Previously Mullin-Acton Company had carried its account with a third bank, who had applied all credits to payment of an overdue note owed it. Mullin-Acton Company had not, by resolution of its directors, selected respondent as its depository, nor authorized any of its officers to indorse or deliver to defendant checks or other evidence of indebtedness.

Appellant challenges, as unsupported by the evidence, the following facts, found. Some are stated in both a negative and positive form, but the latter only will be here given. At the opening of the account, in the name of Mullin-Johnson Company, by the deposit of the check, there was deliv-

ered to respondent a signature card signed by G. H. Mullin and S. J. Johnson, upon which respondent's employee had noted that the depositor was formerly Mullin-Acton Company. The indorsements on the check were not forgeries, nor were they unauthorized by Mullin-Acton Company, but that company and its president and its secretary had full knowledge of the indorsement and the deposit. Mullin-Acton Company, together with its officers, namely, its president and secretary, empowered and authorized the check to be handled as it was, and are estopped to deny that the deposit was authorized or to claim that respondent converted proceeds of the check. The Mullin-Johnson Company was entitled to and was authorized by Mullin-Acton Company to collect the premiums represented by the proceeds of the check and to deposit the check to its account with respondent.

[1-4] "When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative. * * *" Civ. Code, § 3104. A bank which cashes a check on an unauthorized indorsement of the corporation payee and collects its proceeds from the drawee is liable to such payee for such proceeds. *Palo Alto, etc., Ass'n v. First Nat. Bank*, 33 Cal. App. 214, 164 P. 1124; *Buena Vista Oil Co. v. Park Bank of Los Angeles*, 39 Cal. App. 710, 180 P. 12; *George v. Security Trust & Savings Bank*, 91 Cal. App. 708, 267 P. 560; *United States Portland Cement Co. v. United States Nat. Bank*, 61 Colo. 334, 157 P. 202, L. R. A. 1917A, 145, note; *Merchants' Bank v. National Capital Press*, 53 App. D. C. 59, 288 F. 265, 31 A. L. R. 1066, note; *California Stucco Co. v. Marine Nat. Bank*, 148 Wash. 341, 268 P. 891, 67 A. L. R. 1531, note. One who acts upon the indorsement of negotiable paper must ascertain its genuineness at his peril. *California Stucco Co. v. Marine Nat. Bank*, supra; *Standard Steam Specialty Co. v. Corn Exchange Bank*, 220 N. Y. 478, 116 N. E. 386, L. R. A. 1918B, 575; *Hamlin's Wizard Oil Co. v. United States Express Co.*, 265 Ill. 156, 106 N. E. 623. "The signature * * * may be made by a duly authorized agent * * * and the authority of the agent may be established as in other cases of agency." Civ. Code, § 3100. The burden of proving Johnson's authority to indorse the check rested upon respondent. *Buena Vista Oil Co. v. Park Bank of Los An-*

geles, *supra*; *Gilbert v. Miller*, 68 Cal. App. 40, 228 P. 662; *Independent Oil Men's Ass'n v. Fort Dearborn National Bank*, 311 Ill. 278, 142 N. E. 458; *Doeren v. Krammer*, 141 Minn. 466, 170 N. W. 609; *Abraham Arndt & Bros. v. New York Fruit Water Co. (Mun. Ct.)* 140 N. Y. S. 471; *Producers' Oil Co. v. Green (Tex. Civ. App.)* 212 S. W. 68. As secretary, S. J. Johnson had no implied authority to indorse the check. *Palo Alto, etc., Ass'n v. First National Bank, supra*; *Buena Vista Oil Co. v. Park Bank of Los Angeles, supra*; *Gilbert v. Miller, supra*.

[5-8] The authority of S. J. Johnson to indorse the check for Mullin-Johnson Company was shown by a resolution of that corporation, an authenticated copy of which formed part of the signature card which was given to respondent with the deposit of the check. The challenged findings found that S. J. Johnson was authorized to indorse the check on behalf of its payee, Mullin-Acton Company. The only direct testimony on this issue was given by G. H. Mullin, a witness for appellant, whose testimony, if believed, established Johnson's lack of authority to so indorse. In support of the findings, respondent argues that the disputable presumptions specified in subdivisions 1, 19, and 33 of section 1963 of the Code of Civil Procedure created a conflict in the evidence and that, therefore, the court could find in accordance with such presumptions in favor of Johnson's authority. These presumptions are "that a person is innocent of crime or wrong," "that private transactions have been fair and regular," and "that the law has been obeyed." Even if it be presumed that Johnson was not guilty of forgery and that his indorsement was regular, yet such presumptions do not raise the further presumption, impliedly indulged in by the court, of his authority, for a presumption cannot be based upon a presumption. 22 C. J. 85. To give such effect to such presumption would violate the rule that a person cannot make himself another's agent by so acting without the latter's knowledge or consent. *Allen v. San Francisco Wholesale Dairy Produce Exch.*, 59 Cal. App. 93, 210 P. 41. However, the difference between the payee and the indorsee and the use of the check to transfer the former's money to the latter's account raised a presumption that the transaction was dishonest, unfair, and irregular. *Ward v. City Trust Co.*, 192 N.

Y. 61, 84 N. E. 585; *Fisk Rubber Co. v. Pinkey*, 100 Wash. 220, 170 P. 581. The law indulges in no presumption that an agency exists, but instead presumes that a person is acting for himself and not as agent for another. 2 C. J. 919. Since the Code presumptions are general and the presumptions as to use of corporate paper and agency are special, the latter prevail over the former. *McKay v. McKay*, 184 Cal. 742, 195 P. 385.

Respondent argues that the judgment in its favor was inevitable if the trial judge discredited the testimony of G. H. Mullin. Even if it be conceded that the judge was entitled to and did disregard such testimony, because of the witness' interest, motive, and self-contradiction, respondent's conclusion does not follow. As above pointed out, the burden of proving Johnson's authority rested upon respondent, who asserted its existence. *Ewing v. Hayward*, 50 Cal. App. 708, 195 P. 970. Therefore the elimination of Mullin's testimony merely removed evidence upon which the court could have found a lack of such authority, but did not supply evidence from which the court could have found its existence.

[9-11] The court further found in effect that Mullin-Acton Company was estopped to deny Johnson's authority to indorse the check. A person whose signature was unauthorized may be precluded from setting up want of authority. Civ. Code, § 3104. Authority may be actual or ostensible. Civ. Code, § 2298. "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." Civ. Code, § 2317. There are two essential features of ostensible authority, viz., the third person must believe that the agent had authority and such belief must be generated by some act or neglect of the person to be held. *Allen v. San Francisco Wholesale Dairy Produce Exch.*, *supra*. A person, whose check was indorsed without authority, may be estopped to deny such want of authority by his negligence in allowing another to clothe himself or to be clothed with apparent authority to so indorse. *Schmidt v. Garfield Nat. Bank*, 64 Hun, 298, 19 N. Y. S. 252. In 1921, Mullin-Acton Company had had an account with respondent's predecessor, who was then given a copy of the corporation's resolution, certified to by S. J. Johnson, as secretary, which provided that the president and vice president were authorized to draw and indorse checks on behalf

of the corporation. Respondent had never had the account of Mullin-Acton Company, nor had it ever had any dealings with such corporation. See *Buena Vista Oil Co. v. Park Bank of Los Angeles*, supra. Without such previous dealings with Mullin-Acton Company, respondent had no reason to believe in Johnson's ostensible authority, nor had the corporation done or omitted anything to generate such belief. The right of Mullin-Johnson Company to collect premiums and its practice of so doing, with the knowledge and consent of Mullin-Acton Company, did not authorize it to indorse this check and collect its amount. Nor did the fact that it was entitled to a commission on the premiums, paid by such check, entitle it to appropriate all of the premiums by means of an unauthorized indorsement.

Since the questioned findings are unsupported by the evidence and, without such findings the judgment cannot be supported, the judgment is reversed.

We concur: TYLER, P. J.; CASHIN, J.



8 Cal.App.2d 153

**LINEBERGER et al. v. DELANEY
PETROLEUM CORPORATION.**

Civ. 9449.

District Court of Appeal, Second District,
Division 2, California.

June 27, 1935.

Rehearing Denied July 24, 1935.

Hearing Denied by Supreme Court
Aug. 26, 1935.

Mines and minerals Ⓒ78(1)

Lessor held entitled to recover, from lessee under "lease" giving lessee exclusive right with regard to oil development, for wrongful occupation of land for purposes alien to development thereof for oil, as against contention that lessor was restricted to suit for damages from use of land let for particular purpose for another purpose, where "lease" did not use words such as "lease," "let," or "demise" (Civ. Code, §§ 1930, 3334).

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Walter F. Lineberger and another against the Delaney Petroleum Corporation. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Houser & Houser and Joseph A. Ball, all of Long Beach, for appellant.

Denio, Hart, Taubman & Simpson, of Long Beach, for respondents.

FRICKE, Justice pro tem.

Respondents were at all times the joint owners of a certain parcel of land which they leased for oil development purposes to J. E. O'Donnell and wife. This lease was transferred several times, the last lessee being appellant corporation, which is still in possession. Appellant, in addition to construction work connected with the production of oil, erected upon the land a warehouse and a field office not used in connection with such production, and stored pipe and other oil equipment on the property which was not used for drilling or operating purposes on the premises. The "lease" declares that the "lessors do hereby grant to said lessee the exclusive right and privilege" of entering upon the premises and drilling for and removing oil, gas, and other hydrocarbon substances, together with the right to store the same upon the land during the life of the lease, the right to develop water, and to construct, use, and maintain "all buildings, tanks, sumps, machinery, telephone and telegraph lines and other structures, including all pipe lines, which the lessee may desire in carrying on its business and mining operations on said premises," and the right of ingress and egress. The lessee agreed to pay as rental or royalty one-sixth of the market price of the oil and gas produced, and agreed not to erect any buildings within 100 feet of Pacific avenue.

It appears that the field office and warehouse erected by appellant are closer than 100 feet from Pacific avenue, and there is testimony to the effect that the rental value of the property used by appellant for storage and warehouse purposes, and not used in operating the oil wells on the property, was between \$200 and \$250 per month. There is also evidence that although no new wells were being drilled and the operations were limited to pumping two wells, appellant used all of the land except that occupied by the houses of

respondents; that a piece of land 50 by 150 feet around each of the two wells on the land would suffice to care for the wells; that there was no necessity to use any other portion of the property for such purposes; and that the equipment stored on the lands was not necessary for the wells on the property. Respondents at all times received the royalty or rental provided for by the lease. The president of appellant corporation testified that the company used the property as a field office and that the equipment, warehouses, and racks were used for all of their operations and not alone for those on respondents' property.

The basic point raised by appellant is that because of the lease the action should have been one for damages under section 1930 of the Civil Code, providing that when a thing is let for a particular purpose the hirer must not use it for any other purpose, and if he does he is liable for all damages resulting from such use, and not under section 3334 of that Code, for the value of the use of the property for the time of its wrongful occupation. Appellant insists that the entire use and occupancy herein was under authority of the lease and in nowise prohibited thereby, although it appears uncontradicted that the field office and warehouse were closer than 100 feet to Pacific avenue and the lease expressly provided against the lessee constructing any building within such limitation, and that appellant used a substantial portion of the leased property for purposes in nowise connected with the operation of the property as an oil project. Appellant's argument that this unauthorized use of the property is compensated by the rental or royalty paid as provided for by the lease, and that notice required by the lease was not given, fails in that it overlooks the fact that respondents' action is not under the lease, but for use and occupation not covered thereby.

It is significant that the "lease" upon which appellant relies does not use words such as "lease," "let," or "demise," or words to a similar effect such as were used in the lease involved in *Chandler v. Hart*, 161 Cal. 405, 119 P. 516, Ann. Cas. 1913B, 1094, wherein the court held that the effect of the language was to confer upon the lessee an estate for years subject only to the reserved right of the lessors to reside upon the land and to farm the land not needed or used by the lessee, and in the lease involved in *Smith v. United Crude Oil Co.*, 179 Cal. 570, 178 P. 141, in which

the lands were "leased, let and demised" to lessees for the development of oil. The "lease" in the case at bar is very similar to that in *Brookshire Oil Co. v. Casmalia, etc., Co.*, 156 Cal. 211, 103 P. 927, 928, the language there used being, "The first party * * * hereby grants unto the second parties the sole right," etc. The lease before us reads, "Lessors do hereby grant to said lessees the exclusive right and privilege," etc. In the case last cited the court held that "this instrument does not vest in the so-called lessees any present title in the land. It grants only the right to do certain things thereon and to take certain mineral substances therefrom." Construing the instrument, the court further held there was no intention to grant a general right, and that the design was to give only sufficient rights to enable the lessee to carry out the object of the instrument, the production of gas and oil. The case involved the right of a subsequent and separate lessee of the owners to lay a pipe line across the land. As to that, the court holds that if a pipe line laid by such a subsequent lessee did not affect the operations of the original lessees under their lease, the latter had no right to complain or interfere therewith. Since the right of the subsequent lessee could come only from the owners, it follows that in the absence of the subsequent lease the owners could have laid the pipe line under and subject to the same legal principles. In *Smith v. United Crude Oil Co.*, 50 Cal. App. 466, 469, 195 P. 434, following a trial after the Supreme Court decision, *supra*, the right to recover for the use of a part of the land by the lessee for a purpose not specified in the lease was denied for the reason that to do so would allow a recovery for something to which the lessor was not entitled.

In the case before us, as in the *Brookshire Oil Company Case*, there was no demise, lease, or letting of the lands such as would vest in the lessee title in the land, but merely the granting of the right to do the things specified in the lease. And as to those portions of the land not used by the lessee for the doing of the things thus specified, the lessors had the right to use the land themselves. When, therefore, appellant used those portions for purposes alien to the lease, he was using that land without authority and not under the lease, and was using that which the lessors had the right to use. The lessee was not using land which was "let for a particular pur-

pose" for another purpose, and section 1930 of the Civil Code does not apply. The action was properly one to recover the reasonable value for use and occupation.

Appellant specially demurred to the complaint because it failed to allege the duration of the use and occupation. The complaint alleged this duration as being "for more than two years last past" and that the reasonable value of the use was \$200 per month, and asked judgment in the sum of \$2,400. Since damages were demanded for only two years, it is immaterial that the use was alleged as having been for more than that period.

The other points raised by appellant are solely applicable to an action within the scope of section 1930 of the Civil Code, and in view of the opinion herein expressed require no further comment.

The judgment is affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.



STOLL v. STOLL et al. *

Civ. 5375.

District Court of Appeal, Third District,
California.

June 19, 1935.

Hearing Granted by Supreme Court
Aug. 16, 1935.

1. Descent and distribution §82

Where written agreement between father and son that son should manage father's business in consideration of salary and child's share as in case of intestacy was signed and approved by remaining heirs, such ratification amounted to guaranty on part of each heir that terms of agreement would be fulfilled.

2. Insane persons §65

In son's suit for damages resulting from termination of contract made with father to manage father's business at stipulated monthly salary, guardian appointed upon father's incompetency was not liable individually or in representative capacity for such termination.

3. Contracts §266(1)

Contract, as distinguished from mere creation of agency, executed in good faith, without fraud or misrepresentation and for

fair consideration, and merely voidable, may not be rescinded, unless parties can be restored to original position.

4. Parent and child §9(2)

Where son relinquished profitable employment to manage aged father's business until final distribution of father's estate in consideration of salary and child's share as in case of intestacy, contract of employment could not be terminated without first restoring son to position occupied prior to execution of contract by paying son whatever damages son had suffered thereby.

5. Master and servant §25

Where contract of employment does not necessarily require personal supervision of principal, and is of such nature that it may be continued without detriment to him, principal's subsequent incompetency may not terminate contract, as distinguished from mere agency, when it appears that parties intended that contract would remain in full force for specified time beyond principal's incompetency or death.

6. Descent and distribution §82

Where contract of employment between father and son provided that son for a stipulated consideration should manage father's business until final distribution of father's estate, and contract was signed and approved by heirs individually, contract held to create a separate agreement of employment by heirs which was not terminated by father's incompetency, and heirs were liable for damages for voluntary disaffirmance of contract without cause.

7. Descent and distribution §82

Even though agency created by contract of employment between father and son was terminated by father's subsequent incompetency as to father's heirs signing contract, contract of employment remained intact and heirs could not rescind contract without placing son in statu quo.

8. Executors and administrators §202(1)

Where father employed son to manage father's business until final distribution of father's estate, estate was liable for damages accruing to son because of termination of agency of employment upon father's incompetency, notwithstanding agency relation was terminated solely by operation of law.

Appeal from Superior Court, Sacramento County; Neal Chalmers, Judge.

Suit by Edwin P. Stoll against John T. Stoll, Jennie T. Stoll, and the Capital National Bank of Sacramento, individual-

*For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 56 P.2d 226.

ly, and as guardian of the estate of John T. Stoll, an incompetent person. During the pendency of the suit, John T. Stoll died, and his wife, Jennie T. Stoll, who was appointed and qualified as administratrix of his estate, was substituted in that capacity as defendant in place of deceased. From a judgment for defendants, plaintiff appeals.

Affirmed in part, reversed in part, and remanded.

White, Miller, Needham, Harber & Mering, of Sacramento, for appellant.

Inman & West, Downey, Brand & Seymour, and Ralph H. Lewis, all of Sacramento, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment which was rendered against him pursuant to an order sustaining separate demurrers of the defendants and denying leave to amend a complaint for damages based on the termination of an employment to manage the business and properties of John T. Stoll for a definite period of time at a fixed salary.

[1] The complaint alleges that for many years the plaintiff had been employed as division manager of the Remington Arms Company, with headquarters at San Francisco, at a salary of \$350 a month, and that his prospect for continued services with that company was excellent. He was an experienced business manager. John T. Stoll, his father, who was aged, was possessed of a business and valuable properties at Sacramento which required the attention of an experienced manager. The family of John T. Stoll consisted of his wife, Jennie T. Stoll, who was not the mother of his children, and four sons, besides the plaintiff. John T. Stoll persuaded his son Edwin to give up his employment with the Remington Arms Company and abandon his prospects of advancement with that corporation to become the manager of his business and property at an agreed salary of \$350 a month until "final distribution of the estate of said second party (John T. Stoll) has been made." That contract was executed October 26, 1929. It also provided that in consideration of the employment the plaintiff should receive from the estate of his father at least his proportionate share

as an heir at law. That contract was signed and approved by the wife of John T. Stoll and by each of his sons in which they specifically "agree to be bound by the terms and conditions thereof in so far as said terms and conditions affect the rights and interest of each or any of us and each hereby agrees * * * that such employment shall continue for the period provided for in said agreement and at the compensation therein provided with all the powers, authority and duties therein provided." This ratification amounts to a guaranty on the part of each heir that the terms of the contract would be fulfilled, including the payment of \$350 a month until the estate was finally distributed.

The plaintiff thereupon abandoned his employment with the Remington Arms Company and efficiently managed the property and business of his father until January, 1932, for which service he was paid the sum of \$350 a month according to the terms of the contract. On December 2, 1931, John T. Stoll was adjudged to be incompetent, and, upon proceedings duly had, the defendant, Capital National Bank, was appointed and qualified as guardian of his estate. In the former case of Capital National Bank of Sacramento v. Stoll, 220 Cal. 260, 30 P.(2d) 411, 414, the Supreme Court held that the employment of this plaintiff, as agent, was terminated by the subsequent incompetency of John T. Stoll, under the provisions of sections 1996 and 2355, 2356 of the Civil Code. In the last-mentioned case it was specifically held that the contract, as distinguished from the mere agency which it created, remains in full force and that "whatever right the agent may have to recover damages or to protect his expectant interest in the estate is not involved in this action." Thereupon this suit for damages was instituted against the bank individually and as guardian of the incompetent person and against his wife, who were alleged to have repudiated the contract and to have procured the discharge of the plaintiff from his employment contrary to the express terms of the executory agreement, to which they were also principals. Pending the trial of this case, John T. Stoll died on September 3, 1934, and his wife, Jennie T. Stoll, was duly appointed and qualified as administratrix of his estate. By stipulation, she, as administratrix of his estate, was subsequently sub-

stituted as a party defendant in this action, and it was agreed that her demurrer should also stand of record as the demurrer of Jennie T. Stoll, as administratrix of the estate of the deceased person. The several separate demurrers to the complaint were sustained, and the plaintiff was denied the privilege of amending his pleading. A judgment was accordingly rendered against the plaintiff that he take nothing by that action. From that judgment the plaintiff has appealed.

[2] We are of the opinion the demurrer was properly sustained as to the Capital National Bank of Sacramento, both individually and as guardian of the estate of the incompetent person, for the reason that they were not parties to the contract and were not interested therein except in the representative capacity of the bank as guardian of the estate. It may not be held that the bank, either individually or as guardian of the estate, procured the discharge of the plaintiff or the repudiation of the contract. It follows that the bank would not be liable for damages for the termination of the contract.

[3] In the Capital National Bank Case, supra, the Supreme Court held that the employment of Edwin P. Stoll was terminated by the subsequent incompetency of his father, for the reason that the agency of the son was not coupled with a present interest in the property involved. It will be observed the case does not specifically determine whether the written approval of that contract by each of the heirs of John T. Stoll, who subsequently inherited the entire estate, also created a separate contract of employment and a separate liability on their part which was not terminated with respect to their separate liability, since no such incapacity may be charged against any of them. 1 Mechem on Agency (2d Ed.) p. 1173, §§ 1567, 1568. This question does not appear to have been an issue in that case. But, assuming that the effect of the above decision amounts to a complete termination of the entire employment with respect to all of the parties to the contract, it is a mere determination that the agency created by the contract is terminated by operation of law, and the contract still remains intact. It is specifically held in that case that the contract itself was not terminated by the incompetency of the

father, and that "whatever right the agent may have to recover damages or to protect his expectant interest in the estate is not involved in this action." This is in accordance with the uniform rule of law that a contract, as distinguished from the mere creation of an agency, which is executed in good faith, without fraud or imposition and for a fair consideration, and which contract is not void, but merely voidable, may not be rescinded unless the parties can be restored to their original position and be placed in status quo. 1 Elliott on Contracts, p. 594, § 384; 32 C. J. p. 733, § 510; 2 C. J. p. 555, § 197; Doty v. Mumma, 305 Mo. 188, 264 S. W. 656, 657, 34 A. L. R. 1399. In the case last cited it is said: "It is undoubtedly the rule that, where a contract with an insane person has been entered into in good faith, without fraud or imposition, for a fair consideration, without notice of the infirmity, and before an adjudication of insanity, and has been executed in whole or in part, it will ordinarily not be set aside, and in no event, unless the parties can be restored to their original positions."

[4] That is an equitable rule which is based on common justice. It follows that the contract which is involved in this case may not be set aside without first restoring the plaintiff to the position which he occupied prior to the execution of that instrument by paying to him whatever damages he has suffered thereby. That is exactly what the plaintiff sought to accomplish by his complaint in this action.

[5] Moreover, it specifically appears from the language of the contract that it was the intention of the parties thereto, including the wife and sons of John T. Stoll, who ratified the contract and bound themselves by the terms thereof, that it should not terminate at the death of the father, and on the contrary that it was to continue in force until "final distribution of the estate * * * has been made." Where the employment does not necessarily require the personal supervision of the principal and is of such a nature that it may be continued without detriment to him, his subsequent incompetency may not terminate the contract, as distinguished from the mere agency, when it appears to have been the intention of the parties that it would remain in full force for a specified time beyond the incompetency or

death of the principal. In 18 Ruling Case Law, p. 514, § 24, it is said: "If the parties stipulate in the contract of employment that the death of the employer before the expiration of the term of service is not to terminate the relation, the happening of such event will have no effect on the contract, and the employee will be entitled to recover his wages until the term expires. The employee will also be entitled to recover full wages where it is apparent from the subject matter and nature of the contract that the parties intended that it should be completely performed, whether the master should die or not."

[6-8] It may reasonably be held that the contract of employment which was separately signed and approved by each and all of the heirs of John T. Stoll, and which provides that each of them shall "be bound by the terms and conditions thereof in so far as said terms and conditions affect the rights and interests of each or any of us," creates a separate agreement of employment on their part which was not terminated by the subsequent incompetency of the father, and that they are still liable for damages for their voluntary disaffirmance of the employment without cause. But, even though it be deemed that the agency created by the employment was also terminated as to these heirs, by the incompetency of one of the principals to the contract, still the contract itself remains intact, and it may not be rescinded without placing the plaintiff *in statu quo*. We are therefore of the opinion the plaintiff stated a good cause of action against the estate of the deceased and against Jennie T. Stoll, who were parties to the action, for damages which may have accrued to him on account of the termination of the agency of employment, although that result was created solely by operation of law.

It follows that the demurrers to the amended complaint of Jennie T. Stoll individually and as administratrix of the estate of John T. Stoll, deceased, were erroneously sustained.

That portion of the judgment in favor of the Capital National Bank of Sacramento, a corporation, individually, and as guardian of the estate of John T. Stoll, an incompetent person, is affirmed, and that portion of the judgment in favor of Jennie T. Stoll, individually, and as administra-

trix of the estate of John T. Stoll, deceased, is reversed, and the court is directed to overrule the demurrers of the last-mentioned parties and permit them to answer the complaint.

We concur: PULLEN, P. J.; PLUMMER, J.



8 Cal.App.2d 14

**WILSON v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.**

Civ. 10199.

District Court of Appeal, Second District,
Division 1, California.

June 24, 1935.

Hearing Denied by Supreme Court
Aug. 22, 1935.

Constitutional law ⚙️156
Mortgages ⚙️559(2)

Statute providing for appointment of appraiser in foreclosure of mortgage, and limiting amount of deficiency judgment to difference between entire indebtedness and fair market value of property at time of sale, held unconstitutional in so far as it affected right to deficiency judgment, and unenforceable as against one who had received a note and deed of trust prior to passage of statute (Code Civ. Proc. § 725a, as added by St. 1933, p. 1673, and § 726, as amended by St. 1933, p. 2118).

Application by Philip L. Wilson for a writ of mandate to the Superior Court of Los Angeles County and Robert W. Kenny, judge thereof, to compel respondent court to appoint an appraiser of property under Code of Civil Procedure, § 726, as amended by St. 1933, p. 2118, pursuant to which an alternative writ issued.

Alternative writ discharged.

Overton, Lyman & Plumb, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and J. F. Moroney, Deputy Co. Counsel, both of Los Angeles, for respondents.

YORK, Justice.

This matter comes before this court on an amended petition for writ of mandate, pursuant to which the alternative writ

issued. The basis of this proceeding is the denial by the trial court of a motion to appoint an appraiser in a certain action filed in the superior court of Los Angeles county, wherein the plaintiff sought to recover a money judgment against defendants James H. Thomas and Mildred M. Thomas, as makers, and against Philip L. Wilson, this petitioner, as undisclosed principal, upon a promissory note secured by a deed of trust, and in which said plaintiff therein sought to foreclose said deed of trust pursuant to the provisions of section 725a of the Code of Civil Procedure, as added by St. 1933, p. 1673 and section 726, as amended by St. 1933, p. 2118. Prior to the date that said cause was set for trial, petitioner applied to the trial court for the appointment of one of the inheritance tax appraisers to appraise the property involved, in accordance with the terms of said section 726, as amended in the year 1933 (St. 1933, p. 2118), which application was denied. This proceeding is brought before this court on the theory that the trial court was specifically enjoined to appoint one of the inheritance tax appraisers, provided for by the terms of said section 726, in order to fix a value as of the time of the sale of the property sought to be foreclosed in said action, petitioner contending that respondent court is without power to deny the petition to appoint said appraiser. The action of the trial court in refusing to make such appointment is evidently based on its belief that the provision of section 726, Code of Civil Procedure, requiring the appointment of an appraiser, and the provision of said section with relation to the entry of deficiency judgment were and are—as to the parties to said action—invalid, void, and unconstitutional by reason of the fact that the note and the trust deed sought to be foreclosed were made prior to the passage of said sections 725a and 726 of the Code of Civil Procedure, as they now exist.

It is the opinion of this court that this position on the part of the trial court is correct, and that, at least in so far as it affects the right to a deficiency judgment, the appraisal direction in the amended section 726 of the Code of Civil Procedure is unconstitutional and void, and cannot be enforced as against the plaintiff in the action. This is in accord with the decision in the analogous case of *Bennett v. Superior Court* (Cal. App.) 42 P.(2d)

80, in which matter a petition for hearing was denied by the Supreme Court. This is also supported by the reasoning set forth by the Supreme Court in its decision in the case of *Morris v. Pacific Electric Ry. Co.* 43 P.(2d) 276, wherein the effect of remedial legislation, in so far as the same principle here raised is concerned, was discussed and the limits circumscribing the effect of so-called remedial legislation are fully set forth.

There is no merit in the suggestion of petitioner that, because the plaintiff elected to foreclose by court action under section 726, he must take the procedure "as he finds it." If he had caused sale to be made under the power of sale without decree of foreclosure, he would have been met by these identical unconstitutional provisions which the Legislature has written into section 580a of the same code, as added by St. 1933, p. 1672.

On the authority of the decisions hereinabove cited, the alternative writ of mandate is discharged.

I concur: CONREY, P. J.

Mr. Justice HOUSER does not participate in this decision.



HUYSMAN et ux. v. KIRSCH. *

Civ. 9390.

District Court of Appeal, Second District,
Division 2, California.

June 29, 1935.

Hearing Granted by Supreme Court
Aug. 26, 1935.

1. Physicians and surgeons ☞18(4)

Complaint against surgeon for negligently leaving rubber drainage tube in patient's abdomen after operation held to state cause of action in tort and not in contract.

2. Limitation of actions ☞55(3)

Initiatory wrongful act starts running of limitations statute in actions against physicians and surgeons for malpractice (Code Civ. Proc. § 340, subd. 3).

3. Limitation of actions ☞55(3)

Action against surgeon for leaving rubber drainage tube in patient's abdomen af-

er operation held barred where action had not been commenced within year from time when usefulness of tube ceased, and it should have been removed, notwithstanding that patient did not know of presence of tube until after second operation, which occurred more than year and a half after time when tube should have been removed (Code Civ. Proc. § 340, subd. 3).

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Christian Huysman and Clara E. Huysman, husband and wife, against Ralph L. Kirsch. From a judgment of nonsuit, the plaintiffs appeal.

Affirmed.

Frank C. Dunham, E. De Young Vasse, and Louis Semon, all of Pasadena, for appellants.

W. I. Gilbert, Wm. M. Rains, Gibson, Dunn & Crutcher, and Philip C. Sterry, all of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

The superior court caused to be entered a judgment of nonsuit against plaintiffs (husband and wife), which followed the granting of defendant's objection to the taking of any testimony upon the ground that the face of the complaint reveals that the statute of limitations had run against the cause of alleged surgical malpractice. The complaint was filed January 7, 1933.

The defendant, as a surgeon, operated on plaintiff Clara E. Huysman, on the 3d day of January, 1931, and the wound was drained by a nine-inch rubber tube. It is alleged "that defendant knowingly, carelessly and negligently permitted the aforesaid rubber drainage tube to remain inclosed in the abdomen of said plaintiff, Clara E. Huysman, *on or about January 9, 1931, to and including September 26, 1932, and upon each and every day during that period of time.*" (Italics ours.) The tube was removed from the abdomen by defendant on the 26th of September, 1932, at which time the plaintiffs first learned that it had been permitted to remain therein. It is further alleged that "each and every day from about the date of said operation to on or about November 15, 1932" there were created numerous running sores within the patient's abdomen by reason of the improper presence of the tube therein from January 9, 1931, to September 26, 1932, and there were there-

by caused specific disorders of the patient which caused her to be and to continue to be unwell and required that she be given constant care and attention, and that she was unable to perform her family and household duties up to the date of the complaint; that such condition will continue indefinitely.

[1] The recent case of Kershaw v. Tilbury, 214 Cal. 679, 8 P.(2d) 109, following earlier cases to the same effect, holds definitely that such an action in California sounds in tort and not in contract. Subdivision 3, § 340, Code of Civil Procedure, requires that such an action must be started within one year from the act alleged. We must determine, therefore, what event started the running of the statute and when did such event happen. It is certain that the action was not brought within one year from the date of the operation itself nor within one year from the first date of the wrongful maintenance of the tube in the abdomen. But it is claimed by plaintiffs-appellants: (a) That the operation from the beginning thereof to the end of the post-operative treatment was one act and that the statute did not begin to run until the treatment ceased; or (b) that from the date upon which the tube should have been removed but was not, to the date of its removal, there was a continuing tort, hence the maintenance of the tube in the abdomen for any time within the year prior to suit constituted a cause of action within the limitation of the statute.

But there is no California authority to support either theory and much inconsistent therewith. Neither in Hopkins v. Heller, 59 Cal. App. 447, 210 P. 975; Barham v. Widing, 210 Cal. 206, 291 P. 173; Perkins v. Trueblood, 180 Cal. 437, 181 P. 642; Taylor v. De Vaughn, 91 Cal. App. 318, 266 P. 960, nor Wetzel v. Pius, 78 Cal. App. 104, 248 P. 288 (appellants' citations), is there anything supporting them. These cases tend the other way, and Gum v. Allen, 119 Cal. App. 293, 6 P.(2d) 311, which was refused hearing by the Supreme Court, is squarely against such theories.

[2,3] We read these authorities as either holding, or as consistent with the holding, that the initiatory wrongful act starts the running of the statute. In the Gum v. Allen Case, supra, the placing of the pack in the abdomen was proper, but leaving it there after the moment of

closing the incision was the wrongful act. In the instant case the insertion of the drain tube was proper but *leaving it in the abdomen after or not taking it out when its remedial purposes ceased* was the wrongful act. (Italics ours.)

As a matter of fact, a careful consideration of the complaint shows that the two cases are similar in fact and are on all fours in principle. It will be observed that neither the patient nor her husband (plaintiffs-appellants) knew that the tube was in the abdomen until after the second operation. It must, therefore, have been entirely out of sight, or in other words, after its usefulness had passed, it was concealed in the surgical wound exactly as was the pack in the other case. Both pack and tube were properly placed in the wound; both were improperly left there when and after their usefulness there passed.

Authorities which say that treatment of a broken bone after setting, and of the socket after the extraction of a tooth, are necessary parts of the same professional operation, are not authority for appellants' contentions. They are only consistent with the accepted theory that any wrongful act, or the start of a wrongful omission to act, constitutes a cause of action and starts the running of the statute of limitations.

We are of the opinion that the doctrine of "fraudulent concealment," as exhaustively treated in *Kimball v. Pacific Gas and Electric Co.*, 220 Cal. 203, 30 P. (2d) 39, if applied to the facts alleged in the pleadings of this case, would toll the statute. But we are met with a frank concession by appellant in his supplemental brief that the allegation of his complaint to the effect that defendant knowingly permitted the tube to remain in the abdomen means simply that defendant left it there through gross negligence and did not consciously know it had been left therein. We think this concession—and we commend counsel for making it, since his proof in a trial would have revealed it—takes the case out of the doctrine of "fraudulent concealment." We quote from the *Kimball Case*, supra: "We, therefore, hold that the better view and the one supported by the cases in this state and by the weight of authority elsewhere is that as far as a legal action for personal injuries is concerned, the fraud-

ulent concealment by the defendant of the facts upon the existence of which the cause of action depends tolls the statute, and such statute does not begin to run until the discovery by plaintiff or until by reasonable diligence the plaintiff should have discovered the facts."

Unquestionably this conclusion leads to harsh injustices and affords a cloak for the careless and ignorant, but it seems to us that it is the only consistent construction that the courts can give to the statute (section 340, Code Civ. Proc.) as it is, and that it conforms to the correct view of the law of torts. Other jurisdictions have adopted strained theories to avoid the injustice when it is plainly a simple and proper subject of legislation.

Judgment affirmed.

I concur: CRAIL, J.



8 Cal.App.2d 10

MILLER v. COLLINS et al.

Civ. 10150.

District Court of Appeal, Second District,
Division 1, California.

June 24, 1935.

Hearing Denied by Supreme Court
Aug. 22, 1935.

1. Venue ⇐68

Where in action for personal injuries motion for change of venue is made because of claimed fraudulent joinder of defendants for purpose of having action tried in certain county, moving party must establish truth of his charge (Code Civ. Proc. § 395).

2. Venue ⇐68

Where affidavits are presented on motion for change of venue because of claimed fraudulent joinder of defendants, any conflict must be resolved in favor of the prevailing party (Code Civ. Proc. § 395).

3. Venue ⇐70

On motion for change of venue because of fraudulent joinder of defendants, evidence held not sufficient to justify granting of motion (Code Civ. Proc. § 395).

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Edward F. Miller against Fred R. Collins, Mildred Collins, and others. From the judgment, defendants appeal. On motion to dismiss appeal or affirm order denying motion for change of venue.

Motion granted, and order denying motion for change of venue affirmed.

Lasher B. Gallagher, of Los Angeles, for appellants.

Otto A. Gerth, of Los Angeles, for respondents.

CONREY, Presiding Justice.

On motion of respondent for order to dismiss appeal or affirm order denying motion for change of venue.

The complaint states a cause of action for personal injuries alleged to have been suffered by the plaintiff, resulting from the negligence of one Fred R. Collins while driving an automobile within the county of San Bernardino. It was further alleged that at the time of the accident said Collins was an employee of the defendants other than said Collins and his wife, all of whom except the defendants Collins were residing in the county of Los Angeles. This action was commenced by complaint in the superior court of Los Angeles county. Defendants Collins at the time of appearing and filing demurrer to complaint made demand for change of place of trial to the superior court of San Bernardino county, and gave notice of motion for that purpose. The motion was presented upon affidavits of the moving parties together with a counteraffidavit upon the part of the plaintiff. Such motion having been denied, defendants Collins appeal therefrom.

The principal point in controversy relates to the claim of appellants that their codefendants were by the plaintiff made defendants in the action fraudulently, "and said defendants and each of them have been improperly joined as defendants, and said defendants and each of them has been made a defendant solely for the purpose of having the action tried in the County of Los Angeles." In support of this motion the defendant Fred C. Collins in his affidavit "alleges"

that he never was a servant, representative, or employee of said codefendants or any of them; and asserts that said codefendants were joined in this action solely for the purpose of attempting to prevent appellants from having the action tried in the county of San Bernardino, where the alleged cause of action arose and where appellants resided.

On the face of the complaint the said codefendants of the defendants Collins are proper parties to the action. The affidavit of their attorneys states facts which strongly tend to show that the plaintiff and said attorney had some reason to believe, and in good faith did believe, "that all of said defendants bore responsibility and liability to the plaintiff," and that they were proper parties defendant.

[1-3] The record being as above stated, the court had the right to determine the facts in accordance with the evidence produced by the plaintiff. In order to succeed in compelling the demanded change of venue, it was necessary for appellants to establish the truth of their charge that their said codefendants had been made defendants in the action "solely for the purpose" of having the action tried in the county where those defendants resided. Code Civ. Proc. § 395. Where, upon such a motion, there is any conflict in the affidavits, those in favor of the prevailing party must be considered as true, and the facts stated therein must be considered established. *Sourbis v. Rhoads*, 50 Cal. App. 98, 194 P. 521. It may be conceded that notwithstanding the sufficiency of the complaint, appellants would have been entitled to change of venue if they had been successful in proving that the claim against the resident defendants is a mere pretense and made only for the purpose of having the action tried in the county where the complaint is filed. Unfortunately for their contention, the court found against them upon that issue.

The motion of respondent is granted, and the order denying motion for change of venue is affirmed.

We concur: HOUSER, J; YORK, J.

8 Cal.App.2d 5

MALMSTROM v. BRIDGES et al.

Civ. 9690.

District Court of Appeal, First District,
Division 1, California.

June 24, 1935.

Hearing Denied by Supreme Court

Aug. 22, 1935.

1. Automobiles ⇨242(6)

When fact of ownership of automobile causing injuries is established, court or jury may draw inference that driver of automobile was acting as agent of owner and was acting in scope of authority so as to bind his principal.

2. Automobiles ⇨244(26)

Evidence that driver of automobile which struck pedestrian was employed to do odd jobs around the apartment by person who managed apartment for her mother, and that at time of accident he was testing out automobile after making repairs on automobile at his employer's request, *held* to justify finding that he was acting within "scope of his employment" so as to make owner of automobile liable for his negligence.

[Ed. Note.—For other definitions of "Scope of Employment," see Words & Phrases.]

3. Automobiles ⇨244(26)

Evidence that owner of automobile which struck pedestrian gave use of it to her daughter, who managed apartment for her and who gave driver of automobile at time of accident, who was with her mother's knowledge employed by her around apartment, authority to use it while making repairs thereon, *held* to justify finding that driver of automobile was subagent of owner, who was liable for negligent acts of driver when testing out automobile after making repairs (Civ. Code, § 2349, subd. 4).

4. Damages ⇨132(6)

\$10,000 *held* not excessive for injuries sustained by man 66 years of age whose earnings were small, where he was unconscious for number of days and his leg was fractured into fragments, and one leg was left permanently shorter than other.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Axel Malmstrom against M. H. Bridges and others. From judgment for plaintiff, named defendant appeals.

Affirmed.

Myrick & Deering and Scott, of San Francisco, for appellant.

James F. Brennan and Walter McGovern, both of San Francisco, for respondent.

TUTTLE, Justice pro tem.

By this action plaintiff, a pedestrian, recovered judgment through a jury for \$10,000 on account of personal injuries received when he was struck by an automobile. Defendant Bridges appeals from such judgment.

At the time of the accident, which happened in San Francisco, appellant was residing in Eureka, Cal. She owned an apartment house in the former city, which she paid her daughter, Mrs. Holliday, to manage. Appellant purchased an automobile for the use of her daughter in San Francisco. At the apartment house Mrs. Holliday employed one Hawley to do odd jobs about the place. Appellant testified that her daughter was "general supervisor and manager of the business down there," and that the latter was in "complete charge" and "had the authority to hire anybody under those conditions." Appellant knew that her daughter was employing Hawley. She further testified that "I did not ever ask Mr. Hawley or direct him to do anything when I was down there. She (meaning Mrs. Holliday) takes care of that."

The automobile required some repairs. Hawley had some experience in that work, though not while working at the apartment house. He testified that his work consisted of everything to be done about an apartment house, repairing or helping with certain things, "if there was anything broke I repaired it." Mrs. Holliday wanted the car repaired so that she could take a trip. She told Hawley to fix it, and gave him the key to the automobile. The latter, in making the repairs, secured the services of a friend, and this was known to Mrs. Holliday. After such repairs had been made, Hawley drove the car to test it out, and while thus driving he drove into a safety zone and struck plaintiff, inflicting the injuries for which compensation is sought.

Appellant's chief contention is that the evidence is insufficient to sustain the verdict, in that the relationship of principal and agent did not exist between appellant and Hawley, and that the latter was not the servant or employee of appellant. It is further contended that at the time of the accident Hawley was not acting within the

scope of his employment. Defendant Hawley defaulted; his negligence is therefore conceded, and that question is not before us. The sole question is the liability of the owner of the car, defendant Bridges. As the recovery is in excess of the liability as fixed by section 1714¼ of the Civil Code, we may presume that the verdict was given under the doctrine of respondeat superior, or principal and agent. *Daniel v. Jones*, 140 Cal. App. 145, 35 P.(2d) 198. Furthermore, an examination of the record, including all the instructions, indicates clearly that the case was not tried upon the theory of a recovery under the statute mentioned, but upon the theory of respondeat superior or principal and agent.

[1-3] Turning to the evidence in the case, so far as the relations between Mrs. Holliday and Hawley are concerned, the factual structure is almost identical with the situation in *Dierks v. Newsom*, 49 Cal. App. 789, 194 P. 518, 520. There a student in the high school was driving the automobile of his father to the high school for the purpose of repairing the same, and the accident occurred while the student was on his way to the high school. In upholding a judgment against the father, the court said: "The plaintiff made out a prima facie case against the appellant when he showed that the auto causing the injury by the negligent manner of its operation belonged to the appellant." In other decisions upon the same question, the courts have taken a similar view that, when the fact of ownership is established, the court or jury may draw the inference that the party driving the automobile was acting as the agent of the owner, and that the driver was acting within the general scope of his authority to such an extent as to bind his principal. *McWhirter v. Fuller*, 35 Cal. App. 288, 170 P. 417; *Grantham v. Ordway*, 40 Cal. App. 758, 182 P. 73; *Randolph v. Hunt*, 41 Cal. App. 739, 183 P. 358; *Fahey v. Madden*, 56 Cal. App. 593, 206 P. 128; *Perry v. A. Paladini, Inc.*, 89 Cal. App. 275, 264 P. 580; *Lemka v. Nauman*, 103 Cal. App. 757, 284 P. 1062; *Ransford v. Ainsworth*, 196 Cal. 279, 237 P. 747; *Poncino v. Reid-Murdoch & Co.*, 212 Cal. 325, 298 P. 818, citing the *Dierks Case* as authority. There is practically no evidence in the record to justify an inference to the contrary in this case. The evidence all points to the fact that express authority was given to the driver by Mrs. Holliday to take the car into his possession and repair it. There is no conflict upon this

question of fact. As to authority from the owner of the car, appellant herein, the evidence shows that she turned the car over to Mrs. Holliday for the use of the latter in San Francisco. The owner knew that Hawley was working around the apartment house, for she so testified. An agent may be held for the act of a subagent "when such delegation is specially authorized by the principal." Civ. Code, § 2349, subd. 4. "If the principal has either expressly or impliedly assented to the subagent's employment, which assent may be implied from slight circumstances, he is liable for such subagent's acts within the course of his employment." 2 Cor. Jur. p. 690, § 350. Hawley was employed to do "odd jobs" for Mrs. Holliday. We are of the opinion that there was sufficient evidence to justify a finding to the effect that Hawley was acting within the scope of his employment when, upon the express direction of Mrs. Holliday, he took the car for the purpose of making some minor repairs, and that the evidence also will uphold the implied finding that Hawley was in fact the duly authorized subagent of appellant, and that the latter was therefore liable for the damage done. Furthermore, the fact of agency might have been inferred from proof of ownership under the cases discussed above.

[4] Some fourteen instructions are quoted, and it is contended that, by considering them "as a whole," the jury was instructed in substance that it had a right to assume Hawley was the agent and servant of appellant. We do not believe this criticism is justified. These instructions fairly state the law in each instance and leave to the jury the matter of drawing any inference respecting the matter of agency.

It is contended that the damages are excessive. Plaintiff was struck and knocked some fifty feet, and was in an unconscious condition for a number of days. His left leg was fractured into fragments. The injury was not healed at the time of the trial, some eight months after the accident. The veins in his leg were injured, producing a dropsical condition. He is compelled to lift his leg to allow the blood to syphon out in order to prevent clot and gangrene. His left leg is an inch shorter than his right, and this is permanent. His ability to follow any gainful work in the future is problematical. It is true he was sixty-six years of age, and that he was actually earning only a trifling sum each day, but it may be assumed that the jury considered

all these facts and then arrived at a figure which to it seemed just and fair. Following the familiar rule, we cannot say that the award here was so grossly excessive as to shock the moral sense and raise a reasonable presumption that the jury, in reaching its verdict, was actuated by passion or prejudice. *Grant v. Los Angeles Transfer Co.*, 45 Cal. App. 731, 188 P. 294.

We have examined other points raised, but do not find any substantial merit in them.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.



8 Cal.App.2d 32

TOBY et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 10228.

District Court of Appeal, Second District,
Division 1, California.

June 25, 1935.

Rehearing Denied July 24, 1935.

Hearing Denied by Supreme Court
Aug. 22, 1935.

Judges 16(1)

Where order settling final account and setting aside decree of distribution was vacated by judge pro tempore, who derived her power from stipulation between attorney for estate and attorney for moving parties, order was void since distributees of the estate, who were real parties in interest, had not consented to her appointment, which was not, therefore, by stipulation of parties in interest as required by Constitution (Code Civ. Proc. § 473; Const. art. 6, § 5).

Petition for writ of review by Ina B. Toby, and others directed to the Superior Court in and for Los Angeles County, and Hon. Clemmence Brown, as judge thereof.

Order vacating order settling final account and setting aside decree of distribution annulled.

Samuel J. Crawford and Marshall Hickson, both of Santa Monica, for petitioners.

Crail, Shutt, Crail & Crail, of Los Angeles, for respondents.

YORK, Justice.

The petitioners, who are the children by a former marriage of the predeceased spouse of decedent Levi H. Blouch, by their verified petition seek to determine by writ of review the legality (1) of an order of respondent court vacating an order settling final account, and (2) of an order setting aside a decree of distribution in the matter of estate of Levi H. Blouch, deceased.

It appears from the record before us that the estate of decedent Levi H. Blouch consisted of cash, being proceeds from a life insurance policy, and that by the provisions of the last will of said decedent, the whole estate was devised to C. Belle Blouch, his wife, who had predeceased him, dying intestate. It also appears that decedent Levi H. Blouch left no children surviving him, but that his predeceased wife left surviving her G. Harry Brown, Claude L. Brown, Marjorie R. Betts, and Ina B. Toby, sons and daughters, and that said estate having been the community property of deceased and his predeceased spouse, it was distributed in equal shares to the sons and daughters of C. Belle Blouch, the predeceased spouse, pursuant to provisions of section 228 of the Probate Code. Decree of distribution was entered on November 21, 1934.

Under date of January 11, 1935, Frank Blouch and Mervil Blouch McLees, brothers of deceased Levi H. Blouch, moved under section 473 of the Code of Civil Procedure, to set aside the order settling final account and decree of distribution and the order allowing extraordinary attorney fees, alleging in their motion that they were nonresidents of the state of California and had "received no notice of the commencement of proceedings in said estate." Accompanying the motion is a document entitled "Objections to Petition for settlement of final account and for distribution and for allowance of extraordinary attorney fees."

The motion came on for hearing before Clemmence Brown, purportedly acting as a judge pro tempore, under date of January 17, 1935, whereupon the following order was made by her:

"Upon motion herein of Frank Blouch and Mervil B. McLees to vacate order of Nov. 21, 1934, settling final account and de-

cree of distribution and order allowing extraordinary attorney fees in the above entitled matter, coming on the 17th day of January, 1935, for hearing by the Court, notice thereof having been given, and on the proof adduced and good cause appearing therefor, it is Ordered, Adjudged and Decreed by the Court that the said orders dated Nov. 21, 1934, be and are hereby set aside, annulled and vacated; and the petition for settlement of final account and for distribution are hereby reset for February 7, 1935."

In this proceeding the petitioners attack this order as being in excess of and without the jurisdiction of the court and set out various reasons why it should be annulled. The main point raised by petitioners tending to show that the court acted in excess of its jurisdiction is:

That the Honorable Clemmence Brown acting as judge pro tem. was not a duly authorized, elected, or qualified judge of respondent court, but that she derived her power to act purely from the stipulation entered into between the attorney for the estate representing the estate and administratrix only, and the attorney for the moving parties, and that the remainder of the petitioners herein did not consent by any stipulation or agreement in writing, or otherwise, or at all, that the said Clemmence Brown should act as judge pro tem. and decide any issue or matters of fact as pertaining to them.

As to the authority of the judge pro tem., it appears, as the record before us shows, that the judge pro tem., who vacated the order settling final account and set aside the decree of distribution, was not authorized to sit as a judge pro tempore in the cause, for the reason that the stipulation appointing her was not signed by all of the parties in interest, in that the distributees under said decree of distribution had not consented to the appointment of the particular judge pro tempore to try and hear the matter which was determined by her. Section 5, article 6 of the Constitution, reads: "Upon stipulation of the parties litigant or their attorneys of record a cause in the superior court * * * may be tried by a judge pro tempore who must be a member of the bar sworn to try the cause, and who shall be empowered to act in such capacity in the cause tried before him until the final determination thereof." The attorney signing the stipulation as

"attorney for estate" was attorney only for the administratrix of the estate, and never for the distributees. As the distributees were the real parties in interest, the appointment of such judge pro tempore was void because of their failure to consent to the appointment, and the acts of such judge pro tempore were and each of them was void.

The order vacating the order settling final account and setting aside the decree of distribution is annulled.

We concur: CONREY, P. J.; HOUSER, J.



8 Cal.App.2d 181

BREITHAUP v. JAHN & BRESSI
CONST. CO.
Civ. 10273.

District Court of Appeal, Second District,
Division 2, California.
June 28, 1935.

Rehearing Denied July 24, 1935.

1. Highways 200

Where defendant was engaged in road construction work which caused rocks to roll down slope injuring plaintiff who was walking on road below, which defendant knew was used generally by public, and on which there was no construction work in process, and no warning except a "Danger—Blasting" sign 1,600 feet below place of accident, defendant held negligent in failing to give warning of danger.

2. Highways 197(3)

Where plaintiff, who was injured when struck by rocks which rolled down slope from defendant's road construction operations onto road on which she was walking, had never been at place of accident before, was not familiar with surroundings, had no knowledge or warning of construction work above road, which was not under construction and was in use by general public, and less than an hour previous to accident had walked by place of accident without warning of danger, plaintiff held not guilty of contributory negligence.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Marie Breithaupt against the Jahn & Bressi Construction Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Mills, Hunter & Dunn, of Los Angeles (Harold J. Hunter, of Los Angeles, of counsel), for appellant.

H. M. Lineman & M. C. Lineman, Benjamin Lewis, and Walter S. Coen, all of Los Angeles, for respondent.

CRAIL, Justice.

This is an action for damages for personal injuries. At the time plaintiff was injured, she was walking on a road known as the Angeles Forest road in the county of Los Angeles. On the day of the accident defendant was engaged and for six months prior thereto had been engaged in road construction work on what is known as Angeles Crest road, which latter road, at the point where the accident happened, is about 200 feet higher vertically and 300 feet distant on the line of the slope.

At the time of the accident the defendant was making a fill by dumping dirt and rocks from trucks and then leveling the material with a bulldozer. Rocks rolled down the slope when dumped from the trucks or when dislodged by the bulldozer. No warning was given on the lower road in any manner to indicate that work was being done on the Crest road.

Plaintiff and two other women had walked up the lower road and after resting awhile were walking back down the lower road when suddenly and unexpectedly rocks began rolling down the slope towards them. A large rock struck the plaintiff in the head and shoulder, causing the severe injuries complained of.

The case was tried by a judge without a jury and from a judgment in favor of the plaintiff the defendant has taken this appeal.

[1] Appellant's first contention is that the evidence fails to show any negligence on the part of the defendant. There was evidence that the lower road was generally used by the public, and that the defendant had full knowledge of the general use which was made of it. No construction work was being done upon the lower road and there was nothing in the appearance of that road to indicate to persons using it that any danger existed. There was evidence that when the work was first

started a chain was put across the road about 1,600 feet from and below the place of the accident, and that after about two weeks this chain was let down and remained down thereafter. The only sign placed by the defendant on or near the lower road was the "Danger, Blasting" sign which was about 1,600 feet below the place of the accident. The evidence further shows that when blasting was being done the defendants had flagmen on the lower road protecting the public against danger. The work which the defendant was doing on the day of the accident created similar dangers by casting rocks onto the lower road, but there were no flagmen on that day.

All of this evidence tends to support plaintiff's contention that the defendant by some mistake or omission failed on the day of the accident to give any warning to those using the lower road and that the defendant was not using due care at the time.

The dumping or dislodging of rocks in such manner that they will roll with great force down a steep slope onto a roadway may be necessary on occasion. But it is obviously very dangerous to people using the roadway, and the person so dumping should use at least ordinary care not to injure people on the roadway. Whether or not in this instance the defendant used such care was for the trial court to determine under all of the facts and circumstances in evidence.

[2] Appellant also urges that plaintiff was guilty of contributory negligence as a matter of law. Contributory negligence is an affirmative defense and in this instance the burden of proving it was on the defendant. Ordinarily, the question of contributory negligence is solely within the province of the fact finder. We should not disturb its finding in this regard if there is any substantial evidence to support it.

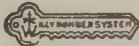
Upon examining the transcript, we find evidence tending to show that before the day of the accident plaintiff had never been at the place where the injury occurred and was not familiar with the surroundings; that there was nothing on the lower road to indicate that the Crest road above was under construction and that plaintiff did not know that such was the fact; that she had no knowledge of the danger; that the only signs which warned of danger were 1,600 feet down the road

and that they made no mention of the upper road; that the road on which plaintiff was walking was not under construction or repair; that it was in use by the general public; that plaintiff saw automobiles and pedestrians using it on the day of the accident; and that plaintiff had walked up the road by the place where the accident happened without mishap or any warning of possible danger less than an hour before the accident happened. Under such circumstances, as a reasonably prudent person, she might ordinarily assume that the road would be safe to walk upon. This case presents a very different situation from one where a person is injured on a highway which is under construction and closed to travel. The danger in the instant case was unforeseen by the plaintiff and was due entirely to the manner in which the defendant was conducting its work on another road, separate and distinct from the one on which plaintiff was walking. The finding of the trial court that plaintiff was not guilty of contributory negligence should not be disturbed.

The appellant makes nineteen assignments of error, but argues only the two disposed of hereinabove. The record discloses that the case was carefully and fairly tried. We find no prejudicial error.

The judgment is affirmed.

We concur: STEPHENS, P. J.;
FRICKE, Justice pro tem.



7 Cal.App.2d 693

PARKER et al. v. AUSCHWITZ.

Civ. 5212.

District Court of Appeal, Third District,
California.

June 20, 1935.

1. Automobiles ⇨146

Motorist has duty to use all precaution necessary to prevent injury, and must not operate vehicle under circumstances that would endanger life, limb, or property of another (St. 1931, p. 2120, § 113 (a).

2. Automobiles ⇨242(3)

Where plaintiff testified that she saw defendant's truck at top of hill in middle of road and that when it came into full view it was on left side of road in violation of statute, defendant had burden of excusing or justifying his position on highway (St. 1931, p. 2124, § 122).

3. Automobiles ⇨244(42)

In action for injuries resulting from collision with truck which had skidded on icy road so as to block greater portion thereof, evidence held to sustain finding that plaintiff was not negligent or careless in driving to left of traveled portion of highway.

4. Automobiles ⇨244(57)

Plaintiff motorist, on seeing defendant's truck across road in front of her and seeing several avenues of escape from collision, was not guilty of negligence as matter of law because she took only apparently open course which resulted in collision.

5. Appeal and error ⇨1011(1)

Trial court's finding based on conflicting evidence will not be disturbed on appeal.

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Action by Louise Parker, a minor, by L. G. Parker, her guardian ad litem, and others, against Ed Auschwitz. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Hale McCowen, Jr., and H. L. Preston, both of Ukiah, for appellant.

H. G. Crawford, of Lakeport, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment against defendant in five cases consolidated in one action for the purpose of trial. All of the actions involve the same automobile collision, four of them being for personal injuries suffered by the minor children of L. G. Parker, their guardian ad litem, and one action by L. G. Parker for medical and hospital services furnished for the minors.

The collision out of which these actions arose occurred about 9:30 o'clock on the morning of a November day near the foot of "Rocky Grade" in Lake county. This grade was approximately 350 feet long, descending from the south toward the north and ranging in degrees of incline from 5 to 12

per cent. The roadway was improved with an oiled surface from 15 to 18 feet in width with graveled shoulders on each side, the entire width of the road not exceeding 25 feet. Throughout the entire course of the grade the road was flanked on both sides by rocks and debris and on the westerly side by trees and brush.

Appellant Auschwitz was proceeding northerly in a model AA Ford truck, geared with three speeds forward, and reverse, and with dual rear wheels. The truck was loaded with about one-third of a normal load of lumber, which extended beyond the bed of the truck, making a total over-all length of truck and lumber approximately 23 feet.

When appellant reached the top of the grade he stopped his truck and shifted from high gear to the next lower gear. He did not disengage the clutch nor shut off the motor of his truck nor apply his brakes. After he had proceeded 30 to 50 feet down the grade, the rear end of the truck slipped to the left, throwing the car out of control, and it then slid or skidded sidewise toward the left or western side of the road and forward a distance of approximately 250 feet, blocking the entire traversable portion of the road to the point of collision hereinafter mentioned. About the time appellant reached the crest of the hill, Louise Parker, referred to herein as plaintiff, then about sixteen years of age, was driving a Pontiac sedan, southerly along the highway and approaching the foot of the grade. At about that point plaintiff first saw appellant as he stopped at the top of the grade approximately in the center of the highway. She had as her passengers three younger sisters and a small cousin, who were on their way to Sunday school. Plaintiff continued to approach appellant, and when within approximately 25 feet of the truck she saw for the first time that the rear end of the truck was on the left side of the road. She then drove her car toward an open space to the right of the truck on her left hand in an attempt to avoid the collision, but as she reached a point about opposite the truck, it suddenly straightened out, resulting in a collision between the two vehicles.

It appeared from the evidence in the case there was a slight curve in the road at approximately where the collision took place and that the angle at which the truck was proceeding down the grade could not have been determined by the driver of the Parker car prior to the time she reached the point where she attempted to drive her car toward the open space at the side of the road.

The court found that the defendant was negligent, that the plaintiff was not negligent, and that defendant's negligence was the proximate cause of the injuries. It is the contention of appellant that none of these findings was supported by the evidence and that the sole cause of the collision was the negligence of plaintiff.

Appellant testified that he did not shut off the motor and apply his brakes, but shifted into second gear and started down the grade. He also testified that the roadway was covered with ice at the time he started his truck from the crest of the hill to proceed downward but he did not observe that fact until the truck started to skid.

Plaintiff testified she saw the truck at the top of the grade before it started on its downward course. It does not appear there was anything to obstruct the view of appellant, and, therefore, if appellant had also looked down the grade, he must have seen the Pontiac car when he was stopped at the top of the grade, and must also have seen the condition of the road, because to look is to see. *Chrissinger v. S. P. Co.*, 169 Cal. 619, 149 P. 175; *Zibbell v. S. P. Co.*, 160 Cal. 237, 116 P. 513.

[1] It was the duty of appellant to use all precaution necessary to prevent an injury. He saw or should have seen the condition of the road, the pitch of the grade, and the ice or frost upon the surface. He was in duty bound at all times to operate his truck, having due regard for the traffic, surface and width of the highway, and must not operate it under circumstances that would endanger the life, limb, or property of another. Section 113, subd. (a), California Vehicle Act (St. 1923, p. 553, as amended by St. 1931, p. 2120). As he paused at the crest of the grade he knew he was about to descend a grade varying in steepness from 5 to 12 per cent. of incline, in a truck without chains, with a load extending several feet beyond the body of the truck, that the surface of the roadway was slippery, that a sedan was approaching up the grade, that his truck was beyond the right of the center of the roadway, and that he had not put the truck in compound low.

[2, 3] It was also testified by plaintiff that when she saw the car at the crest of the grade it was approximately in the center of the road and when it finally came into full view it was then on the left or wrong side of the road. This was of itself a violation of section 122 of the California Vehicle Act (St. 1923 p. 557, as amended by St. 1931, p.

2124), which provides that the driver of a vehicle upon a highway of sufficient width shall drive upon the right half of the highway. The burden therefore rested upon appellant to excuse or justify his position upon the highway. This he attempted to do by showing the truck skidded, and while the mere skidding of an automobile is not necessarily negligence (Smith v. Hollander, 85 Cal. App. 535, 259 P. 958, 58 A. L. R. 268; Lambert v. Eastern Mass., etc., Co., 240 Mass. 495, 134 N. E. 340, 22 A. L. R. 1291), the burden of establishing justification is on appellant. The court in its finding found that plaintiff was not negligent or careless in the operation of the sedan; the finding being that there was a bend in the road at approximately where the collision took place and that the angle at which the truck was proceeding down the grade could not have been ascertained by plaintiff prior to the time when she reached the point where she turned her car toward an open space on the east side of the road and that the last clear chance and opportunity for safety of plaintiff lay in an attempt to drive said sedan into an open area entirely out of and to the left of the traveled portion of the roadway on the grade. This finding is amply supported by the testimony of plaintiff who fixed the location of the respective vehicles at their various points as they approached and also described the condition of the highway with reference to rocks and obstructions upon the sides and the gradual curve in the highway itself.

[4, 5] The evidence discloses that plaintiff had a choice of courses to follow upon seeing the approaching danger. She could have stopped her car; she could have turned out of the traveled portion of the highway to the right as claimed by appellant, although such a course was impractical due to rocks and trees along the road; she could have driven to the left of the traveled portion of the road as she attempted to do; or she might have increased the speed in an attempt to pass the approaching truck. Plaintiff had a right to follow either or any of the courses open to her in an endeavor to avoid the collision and she cannot be held negligent because she chose the course she did, even admitting it was wrong. Olsen v. J. J. Jacobs Motor Co., 99 Cal. App. 423, 278 P. 1051; Miner v. Dabney-Johnson Oil Corp. (Cal. App.) 22 P.(2d) 265. It appears, however, that if she attempted to pass the approaching truck to her right, she was bound to be hit. If she turned her car off the road to the right, she would strike trees and boul-

ders which would prevent her from escaping contact with the approaching truck. If she stopped in her course, she would be hit because the truck came down the grade at an angle of 45 degrees with a load of lumber occupying the entire roadway. The only course apparently open was the one which she attempted to take and that was the one to drive to her left and into an excavation into the side of the road. We cannot see, under the circumstances, that she could have been held to be negligent, nor can we declare her guilty of negligence as a matter of law. It is quite apparent the finding of the trial court was based upon conflicting evidence, and in accordance with the well-established rules of appellate practice those findings will not be here disturbed.

For the reason given, the judgment should be affirmed, and it is so ordered.

We concur: PLUMMER, J.; THOMPSON, J.



7 Cal.App.2d 755

Paul BERNHARD, Plaintiff and Respondent,
v. Ed AUSCHWITZ, Defendant and
Appellant.
Civ. 5211.

District Court of Appeal, Third District,
California.

June 20, 1935.

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Hale McCowen, Jr., and H. L. Preston, both of Ukiah, for appellant.

Sandford, Burger & Barry, of San Francisco, for respondent.

PER CURIAM.

This is an appeal from a judgment entered by the superior court of Lake county, against the defendant in an action for damages to an automobile, brought by the assignee of the insurer of the car to whom the claim had come by subrogation.

The car here in question was the sedan involved in the collision described in the case of Parker v. Auschwitz, 7 Cal. App. (2d) 693, 47 P.(2d) 341, and the right of the action to recover is based upon the law and the facts discussed in that case.

It is unnecessary to again review the authorities cited.

For the reasons given in the case of *Parker v. Auschwitz*, supra, the judgment is affirmed.



In re CRANE'S ESTATE. *

CRANE v. CRANE.

Civ. 10380.

**District Court of Appeal, Second District,
Division 2, California.**

June 29, 1935.

**Hearing Granted by Supreme Court
Aug. 26, 1935.**

1. Wills ☞194

Property settlement agreement between testator and wife wherein each agreed not to contest probate of other's will, interfere with other's property rights therein agreed, assert any interest as heir of the other, or assert any right to administer other's estate, *held* not waiver of right of wife to be legatee of testator if husband should include her as such in will.

2. Wills ☞78, 79, 481

Will is ambulatory in nature and becomes an effective act upon death of maker.

3. Wills ☞764

Property settlement agreement between testator and wife wherein each agreed not to contest probate of other's will, interfere with property rights therein agreed, assert any interest as heir of other, or assert any right to administer other's estate, *held* not ademption of legacy in favor of wife.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Proceedings in the matter of the estate of Emmett C. Crane, deceased, by Kathryn F. Crane against Burton Briggs Crane, as executor of the last will of Emmett C. Crane, objecting to order of final distribution. From an adverse decree, objector appeals.

Reversed, with directions.

Clarke & Bowker, Don G. Bowker, and Robert M. Clarke, all of Los Angeles, for appellant.

Burton Briggs Crane, of Los Angeles, in pro. per.

CRAIL, Justice.

This is an appeal from an order in probate for the final distribution of the estate of the above-named decedent. By the terms of the decedent's will, the appellant, who is the surviving widow of the decedent, was bequeathed the sum of "one thousand dollars in money, or value from residue interests, for every year or major fraction thereof of our married life." The trial court decreed that the widow was not entitled to take the bequest, for the reason that she had entered into the property settlement agreement hereafter referred to, and it is from this ruling the appeal is taken.

The parties were married on October 21, 1925. The will was made on November 4, 1926. The parties separated January 21, 1927, and they entered into the property settlement agreement February 21, 1927. They resumed marital relationship on January 1, 1928, and again separated March 7, 1928. The date of decedent's death was June 26, 1929. The will was an holographic will.

[1, 2] The pertinent parts of the property settlement agreement are as follows: "It is further expressly covenanted and agreed that neither of the parties hereto will in any way or manner contest or oppose the probate of the other's will, whether heretofore or hereafter made, or interfere with the other, his or her heirs or assigns, in the exercise of the rights of property herein agreed to; that neither of them will at any time hereafter assert any right, interest or title as heirs at law of the other or as against the estate of the other, and all claim or right as surviving husband or wife, and all right to contest or oppose the last will of the other is hereby expressly waived, together with all right to administer, or to apply for letters of administration, or letters of administration with the will annexed, upon the estate of the other. * * * It is the true intent and purpose of this agreement that the parties hereto have settled and forever adjusted, and that they do hereby settle and forever adjust, by and between themselves, all present and future property rights of every kind and nature, whether community or separate, wheresoever the same is or may be located, and all other rights and claims which either may have or claim to have against the other, so far as their property rights are concerned, and in addition thereto that the said parties hereto have settled and adjusted, and do hereby

☞For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 57 P.2d 476.

settle and adjust, and forever determine, all of their respective rights to, of and in any inheritance the one from the other, respectively, or in or to the estate of either."

The trial court made several findings to the general effect that the appellant did "waive, relinquish and quitclaim to decedent's estate any devise or bequest made or provided for her in any then existing will of the decedent." The respondent does not contend that the agreement revokes the prior will, but contends that "such agreement finally settles and determines not only their existing, but also their future, marital rights * * * including their respective rights in and to the estate of the other upon death."

At the outset, in construing the contract it should be borne in mind that the testator could have revoked the will forthwith or at any time before his death, and also that he could have made a new will in which the appellant would not have been included as one of the legatees, and that the testator needed no agreement from the appellant waiving her right to be a legatee under his will. A reading of the agreement makes clear that the parties were not contracting with regard to the appellant's right to be a legatee. She had no such right. Why should the parties needlessly bind themselves against voluntarily bequeathing property to the other or from accepting property voluntarily bequeathed by the other, if the other should wish to so bequeath his property? The decedent had nearly three years, after making the agreement, in which he could have changed his will, if he had so desired. For reasons sufficient to himself he did not make such change. A will is ambulatory in nature and becomes an effective act upon the death of the maker. The retention of a will in the possession of its maker is a continuing expression of his wish that in case of death his estate be distributed as therein set forth. When the decedent died, he held among his effects this written request that there be given to his wife the bequest as above set forth.

The agreement upon which respondent relies is an ordinary property settlement agreement, and the only reference to a will is as follows: " * * * Neither of the parties hereto will in any way or manner contest or oppose the probate of the other's will, whether heretofore or hereafter made," and "all right to contest or oppose the last will of the other." Not one word is said in

the agreement about appellant's rights as a legatee.

It is true that the appellant waives all her rights arising out of the marital relation, and it is true also that she waives her rights as an heir, but rights as a legatee are not in any sense included in such rights, and it is only as legatee that she appears herein. Appellant did not waive her right to be a legatee if decedent should desire to include her among those to share his bounty. Neither did decedent foreclose himself from leaving her a small bequest in the will. Estate of Maddux, 138 Cal. App. 430, 32 P.(2d) 392.

[3] There is no merit in respondent's contention that the agreement constituted an ademption of the legacy in appellant's favor under the decedent's then existing will. The rule of ademption has no relevancy to the facts before us.

The words "our married life" are construed to mean the period from the marriage of the parties until the death of decedent.

The order is reversed, and the cause remanded, with directions to amend the decree of distribution by including an order of distribution to the appellant of the bequest made to her in the will.

We concur: STEPHENS, P. J.;
FRICKE, Justice pro tem.



KIRSCHBAUM v. McCARTHY.*
Civ. 9263.

District Court of Appeal, First District,
Division 1, California.
June 19, 1935.

Hearing Granted by Supreme Court
Aug. 16, 1935.

1. Automobiles ☞244(11)

In action for injuries caused by automobile collision at street intersection, evidence held to support conclusion that eastbound plaintiff entered intersection at time when she had right of way over southbound defendant (St. 1923, p. 517, as amended).

2. Automobiles ☞244(11)

In automobile accident case, evidence that southbound defendant swung over to east side of street in passing around rear end of westbound street car and struck east-

bound plaintiff motorist on left side, that collision occurred in southeasterly quarter of intersection, and that plaintiff was not traveling at unlawful speed, *held* to support judgment for plaintiff.

3. Trial ☞296(4, 5)

In automobile accident case, instruction that eastbound plaintiff had right to assume that person driving south on intersecting street would keep on west side of street while crossing intersection and that no vehicle would approach her from left at time when her car was beyond and east of medial line of intersecting street *held* proper, when considered with other instructions and with circumstances that accident occurred in southeasterly quarter of intersection.

4. Appeal and error ☞981

New trial ☞99

Granting of new trial on ground of newly discovered evidence is discretionary action with trial court, which will not be disturbed on appeal unless abuse of discretion appears.

5. New trial ☞99

New trial on ground of newly discovered evidence should not be granted where moving party has not shown due diligence in discovering and producing new evidence, nor where evidence is merely cumulative, nor unless it is of such character as to indicate it will render different result on new trial.

6. New trial ☞102(3)

In automobile accident case, defendant *held* not entitled to new trial on ground of newly discovered evidence where first witness, plaintiff's passenger, was mentioned by plaintiff's counsel in opening statement and defendant had notice of character and importance of her testimony, where defendant knew before trial that second witness, a physician, had been attending plaintiff and where third witness' testimony was shown by affidavits to be too doubtful to justify reversal of trial court's ruling.

7. Damages ☞132(3)

\$50,000 for head injury not resulting in skull fracture and in injury to vestibular nerve affecting plaintiff's equilibrium *held* excessive and was reduced to \$25,000.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Caroline Kirschbaum against P. H. McCarthy, Jr., administrator with the will annexed of the estate of P. H.

McCarthy, deceased. Judgment for plaintiff, and defendant appeals.

Modified and affirmed.

Myrick & Deering and Scott, of San Francisco, for appellant.

J. H. Sapiro, E. V. McKenzie, and C. H. Sooy, all of San Francisco, for respondent.

JAMES, Justice pro tem.

This is an appeal from a judgment on a verdict rendered in the court below in favor of the plaintiff for the sum of \$50,000, for personal injuries received by her in a collision between a Ford automobile driven by her and a Duesenberg automobile driven by the defendant's testator. The collision occurred at the intersection of Cole and Hayes streets, in the city and county of San Francisco, about 10:30 a. m. on June 26, 1931. The grounds on which appellant relies for a reversal of the judgment will be dealt with in the order of their presentation, and such facts as appear to be pertinent to a determination of such questions will be given as the occasion for their statement arises.

1. Appellant asserts the evidence shows, without conflict, that the Duesenberg first entered the intersection and had proceeded more than halfway across the intersecting street when the Ford entered the intersection at a high rate of speed and drove directly into the path of the Duesenberg. We assume from this assertion that it is appellant's contention the evidence fails to establish any negligence on the part of the driver of the Duesenberg, or that it does establish, as a matter of law, the existence of contributory negligence on the part of the driver of the Ford. In either case the verdict would not be sustained. The effect of the verdict of the jury in favor of the plaintiff was, of course, a negation of both contentions. As the finding of a jury or of a trial court on a question of fact will not be disturbed by this court if there is any substantial evidence adduced to support it, our present task is to ascertain what evidentiary basis there is for these implied findings.

The two intersecting streets meet at right angles. Cole street runs generally north and south, while Hayes street has a proximate easterly and westerly direction. They are each approximately 40 feet wide from curb to curb. On Hayes street are

two lines of street car rails in the center thereof, occupying a total of 15 feet 7 inches of the width of that street. During the brief space of time immediately preceding the collision, a street car was moving slowly along the northerly tracks, in a westerly direction, across the intersection, while the Duesenberg was traveling southerly on Cole street, to the north of the intersection, and some space to the west of the center line of that street. This automobile entered the intersection, passed behind, or to the east of the rear of, the street car, and struck the Ford on the latter's left, or northerly side, at a point somewhere south of the center line of Hayes street. From this statement of the situation it becomes at once apparent that the question of which automobile entered the intersection first, if not the controlling factor, is at least of primary importance in the determination of the issue presently under consideration. By the provisions of the California Vehicle Act in effect at the time of this collision (St. 1923, p. 517, as amended), a vehicle first entering an intersection has right of way over one subsequently entering; and, when both enter at the same time, the vehicle to the right has the right of way. As the Ford entered the intersection in question to the right of the Duesenberg, if both cars entered simultaneously, the Ford would have the right of way.

[1] The testimony of two witnesses only is important in determining this question. McCarthy, the driver of the Duesenberg, did not see the Ford until within a few feet of the point of the collision, and hence did not see it enter the intersection, but appellant argues, from other matters testified to by the witness, that it would have been impossible for the Ford to have entered the intersection until after the Duesenberg had done so. If full credit be given his testimony, such a conclusion could properly be drawn therefrom, but obviously the jury did not so consider it. The witness C. R. Pollard was the motorman on the street car which crossed the intersection just ahead of the Duesenberg. While he did not see either vehicle in the act of entering the intersection, he testified to his observations of the positions, directions, speeds, and distances of each vehicle, as well as that of the street car he was operating, at the time when the collision appeared probable, and from these conditions gave his conclusion, both orally on the witness stand, and in a writ-

ten statement introduced in evidence (defendant's exhibit H), that the Ford entered the intersection first. Without a detailed relation of the testimony of this witness, suffice it to say that his conclusion, based upon his observations above referred to, appear to us to be much more persuasive than does the conclusion to the contrary drawn from the testimony of the witness McCarthy. In our opinion, the evidence amply supports the conclusion that the Ford entered the intersection at a point of time when it had the right of way over the Duesenberg.

[2] Several other matters in connection with this ground of appeal may well be mentioned here. The driver of the Duesenberg asserted that he never passed over the center line of Cole street, but was at all times on his right, or the westerly side of that line, and that the collision occurred while his car was in that position. The weight of evidence, however, appears to be that he swerved to the left or easterly side of the center line of Cole street, in passing the rear of the street car, and that the collision occurred somewhere in the southeasterly quarter of the intersection. The speed of the Ford as an element in the situation does not seem to have received much attention. However, there is sufficient evidence in the record to justify the belief that that car was not traveling at any excessive or unlawful rate of speed at any time, at least within the intersection. From the foregoing observations, it follows that it is our opinion the evidence in this case is sufficient to sustain the verdict of the jury in favor of the plaintiff.

[3] 2. Appellant next challenges instruction X given to the jury by the trial judge. It is in these words: "You are instructed that plaintiff had a right to assume that any person driving in a southerly direction on Cole street would drive on the westerly side of said Cole street across the intersection, and that no vehicle would approach her from the left at a time when her car was beyond and to the east of the medial line of Cole street. This, of course, does not mean that any driver of an automobile has a right to proceed blindly and in disregard of danger which is obvious or which, by the exercise of ordinary care could be obvious, because it is at all times the duty of each person to exercise ordinary care; and this is true even though the negligence of an-

other person caused the danger. It is for you to determine, of course, as I have repeatedly advised you, the facts of the case. It is for you to say whether the car of the plaintiff passed the medial line at the time of the asserted collision." We find no error in the giving of this instruction. When considered in connection with the other instructions given, and the asserted circumstances of the case, it correctly states the law.

[4-6] 3. Appellant's motion for a new trial in the court below, there denied, was based in part on the ground of newly discovered evidence. It is here contended that the lower court was in error in denying the motion made on that ground. The witnesses from whom the new evidence was proposed to be elicited were Mrs. Fambrini, Dr. Burns, and Angelo Cabano. The granting of a new trial upon the ground of newly discovered evidence is largely discretionary in the trial court, and the action of that court will not be disturbed on appeal, unless a case of abuse of discretion is clearly disclosed by the record. It should not be granted where the moving party has not shown due diligence in discovering and producing the new evidence, nor where the same is merely cumulative, nor unless it is of such a character as to indicate that it will render a different result probable on a new trial of the action. Tested by these rules, we will examine this point made for reversal. The trial below began on December 13, 1932, and did not conclude until the evening of December 30, 1932. On the day the trial opened, Mr. McKenzie made an opening statement in behalf of plaintiff in which he stated in part: "We propose to show that at or about quarter after ten on June 26th Miss Kirschbaum left St. Mary's Hospital to make certain rounds in the course of her duties, and at that time one of the Sisters asked her to take home a patient, a clinical patient, who was there present, and that lady's name is Mrs. Fambrini. * * * Miss Kirschbaum drove the car and Mrs. Fambrini got into the car. They proceeded down Hayes Street, that is, towards the Ferry. They drove along Hayes Street on the southerly side of Hayes Street down in this direction, and traversed the projected property line of Cole Street. * * *" From this statement it is apparent defendant had full notice, several weeks ahead of the close of the trial, of the existence of this witness, and of the character and importance

of her testimony. Under these circumstances, we are not impressed with the diligence shown. It may be true, as contended, that defendant relied on her being called by the plaintiff, but we suggest that counsel should not, in presenting their case, rely too much on a prediction of what their opponent may do.

The witness Burns was a practicing physician of San Francisco, where the trial was held, and could have been called by defendant at any time. His attendance on the plaintiff was known to defendant before the trial began.

There were two conflicting affidavits presented on the motion for a new trial, respecting testimony expected to be given by the witness Cabano. Not only is the diligence shown in his discovery doubtful but the value and character of the testimony which he might reasonably be expected to give, in the light of these two affidavits, is too doubtful to justify the reversal of the lower court's ruling on this motion.

4. In appellant's reply brief, exception is taken to the giving of instruction V. This instruction correctly states the law and does not invade the province of the jury.

[7] 5. The remaining point made on this appeal is that the amount of the verdict is so excessive as to appear to have been rendered under the influence of passion or prejudice. Upon this subject there was medical expert testimony on the part of plaintiff to show that she suffered an injury to her head, resulting in pains occurring at intervals, and that she walked with some difficulty; that in consequence of this cerebral injury she is unable to perform her duties as a nurse, and there is a probability that this inability will continue; that this condition is due to the vestibular or eighth nerve, which affects equilibrium. Defendant attempted to show at the trial that plaintiff was malingering. He produced testimony to show that her cerebral injury could not be classed as severe as she had not suffered a fracture, and that she grossly exaggerated her condition; that her complaints had no medical background; that a patient usually recovers from her character of injury. However, accepting the testimony of plaintiff's medical witnesses to be true, and giving it its full value, the damages awarded are so excessive as to justify but one conclusion; namely, that

they were given under the influence of passion or prejudice, as the evidence cannot support a verdict for \$50,000.

Conceding that plaintiff suffered the cerebral injury alleged, we are of the opinion that the sum of \$25,000 is a reasonable amount to fully compensate her for such injuries. The judgment is therefore modified by reducing the amount to the sum of \$25,000, and, as so modified, it is affirmed. *Hoffman v. Southern Pacific Co.*, 215 Cal. 454, 11 P.(2d) 387.

We concur: TYLER, P. J.; CASHIN, J.



8 Cal.App.2d 200

PEOPLE v. WILSON.

Cr. 2736.

District Court of Appeal, Second District,
Division 2, California.

June 29, 1935.

Hearing Denied by Supreme Court

July 29, 1935.

1. Rape ☞51(4)

Evidence held to sustain conviction for rape by force and violence as against contention that prosecutrix consented.

2. Criminal law ☞1144(15)

Appellate court must assume that jury followed judge's instruction to disregard certain improper and irrelevant questions and answer thereto elicited without objection.

3. Criminal law ☞978(3)

In rape prosecution, denying new trial for newly discovered corroborative evidence held not error, where it did not appear why evidence was not produced at trial.

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Harvey Wilson was convicted of rape by force and violence and of a violation of Penal Code, § 288a, relating to sex perversions, and attempted violation of section 286, relating to the crime against nature, and he appeals.

Affirmed.

W. Thomas Davis, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for the People.

WILSON, Justice pro tem.

[1] The appellant and a codefendant were charged in three counts with the crime of rape by force and violence, with violation of section 288a of the Penal Code, and with attempted violation of section 286. Appellant was convicted of the first and third offenses, and of attempting to commit the second. His codefendant was acquitted of all three charges.

Two points raised by the appellant, to wit, that the verdict was contrary to the evidence and that there was not sufficient evidence to sustain the conviction of rape, may be considered together. A statement of the revolting testimony would serve no purpose. It is ample to sustain the verdict. The appellant admitted the act of sexual intercourse, but asserted that the prosecutrix consented thereto. Her evidence as to force and violence is corroborated by her having jumped from a window completely nude, by the evidence of two lay witnesses who saw her immediately thereafter and to whom she made complaint, by her hysterical condition, by the evidence of a physician who examined her within a short time after the crime was committed, and by the presence of bruises and lacerations upon her face and body. Such conflicting evidence as is in the record came from the appellant, from his codefendant who was on trial with him, and from another man who accompanied them to the apartment of the prosecutrix, but who was in an intoxicated condition. The acquittal of appellant's codefendant furnishes no reason for a reversal. The claim was not that the codefendant actually outraged the prosecutrix, but that he assisted by holding her while the several acts were committed by appellant. This is not one of the class of cases in which the acquittal of one defendant necessarily requires the acquittal of another. It would be idle to speculate concerning the reason for the verdict in favor of the codefendant. A reasonable doubt in the minds of the jurors as to whether he assisted the appellant would be sufficient answer to the query.

[2] During the trial the deputy district attorney propounded questions to the prosecutrix which did not concern the crime and which appellant asserts were asked for the purpose of exciting the sympathy of the jury. The questions were highly improper, and the trial deputy must have known they had no relevancy to the issues. Appellant's counsel made no objection to the questions, but immediately upon the apperency of their improper character the trial judge directed the deputy to cease his line of inquiry and instructed the jury to disregard the questions and the answer already given. We must assume that the jury followed the court's instruction.

[3] The motion for a new trial was made upon the ground of newly discovered evidence set forth in the affidavit of a prisoner in the county jail who had been convicted of a felony but not sentenced. The statements made in the affidavit indicate the unchastity of the prosecutrix. Inasmuch as she admitted that she was living with a man to whom she was not married, the proffered evidence would have merely corroborated her admission of immorality. Furthermore, it does not appear why the evidence was not produced at the trial.

The judgment and the order denying a new trial are affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.



8 Cal.App.2d 185

PEOPLE, by and through Department of Public Works, v. BARNES et al.

Civ. 10208.

District Court of Appeal, Second District,
Division 2, California.

June 28, 1935.

Eminent domain ☞222(5)

In proceedings for condemnation of property for highway purposes wherein at time of trial improvement had been already put in, instruction that damages must be assessed once and for all, and in assessing damages to remaining property jury should assume that plaintiff would use property taken for most detrimental and injurious use possible to which it may lawfully be put, *held* properly

refused as leaving out element of reasonableness and as permitting jurors to search for remote, uncertain, and improbable damages which might have been possible regardless of their reasonableness (Code Civ. Proc. § 1248).

Appeal from Superior Court, Santa Barbara; Atwell Westwick, Judge.

Condemnation proceedings by the People of the State of California, acting by and through the Department of Public Works, against John H. Barnes and others. From a judgment, defendants appeal.

Affirmed.

T. H. Canfield, of Santa Barbara, for appellants.

Clarence W. Morris, of San Francisco, for respondent.

CRAIL, Justice.

This is an appeal by the defendants M. B. and Gladys Roston from a judgment taking from them by condemnation proceedings a strip of land 19.82 feet by 88 feet for highway purposes and awarding severance damages for injuries to the remainder of defendants' lot. Defendants' fundamental contention is based upon the following language which was used in the case of East Bay Municipal Utility District v. City of Lodi, 120 Cal. App. 740, 8 P.(2d) 532, 541: "The law seems to be quite uniform that in eminent domain proceedings the damages must be assessed once and for all, and must include all the damages that might be inflicted by the condemning party." The defendants insist upon emphasizing the word "might" in the last part of the sentence. Following this thesis, the defendants first contend that the court erred in refusing to give to the jury an instruction to the effect that the damages should be based upon the *most injurious use* to which the property taken *might* be lawfully put.

It is important to note that in the instant case the property is being condemned for highway purposes and at the time of the trial the improvement had been already put in. The Lodi Case was a proceeding to condemn the riparian rights of the defendant in the waters of a stream. The damages were predicated upon the plaintiff's oral statements that it would not actually use all the water in the stream by the use of its dam, but that it proposed to continue to discharge above the lands of the defend-

ant a specified quantity of water flowing in the river which was sufficient for defendant's uses. However, there was nothing in the judgment which obligated it so to do and it consistently refused to so obligate itself. It was with this state of facts before it that the court used the language first quoted herein and upon which the defendants rely. A perusal of the Lodi Case makes clear that the part of the said sentence which should be emphasized is the words "once and for all" and that the word "reasonably" should be inserted before the word "inflicted." That such was the intention of the court in that case is indicated by the following quotations included in the opinion upon which that sentence was based, "damages once and for all time, based upon the most injurious use of the land *reasonably possible* to which the city might lawfully put it," and, "The general rule in condemnation proceedings is that all damages, present or prospective, that are the *natural or reasonable incident* of the improvement to be made or work to be constructed * * * must be assessed." That such is the proper interpretation is also made clear by the following summation of the matter contained in the case: "The rules which we have just stated are set forth in 20 C. J., beginning on page 765, where unaccepted promises are held insufficient as a diminution of damages (citing a number of cases), and then it is further said: 'The probability that the appropriator will not exercise, or the fact that there is no present intention of exercising to the full extent the rights acquired, should not be considered in reduction of damages where there is nothing to prevent a full exercise of such rights, since the presumption is that the appropriator will exercise his rights and use and enjoy the property taken to the full extent.' See, also, the case of *Sternes v. Sutter-Butte Canal Co.*, 61 Cal. App. 737 [747], 216 P. 66, where it was held that damages must be assessed once and for all."

The defendants, in line with their thesis, complain of the refusal to give the following instruction: "You are instructed that damages must be assessed once and for all, and that in assessing the damages, if any, to the remaining property of the defendants, you must assume that the plaintiff will use the property taken for the *most detrimental and injurious use possible* to which it may lawfully be put." The trial court instructed the jury in this regard to take into consideration all the injurious

consequences reasonably probable and all matters and conditions which might reasonably be expected to follow the location and operation of the road, and that in assessing damages all damages, present and prospective, that are natural, necessary, or reasonable incidents to the curtailment of the uses to which the land might otherwise be put must be assessed, and further instructed the jury that it must not consider a possibility that the plaintiff had no intention of exercising to the full extent the rights acquired to the property taken because there was nothing to prevent them from fully exercising the rights acquired in the property later if they so desired, and that all these factors should be taken into consideration, as no subsequent damages could ever be allowed for consequential damages. The instruction which the court refused to give leaves out of it the element of *reasonableness* and would have permitted the minds of the jurors to take a journey into an unknown realm to search for remote, uncertain and improbable damages which *might* have been possible regardless of their reasonableness.

In spite of the inadvertent omission of the word "reasonably" in the Lodi Case, section 1248 of the Code of Civil Procedure still remains the law of California in such matters. It reads in part: "What must be ascertained and assessed in condemnation suits. The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess: * * * 2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff."

This same thesis of defendants appears in the arguments in support of all their points, the contention as to each of them being that the alleged errors become reversible error because of the trial court's fundamental error, and therefore it will not be necessary to say anything additional as to these points. Certainly the judgment would not be reversed on these minor points unless the defendants were correct in their fundamental contention.

Judgment affirmed.

We concur: STEPHENS, P. J.; FRICKE, Justice pro tem.

8 Cal.App.2d 364

BROWN v. BROWN.

Civ. 9354.

District Court of Appeal, Second District,
Division 1, California.

July 10, 1935.

1. Husband and wife Ⓒ278(2)

Wife held not entitled to enforce property settlement made with her husband in contemplation that wife would obtain a divorce, which provided that husband was to make monthly payments to wife and was to keep up premiums on insurance policies for her benefit, since a contract in contemplation of divorce is in violation of policy of state.

2. Contracts Ⓒ111

Contract which was against public policy because made in contemplation of divorce held unenforceable by estoppel or because supported by sufficient consideration.

3. Contracts Ⓒ138(6)

Court will act sua sponte to refuse enforcement of contracts void as against public policy, when their invalidity becomes apparent.

Appeal from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Action by Zoe Lowe Brown against Herbert Cutler Brown. Judgment for plaintiff, and defendant appeals.

Reversed.

Ivan G. McDaniel, of Los Angeles, for appellant.

Carpenter, Babson & Fendler, of Los Angeles (Ingle Carpenter and Harold A. Fendler, both of Los Angeles, of counsel), for respondent.

SHINN, Justice pro tem.

On February 1, 1917, while they were husband and wife, a property settlement was entered into between plaintiff and defendant. By the terms of the agreement certain real and personal property was divided between the parties. The agreement provided that defendant would pay the plaintiff the sum of \$200 per month until the minor son of the parties became of age and thereafter the sum of \$125 per month during her lifetime, with the further stipulation that if plaintiff obtained a divorce and remarried, the payments to her should cease; that the defendant would keep up the premium payments upon life insurance policies upon defendant's life during the

time that there were obligations to second party unsatisfied under the terms of this instrument. It was further agreed that plaintiff should receive \$12,500 from the policies when they became payable and that the estate of defendant would make up any deficiency below that sum. It was agreed that in the event the parties were divorced defendant would pay plaintiff within five years after her remarriage the sum of \$12,500, with interest from the date of her remarriage; that the policies should be held by plaintiff as security for all moneys which might become due under the terms of the agreement, namely, said monthly payments and the sum of \$12,500 which was to be paid to plaintiff upon the above-stated conditions. Defendant paid under the agreement, over a period of years, the sum of \$19,833. He kept up the premium payments until 1930, when the policies were canceled because of the failure of defendant to pay further premiums. Plaintiff's first cause of action was for the sum of \$1,077 alleged to be due and unpaid on account of accumulated monthly installments; her second cause of action was for \$456 interest on money alleged to have been received by defendant for the use and benefit of plaintiff; the third cause of action was for the recovery of \$11,225, being the sum of \$12,500 mentioned in the agreement, less \$1,275 alleged to have been paid on account thereof, which sum it was alleged defendant had received for the use and benefit of plaintiff; the fourth cause of action was for the same amount alleged to be due on an account stated; and the fifth cause of action was for damages alleged to have been suffered by plaintiff by reason of the failure of defendant to keep the policies in force.

Defendant answered, admitting the execution of the agreement and the failure to keep the policies in effect, but substantially denying the other allegations of the complaint. Judgment went for defendant upon the first four causes of action and for the plaintiff in the sum of \$11,225 upon the fifth cause of action. Defendant's appeal is brought here upon the judgment roll alone.

The findings disclose that on May 8, 1919, plaintiff obtained a divorce from the defendant in Reno, Nev., and has not remarried. The decree made no provision for her support and did not refer to or approve the property settlement agreement. It was also found by the court that the agreement

of the defendant to pay plaintiff the stipulated monthly payments was made and "that the execution and delivery of said instrument at that time and date was conditioned upon, and in contemplation of, the thereby promoting of an immediate or forthwith dissolution of the marriage then existing between plaintiff and defendant." Accordingly, it was held that the agreement was void and unenforceable by plaintiff in so far as it obligated the defendant to make the installment payments as agreed. The judgment in plaintiff's favor for damages under the fifth cause of action was based upon a finding "that there was ample consideration for the promise of defendant to pay to the plaintiff the said sum of \$12,500 as set forth in paragraph fifth of said instrument as therein provided, and for the promise and agreement of defendant to pay the premiums upon the three policies of life insurance."

[1-3] We are of the opinion that the above findings do not support the judgment in plaintiff's favor. Where a husband and wife agree that a divorce shall be obtained by one or the other, and adjust their affairs in contemplation of a divorce by entering into a settlement conditioned thereon, of their property rights and make promises of an executory nature pertaining thereto, and such facts are established in a subsequent action on the contract, they have no right to receive the aid of the court in the enforcement of their agreement, which the law condemns as a violation of the policy of the state. If, as the court found, it was of the essence of the agreement, although not stated therein, that plaintiff should obtain a divorce from the defendant, and the promises of the defendant were made in contemplation of and to facilitate, and conditioned upon, a dissolution of the marriage, that fact bars a recovery by plaintiff in a suit based on the contract. *Newman v. Freitas*, 129 Cal. 283, 61 P. 907, 50 L. R. A. 548; *Pereira v. Pereira*, 156 Cal. 1, 103 P. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107; *Whiting v. Whiting*, 62 Cal. App. 157, 216 P. 92. The case clearly falls within this well-settled principle. The question of consideration is not material. The contract itself shows ample consideration in the mutual covenants of the parties, under which their property was divided, certain obligations were assumed, and waivers were made. But the law does not look with ap-

proval upon a contract in contravention of good morals merely because it is supported by a sufficient consideration, nor does the law allow the enforcement of contracts void against public policy through the application of the doctrine of estoppel. *Colby v. Title Ins. & Trust Co.*, 160 Cal. 632, 117 P. 913, 35 L. R. A. (N. S.) 813, Ann. Cas. 1913A, 515. The court will act sua sponte to refuse enforcement of such contracts when their invalidity becomes apparent. *Dean v. Mc Nerney*, 91 Cal. App. 206, 266 P. 975.

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.



7 Cal.App.2d 661

SWIGERT v. PACIFIC ELECTRIC RY. CO.

et al.

Clv. 9293.

District Court of Appeal, Second District,
Division 1, California.

June 19, 1935.

Rehearing Denied July 18, 1935.

Hearing Denied by Supreme Court
Aug. 16, 1935.

1. Railroads ⇨324(1)

Truck driver killed in crossing collision was required to exercise only ordinary care or such care as would have been exercised by reasonably prudent person in similar circumstances.

2. Trial ⇨178

Evidence adduced in behalf of person injured should be viewed in light most favorable to him in determining whether he was guilty of contributory negligence as matter of law.

3. Negligence ⇨136(9)

Person injured cannot be held guilty of contributory negligence as matter of law, where reasonable persons might differ as to whether he exercised care of reasonably prudent person.

4. Negligence ⇨122(1)

All men are presumed ordinarily careful in protecting themselves against possible injury.

5. Railroads ⇨328(4)

Driver on private road who stopped truck between 10 and 15 feet from nearest rail at

railroad crossing, where view of approaching trains was obstructed by orange grove, and then proceeded forward after looking and listening, held not guilty of contributory negligence as matter of law, though place at which he stopped was not the best possible place available for view of track.

6. Railroads — 348(5)

Evidence held sufficient to sustain finding of negligence of railroad company in colliding with truck at crossing on private road, where there was evidence that electric train was running downgrade at 70 miles an hour and that whistle was not sounded.

Appeal from Superior Court, Los Angeles County; Maurice T. Dooling, Jr., Judge.

Action by Lillian E. Swigert against the Pacific Electric Railway Company and another. Judgment for plaintiff, and defendant appeal.

Affirmed.

Frank Karr, E. E. Morris, C. W. Cornell, and O. O. Collins, all of Los Angeles, for appellants.

Fred F. Kelley and Vincent J. Blumberg, both of Los Angeles, for respondent.

PER CURIAM.

The defendants appeal from a judgment entered against them on the verdict of a jury fixing damages for the death of the plaintiff's husband. Appellants contend that the evidence shows the deceased to have been guilty of negligence as a matter of law.

Deceased was killed in a crossing accident on the line of the defendant railway near Glendora. At this point the defendant corporation maintains a single-track electric railway, constructed in the same manner as a steam railway in open country. The two-car train which struck the truck which the deceased was driving, was running west and the deceased was traveling on a private road from north to south, crossing the railway track at a right angle. The train was approaching him from the side of the truck on which he was sitting, and the principal controversy arises over the view which deceased had of the tracks to the east, and whether or not he looked for approaching trains at the times and places required of him.

The view of one approaching the tracks from the north was obstructed by the trees of an orange grove which at the time of the accident lay on the north of the track and on each side of the private road. It was stipulated that at a point 10 feet north of the north rail of the railway track there was an unobstructed view of a train approaching from the east for 1,600 feet; at 12 feet, a train could be seen for 500 feet to the east; at 15 feet, for 413 feet to the east; and at 20 feet the vision in that regard was reduced to 288 feet. The record shows that the deceased at the time of the accident was employed at the orange grove. He had used the crossing two or three times a day for a number of months, and there is testimony that he had stated at various times that it was a dangerous one. The accident occurred about 9 o'clock in the morning of a clear day.

As the grounds for its position that the evidence shows the deceased to have been guilty of contributory negligence as a matter of law, appellants present what they assert was the uncontradicted evidence of plaintiff's witness that the deceased stopped the truck to look for approaching cars at only one point, from which there was a view of 300 feet to the east. They insist that as the admitted facts show that at a point 10 feet from the rail the train could have been seen for 1600 feet, deceased could not choose a point where such a limited view could be obtained, knowing, as he did, the dangerous character of the crossing and that trains passed at a speed of 50 or 60 miles per hour; also, that as the deceased was only 6 feet from the front of the truck as he sat in the driver's seat, and the overhang of the train was 26 inches, it is urged that it must be apparent that he could have stopped his truck clear of the track at the point where a train was visible for 1,600 feet to the east.

But at the outset, particular attention should be directed to certain additional facts that appear in the testimony received at the trial and which, for the purpose solely of passing upon the question of contributory negligence of the driver of the truck "as a matter of law," must be accepted as literally true and unimpeachable: Immediately before the accident occurred, the car of the defendant corporation was running on a downhill grade of five per cent at a rate of 70 miles per hour, with "all brakes set." No whistle was sounded

on the train as it approached the crossing. After the accident, the car "skidded" for a distance of over 1000 feet. Although the body of the car projected 2 feet, 2 inches, beyond the rails of the track upon which the car was running, how much further, if any, than 2 feet, 2 inches, the body of the car projected by reason of swaying as it ran on a five per cent down grade at a rate of 70 miles per hour, is not disclosed by the evidence. The body of the truck with which the car collided was 16 feet long; but whether it was loaded or empty, does not appear within the evidence adduced. The outside branches of the trees of the orange grove nearest the railroad track were "a little over eleven feet—nearly twelve feet" from the north rail of the railroad track. Before attempting to cross the railroad track, the driver of the truck caused it to come to a complete stop "between ten and fifteen feet," or, as otherwise testified, "between ten and twelve feet" from the north rail of the railroad track, at which point both the driver and his passenger looked and listened for an approaching car. Although the passenger testified that at that point (wherever in fact it was) "you could see around—just about 300 feet," that, of course, was only an estimate. Also that as hereinbefore indicated, by stipulation of counsel, even if the truck was stopped at the *maximum* distance from the track, to wit, 15 feet, as testified by the witness, a car on the railroad track could have been seen by the driver of the truck at a distance of 413 feet from the place where the truck was then located. Thereafter the truck proceeded at a rate of speed of between 3 and 7 miles per hour in an attempt of its driver to cross the railroad track.

Since it is obvious that at exactly what point the truck was stopped is indeterminable, and that had it stopped at a greater distance than 12 feet from the railroad track the outer branches of the orange trees to some extent would have obscured the view of the railroad track, and since within the testimony the point of stoppage was either between 10 and 15 feet, or between 10 and 12 feet, it is fair to assume that the actual point where the truck was stopped was at no greater distance from the north rail of the railroad track than 12 feet; at which point, according to the evidence (by stipulation), a view of the track could have been had for a distance of 500 feet. Assuming that 12 feet is approximately correct, because of the fact

that the driver's seat on the truck was 6 feet from the front of the truck, it thus is clear that at that point the front of the truck was within 6 feet of the north rail of the track. However, since the "overhang" of the car of the defendant corporation was 2 feet, 2 inches, even allowing nothing for the sway (if any) of the car running at a rate of 70 miles per hour on a down grade of five per cent, if the truck had remained stationary at the point where it had stopped, it would have missed being struck by a passing car by a distance of 3 feet 10 inches only; and if the truck had actually stopped at what might be termed the "perfect" distance of 10 feet from the track, its clearance from a passing car would have been less than 2 feet, or exactly 1 foot and 10 inches.

The appellants direct attention to the fact that the care required of one about to cross a railroad track has been declared many times by the appellate courts of this state, and in that regard refer particularly to the leading case of *Griffin v. San Pedro, Los Angeles & Salt Lake R. R. Co.*, 170 Cal. 772, 151 P. 282, 283, L. R. A. 1916A, 842, wherein it is stated that "a person approaching a railway track, which is itself a warning of danger, must take advantage of every reasonable opportunity to look and listen." They then say that while still at a point of safety from passing trains, the driver of the truck could have seen a car approaching as far away as 1600 feet; and that if with full knowledge of the dangerous character of the crossing, which the evidence shows the deceased had, he chose a point to look for trains where he could see them for only 300 feet, he thereby neglected the plainest precautions for his own safety. In other words, for the reason that "a person approaching a railway track * * * must take advantage of every reasonable opportunity to look and listen" (since it was *possible* for the driver of the truck to have stopped it at a point, to wit, 10 feet from the north rail of the railroad track, where the train was visible for 1,600 feet to the east), that because of the fact that the driver of the truck stopped it between 10 and 15 feet (or about 12 feet) from the north rail of the railroad track, where he could see for a distance of only 500 feet, the said driver was guilty of contributory negligence as a matter of law.

It is thus apparent that, in effect, the controlling principle of law for which the appellants contend, is that in order that a

plaintiff in an action may escape conviction of contributory negligence in a situation such as is presented by the facts herein, it must appear not only that he stopped his automobile at a point where he had a *reasonable* view of the railroad track, but that as well it must appear that such point was the *best possible place available for that purpose*. But if it may be assumed that the truck was stopped at a distance of 12 feet from the north rail of the railroad track, at which point the driver could have seen up the track for a distance of 500 feet, at which time and place no car was visible; and that thereafter, the driver consumed an appreciable length of time in looking in the opposite direction for a possibly-approaching car, as well as in starting the truck and later in attempting to cross the railroad track, it would seem reasonable that from such facts it well may be argued that contributory negligence, as a matter of law, may not be properly attributed to the driver of the truck.

[1-3] Not only by the provisions of the statute applicable thereto, but as well by numerous judicial constructions thereof, all the care that was or could have been required of the driver of the truck was *ordinary* care, or such care as would have been exercised by a reasonably prudent person in circumstances similar to those in which the driver of the truck was placed. It should be remembered that on consideration of the question of whether a plaintiff should be adjudged to have been guilty of contributory negligence as a matter of law, the evidence adduced in his behalf should be viewed in its most favorable light to the cause of the plaintiff; and that when so viewed, if it appear that one reasonable person might differ from another or others as to whether the plaintiff had exercised the care and prudence in the premises that would have been exercised by a reasonably prudent person in similar circumstances, the inevitable legal result should be that the plaintiff could not be held to have failed to use ordinary care. General observation in a situation such as is here involved leads to the conclusion that of the thousands of drivers of automobiles, comparatively few exercise the degree of prudence that was exercised by the driver of the truck in the instant case. But without reference to such obvious fact, as hereinbefore has been suggested, the solution of the question of whether due care was exercised should be reached by a considera-

tion, not of what a *very* careful and cautious person would have done, but rather by a determination of whether what the driver of the truck did in the premises was comparatively something less than that which a person using ordinary care for his own safety and protection from injury would have done under the same or similar circumstances.

In the instant case, the following suggestive questions may not be amiss: How was the driver of the truck to learn of the location of the exact point at which he might see an approaching car at the greatest possible distance from the crossing? Must he have been able to properly operate (and actually operate) a set of surveyor's instruments for that purpose? And in some manner having ascertained that exactly 10 feet from the north rail of the railroad track was the most available and best possible point, was he obliged to carry with him a tape line, or some other "gadget" for the measure of distances, in order to correctly mark the spot? Was he required thereafter, without variation of the fraction of an inch (disregarding his possible lack of great skill in that regard) to stop his truck at exactly 10 feet from the north rail of the railroad track, or for his failure in that regard suffer the consequences of his imprudent act? Furthermore, if the driver of the truck knew that 10 feet from the north rail of the railroad track was the proper distance therefrom at which the truck should be stopped in order to obtain the best possible view of the railroad track, should the fact not be taken into consideration that in forming an *estimate* of that distance reasonable men might differ greatly one from the other or others? Again, let it be supposed that after having stopped his truck, the driver thereof realized that he had failed to stop it at a distance of exactly 10 feet from the north rail of the railroad track; was he obliged to try again and again until his stop was absolutely accurate? Or, if in his attempt to stop his truck at the 10-foot point, he overshot the mark and stopped at a point 8 feet or less from the track in which position the truck would have been struck by a passing car, in order that he be not adjudged guilty of contributory negligence as a matter of law, should he have backed his truck to the 10-foot spot?

It is apparent that in effect the rule suggested by the appellants would require not *ordinary* care on the part of a driver of an automobile, but that the application of

such a rule would demand *extraordinary* or the *highest* degree of care on his part. That such is not the law appears in the negligence case of *Alloggi v. Southern Pacific Co.*, 37 Cal. App. 72, 77, 173 P. 1117, 1119, where it is said: "The court did not err in refusing to instruct the jury that it was the duty of the plaintiff to stop, look, and listen at the most advantageous place. He was not required to look at the *most* advantageous place; for this would be putting upon him the burden of not only knowing the most advantageous point, but also of exercising the highest degree of care, while all that was required of him was ordinary care."

With reference to contributory negligence, in the case of *Seller v. Market-Street Ry.*, 139 Cal. 268, 271, 72 P. 1006, 1007, in part it was said: "* * * If the conceded facts are such that reasonable minds might differ upon the question as to whether or not one was negligent, the question is one of fact for the jury. * * *"

And in *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 229, 53 P. 651, the rule was thus expressed: "If but one conclusion can reasonably be reached from the evidence, it is a question of law for the court; but if one sensible and impartial man might decide that the plaintiff had exercised ordinary care, and another equally sensible and impartial man that he had not exercised such care, it must be left to the jury. * * * Our ideas as to what would be proper care vary according to temperament, knowledge, and experience. A party should not be held to the peculiar notions of the judge as to what would be ordinary care. That only can be regarded as a standard or rule which would be recognized or enforced by all learned and conscientious judges, or could be formulated into a rule. In the nature of things, no such common standard can be reached in cases of negligence, where reasonable men can reach opposite conclusions upon the facts."

[4, 5] The presumption is that all men are ordinarily careful in the matter of protecting themselves against possible injury to their persons. If that presumption here obtains, even a casual observer of the actions of motorists at grade crossings of public highways over railroad tracks will convince even the most skeptical of men that not one driver of an automobile in a dozen exerts the care and vigilance for his

safety that was exercised by the driver of the truck in the instant case. Nor, although the driver of the truck actually did "stop, look and listen," does the written law of this state (or probably of any state) require any such particular care. In the facts of the instant case the only proper function of this court is to determine, as a matter of law, whether in the premises the driver of the truck conducted himself with that degree of care and circumspection as would the average adult human under the same or similar circumstances. But, for its solution, primarily that problem, as a matter of fact, was one with which the jury was charged; and in the absence herein of facts which unerringly would indicate that as a matter of law the driver of the truck was guilty of contributory negligence, or that the jury was swayed by fraud practiced upon it, or that it was otherwise improperly influenced in arriving at its conclusion, this court is legally powerless to interfere. This court is unable to agree with the suggestion in substance presented by appellants to the effect that the driver of the truck was so palpably negligent that reasonable minds could not differ one from the other on the question as to whether he had acted as a reasonably prudent person would have acted in the same or similar circumstances.

[6] Regarding the question as to whether the defendants were guilty of negligence—although with respect particularly to the rate of speed at which the car of the defendant corporation was traveling, as well as to whether a whistle was properly or at all sounded on the train, the evidence adduced by the respective parties to the action was in conflict, one with the other—it is clear that the jury had the right to conclude (as apparently it did), not only against the contentions made by the defendants in that regard, but also that, considering all the circumstances connected with the happening of the accident, the negligence of the defendants had been established by a preponderance of the evidence.

No error was committed by the trial court either in giving instructions to the jury that were requested by plaintiff, or in refusing to give to the jury certain instructions that were requested by the defendants.

The judgment is affirmed.

8 Cal.App.2d 217

WHITE et al. v. ROSENSTEIN et al.

Civ. 9818.

District Court of Appeal, Second District,
Division 2, California.

June 29, 1935.

1. Appeal and error ☞1099(3)

Opinion, on appeal on judgment roll, that findings did not support judgment for notary and bondsman in suit by mortgagee for amount of loan secured by trust deed on property which had been conveyed by grant deed, the acknowledgment to which was taken by notary without knowing that acknowledger was person she claimed to be, *held* not to preclude appellate court from examining evidence on second appeal to consider question of contributory negligence of mortgagee.

2. Notaries ☞11

In suit by mortgagee against notary and bondsman for amount of loan secured by trust deed on property which had been conveyed by grant deed, the acknowledgment to which was taken by notary without knowing that acknowledger was person she claimed to be, evidence *held* to justify denial of recovery on ground of contributory negligence of mortgagee who inspected premises before making the loan and there met true owner, without inquiring as to her status (Civ. Code, §§ 19, 1185; Pol. Code, § 801).

3. Notaries ☞11

Acknowledgment to grant deed taken by notary without knowing that acknowledger was person she claimed to be *held* to proximately contribute to injury of mortgagee who subsequently made loan secured by trust deed, which was signed by grantee in fraudulent deed and acknowledgment to which was taken by another notary and accepted without first notary's checking identity of grantee (Pol. Code, § 801; Civ. Code, § 1185).

4. Appeal and error ☞1099(3)

Opinion, on appeal from judgment based on theory that mortgagee need not show negligence of notary and rendered in suit for amount of loan secured by trust deed on property which had been conveyed by grant deed, the acknowledgment to which was taken by notary without knowing that acknowledger was person she claimed to be, *held* to preclude appellate court, on second appeal, from considering question whether mortgagee must also show value of premises and insolvency of makers of secured note.

Suit by Howard White and another against Harriett B. Rosenstein and another. From a judgment in favor of plaintiffs, named defendant appeals.

Reversed, with direction.

See, also, 25 P.(2d) 884, 134 Cal. App. 576.

Mark M. Cohen, of Los Angeles (Irwin M. Fulop, of Los Angeles, of counsel), for appellant.

Hyams & Himrod, of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

This is an appeal from a judgment in favor of plaintiffs-respondents made and entered pursuant to our order after a former appeal. Howard White, one of the respondents, is deceased, and no substitution has been made. The appeal of National Surety Company has been dismissed, leaving Harriett B. Rosenstein as the sole appellant.

The basic facts from which the cause of action arose are as follows: On the 16th day of March, 1928, Anna B. Dorn owned certain real property situated in Los Angeles county, and on that day one Ora Nye, falsely representing herself to be Anna B. Dorn, appeared before the defendant Harriett B. Rosenstein and signed the name of Anna B. Dorn as grantor to a deed purporting to convey such property to one J. Harvey; and at the same time the defendant Harriett B. Rosenstein took the acknowledgment of the said Ora Nye masquerading as Anna B. Dorn to such deed and attached her certificate of acknowledgment thereto in due form, in which she certified that Anna B. Dorn personally appeared before her and was known to her to be the person whose name was subscribed to the deed. The deed was subsequently recorded. At the time of the acknowledgment the notary was not acquainted with the said Ora Nye who was masquerading under the name of Anna B. Dorn, and an acquaintance of the appellant, Harriett B. Rosenstein, introduced Ora Nye to her as Anna B. Dorn. To further satisfy herself as to the identity of the supposed Anna B. Dorn, the notary, Harriett B. Rosenstein, requested identification, and said Ora Nye, posing as Anna B. Dorn, exhibited to appellant correspondence, letters, and other docu-

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

ments addressed to Anna B. Dorn and on which the name Anna B. Dorn appeared.

Thereafter and subsequent to the recording of said purported deed Ora Nye, posing under the name of Jean Harvey, requested a loan of \$4,000 from the plaintiffs to be evidenced by a promissory note and secured by a deed of trust on said property, which at that time stood of record in the name of J. Harvey. Ora Nye and her confederate, J. Harvey, approached a loan agent by the name of Whitman, and Whitman as their agent contacted a man by the name of Kinsey, who was a loan broker. Kinsey, who was an agent for respondents, told the latter about the proposed loan and went with Mary E. White to examine the property. The property consisted of a lot 50 by 120 feet, and on the front of the lot stood a vacant house. About 20 feet away from the front house and on the rear of the lot stood a smaller house, in which an elderly woman, Anna B. Dorn, then resided and in which she had resided for many months. Mary E. White and her agent Kinsey, after inspecting the front house, passed through the rear door into the space between the front and rear houses. There they saw Anna B. Dorn, owner of the premises, who was, as stated, living in the smaller house on the rear of said lot. Anna B. Dorn inquired as to what was wanted. Kinsey replied that they were looking through the house. Mrs. Dorn made no objections and no further conversation was had between the said elderly woman and Kinsey or Mrs. White, the latter believing the elderly woman, Mrs. Dorn, to be a tenant on said property. No investigation was made by Mrs. White or Kinsey relative to the status of the elderly woman, Mrs. Dorn, or her interest in or to the property. Thereafter respondents delivered into title company escrow the sum of \$4,000, to be paid over, and J. Harvey and Jean Harvey, alias Ora Nye, delivered into the same escrow a promissory note and a trust deed purporting to secure the payment of said note. The note and deed were both signed by J. Harvey (a single man) and Jean Harvey (a married woman), and the signatures to the deed were acknowledged before a notary. No investigation of identity of Jean Harvey was made.

This case was before us on a former appeal. 134 Cal. App. 576, 25 P.(2d) 884. The trial court had decided in favor of

plaintiffs, and, after the signing of findings of fact and conclusions of law and a judgment, the court determined under a motion authorized by section 663 of the Code of Civil Procedure to change its conclusions of law so that the specific or probative facts, rather than the ultimate facts found, should support the conclusions of law and the judgment. Accordingly, the conclusions of law were changed and a judgment was entered for defendants. The appeal was upon the judgment roll, and we determined that it did not appear that the conditions authorizing such action were present. The conditions referred to consisted of those in the following quotation from *Forsythe v. Los Angeles Ry. Co.*, 149 Cal. 569, 87 P. 24, 27: "But, in the second place, the general rule is that the finding of the ultimate fact prevails in support of the judgment notwithstanding a finding of a probative or evidentiary fact which tends to show that the ultimate fact was found against the evidence. And findings of probative facts will not invalidate the finding of an ultimate fact unless the latter is based on the former, and is entirely overcome thereby, and unless, also, it appears that these findings of probative facts dispose of all the facts involved in the pleadings, and that the facts found constitute all the facts in the case." We therefore found that the specific or probative facts in the findings did not operate to overcome the ultimate facts which supported the judgment, and we reversed the judgment with directions to make and cause to be entered a judgment for plaintiffs against defendant as prayed for, or, in effect, the re-entry of the first judgment. This order was complied with, and this appeal is upon this third judgment and is by the defendants, whereas the first appeal was by the plaintiffs.

[1] The appeal is upon the record under section 953a of the Code of Civil Procedure, and one of the main points of the appeal is that plaintiffs were guilty of negligence or contributory negligence proximately contributing to the injury. Appellant contends that this and other points made are foreclosed by the former opinion and decision, under the doctrine of the law of the case. It will be borne in mind that it was held in the former opinion that the judgment roll did not reveal that all of the probative fact was set out specifically in the findings, and that was the reason why we could not say that the specific

findings entirely overcame the ultimate findings. There may have been probative facts directly supporting the ultimate findings. Our statement in the first opinion that the findings do not support the judgment appealed from, but, on the contrary, support the relief sought by the complaint or the first judgment entered, was based on the rule that it must be assumed on appeal that the evidence supports the ultimate facts found by the court where the facts are not in the record, except in the circumstances of the quotation from the Forsythe Case. We intimated there that the probative facts stated in the findings would not support the judgment, but we specifically held that the point was not before us. We conclude that the law of the case does not preclude our examining the evidence for the purpose of considering the question of negligence.

Now after a study of the briefs upon this appeal, with the evidence before us, we can pass authoritatively upon the point, we ventured to intimate upon. It is true, as we now ascertain it to be, that the probative facts referred to in the findings constitute practically all of the facts in the case bearing upon the questions of negligence and contributory negligence, and we have come to the conclusion that our intimation—as dicta so often is—was wrong. The author of this opinion also wrote the opinion referred to, but the concurring justices are not the same.

[2] Simply stated, appellant contends that the incident of the meeting heretofore detailed between respondent Mary E. White and Anna B. Dorn constituted notice to Mrs. White of the circumstances sufficient to put a prudent person upon inquiry. From which appellant concludes that under the authority of section 19 of the Civil Code this case must be considered as though Mrs. White knew that the elderly lady who spoke to her upon the Dorn premises was Anna B. Dorn, the true owner. In the instance of this case Mrs. White visited the premises for the purpose of inspection, with the idea of accepting the property as security for a contemplated loan to the owner, as she thought. While upon the property she met—unknowingly—the owner, and thought she was a tenant. The owner inquired the mission of Mrs. White and her agent, and it would seem, therefore, that Mrs. White ought to have been on her notice that the old lady was not a trespasser but, on the contrary, had some

right that prompted her to challenge the callers. Neither Mrs. White nor her agent vouchsafed their mission or sought to know why they had been questioned, but rather foreclosed any further conversation by a short, almost meaningless, reply, “just looking at the house,” which was apparent without words.

As early in the California Supreme Court Reports as 12 Cal. 363 (73 Am. Dec. 543), in the case of *Hunter v. Watson*, it was decided that the open, notorious possession of real estate is evidence of notice as to ownership of one holding under an unrecorded deed against one holding a recorded deed. In *Smith v. Dall*, 13 Cal. 510, the opinion of Chief Justice Terry states, although it is not concurred in by Justice Field, the other member of the court functioning, that possession of a tenant is not notice of the landlord's title. This was soon overruled and ever since it has been consistently held that such possession is notice of the landlord's title. In *Havens v. Dale*, 18 Cal. 359, the doctrine of notice by possession was affirmed and defined in the following terms: “We hold, therefore, that the holder of the unrecorded deed must show a *possessio pedis*—an actual, bona fide possession, consistent with his written title; and that this possession must be evidenced by an actual inclosure or something equivalent, as showing the extent and the fact of his dominion and control of the premises.”

There is, of course, no question of an unrecorded deed in the instant case, but the principle applies to the facts of this case and has been applied many times to purchases of real estate in which a person in possession personally or by tenant has a better title than the purchaser's vendor. The application of this principle is illustrated in *O'Rourke v. O'Connor*, 39 Cal. 442, and this case also covers the circumstances of the tenant's possession. We quote from the opinion: “If, then, the actual possession of the premises by the plaintiff's tenant was sufficient to put a purchaser from Cody on inquiry as to the plaintiff's title or interest, the judgment is right. It is well settled in this State, that the possession of the tenant is notice of his landlord's title; that is to say, such possession is sufficient to put a person dealing with the property upon inquiry; and the law will charge him with notice of all those facts which he might have ascertained, had he pursued the inquiry with proper dili-

gence. (*Dutton v. Warschauer*, 21 Cal. [609] 628 [82 Am. Dec. 765]; *Pell v. McElroy*, 36 Cal. 268.)" It will be recalled that Mrs. White thought Anna B. Dorn was a tenant. She then was under the duty of inquiring as to the tenant's as well as the owner's title. It also follows that Mrs. White was not mistaken as to the open and notorious possession of the whole of the premises by the owner, and inquiry would have revealed the true owner. It was apparent that the lot with the two houses was under one control. See *Scheerer v. Cuddy*, 85 Cal. 270, 24 P. 713, in which the doctrine is extended far beyond what it need be in the instant case, and in which the effect of possession of real estate and the diligence required of the vendee is fully treated by the court and by a very full quotation from the authoritative case of *Pell v. McElroy*, 36 Cal. 268. See, also, *Whitney v. Sherman*, 178 Cal. 435, 173 P. 931; *Taber v. Beske*, 182 Cal. 214, 187 P. 746; *Follette v. Pacific Light & Power Corporation*, 189 Cal. 193, 208 P. 295, 23 A. L. R. 965. The same rule in principle and reason applies to encumbrances and is so held by the reviewing courts of this state, as will be noticed in some of the cases cited under different points. See *Randall v. Allen*, 180 Cal. 298, 180 P. 941.

We hold that the evidence supports the proposition that Mrs. White to all legal intents and purposes knew that the lady she met on the premises was the owner, with all of the consequences that follow therefrom. It was negligence on her part in the circumstances to proceed to deal with a person whose identity was actually wholly unknown to her. She relied upon a grant deed which proved to be spurious and was of record only by the grace of a notarial seal and certificate negligently affixed by the notary after a fraudulent acknowledgment by an imposter with criminal intent. See *Security Trust & Savings Bank of San Diego v. Matson*, 116 Cal. App. 616, 2 P.(2d) 1001, and *Oakland Bank v. Murfey*, 68 Cal. 455, 9 P. 843.

Section 801 of the Political Code provides: "For the official misconduct or neglect of a notary public, he and the sureties on his official bond are liable to the parties injured thereby for all the damages sustained." Section 1185, Civil Code, defines the requisites for acknowledgments, and the case of *Anderson v. Aronsohn*, 181 Cal. 294, 184 P. 12, 10 A. L. R. 866, treats

definitely of the duties and liabilities of notaries public.

It seems, to the point of demonstration, that the notary herein, appellant, was negligent, and we shall waste no time discussing that point. It seems certain also that Mrs. White, the respondent, was guilty of negligence. The negligence of both contributed proximately to the fact that respondent loaned her money to a person other than the owner of the property that was taken as security, and if any financial damage was suffered by respondent, she is without remedy as against appellant. *Security, etc., Bank v. Matson*, *supra*.

[3] Appellant argues that since the money was loaned upon a note and trust deed long after the fraudulent grant deed was put of record under the negligent and fraudulent acknowledgment, and such trust deed was signed by J. Harvey (a single man) and Jean Harvey (a married woman), and a notary took the acknowledgments which were accepted without appellant's checking the identity of Jean Harvey as Ora Nye, the acknowledgment to the grant deed did not contribute proximately to the injury. We do not agree with this, and in view of our conclusion that respondent was negligent, we shall not detail our reasons for such nonagreement. We think, however, that a proper understanding of *Oakland Bank v. Murfey*, *supra*, *Security, etc., Bank v. Matson*, *supra*, and *Smith v. Yule*, 31 Cal. 180, 89 Am. Dec. 167, will reveal our reason and support our conclusion.

[4] Appellant contends that there is no finding of value of the mortgaged premises, nor of the insolvency of the makers of the note, and that, indeed, there are no allegations in the complaint covering these points, which she thinks are essential. *Heidt v. Minor*, 113 Cal. 385, 45 P. 700. But here we do run into the law of the case. In the face of these contentions, made by respondents in the first appeal, we determined that the ultimate facts set out in the findings supported the relief sought by the complaint, hence our direction that a judgment be made in favor of plaintiffs; and these subjects are not referred to in any manner in the findings. They are not the subject of ultimate findings and therefore there are no findings to which we can apply the test of support by the record. So far as we are informed, these points were not raised

in any pleading, and it would appear that the trial court found its two former judgments upon plaintiffs' theory that no showing was needed beyond the negligent taking of the impostor's acknowledgment to the grant deed to entitle plaintiffs to recover from the notary the full sum loaned, with interest. We do not want to be understood as approving this theory, but since this was the only theory upon which the trial court could have acted, and since our former opinion held that the findings supported the judgment, there is no escaping the conclusion that the law of the case precludes its reconsideration. *Phelan v. City and County of San Francisco*, 20 Cal. 39; *Lucas v. City of San Francisco*, 28 Cal. 591; *Lambert v. Bates*, 148 Cal. 146, 82 P. 767; *Ellis v. Witmer*, 148 Cal. 528, 531, 83 P. 800; *Tally v. Ganahl*, 151 Cal. 418, 90 P. 1049; *Conde v. Sweeney*, 16 Cal. App. 157, 116 P. 319.

To recapitulate: We are convinced that the notary, the appellant, was negligent; but we are also convinced that the mortgagee, the respondent, was equally guilty of negligence, and that the negligence of each contributed proximately to cause the loss. The evidence of the transactions is all before us, and there is no dispute as to facts. A new trial would but reproduce the same legal problems that we have treated herein, and our treatment has become the law of the case.

The judgment is reversed and the trial court is directed to make and cause to be entered a judgment for the defendant Harriett B. Rosenstein and against the plaintiffs.

We concur: CRAIL, J.; FRICKE, Justice pro tem.



7 Cal.App.2d 748

JAMES v. COLONIAL MUT. LIFE ASS'N.

Civ. 1715.

District Court of Appeal, Fourth District,
California.

June 22, 1935.

1. Insurance ⇨365(1)

Holder of benefit certificate who at time of acceptance of request for reinstatement

was 55 years and 3 months of age *held not* "more than 55 years of age," within contemplation of statute prescribing age limit for issuing benefit certificates, being considered as 55 until he reached 56 (Civ. Code § 452e).

2. Insurance ⇨365(1)

Statute prohibiting issuance of benefit certificates to persons more than 55 years of age *held not* to prevent reinstatement of certificate holder over age limit on payment and acceptance of assessment only few days after default; statute being applicable to issuance of original certificate only (Civ. Code, § 452e).

3. Insurance ⇨392(1)

Insurer may waive forfeiture arising from failure to promptly pay premium, and, where there is no other condition imposed by convention of the parties, acceptance of money after knowledge of forfeiture is "waiver."

[Ed. Note.—For other definitions of "Waiver," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Vancy James against the Colonial Mutual Life Association. Judgment for defendant, and plaintiff appeals.

Reversed, with instructions.

Alfred J. Smallberg and Oliver M. Hickey, both of Los Angeles, for appellant.

Charles R. Thompson, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

The defendant is a mutual benefit and life association, organized and operating under the provisions of sections 452a to 453, inclusive, of the Civil Code. On May 26, 1931, the defendant issued two certificates of membership and insurance to one Viter Chappel in the face amount of \$1,500 each, naming this plaintiff as beneficiary. Each certificate or policy called for the payment of \$5 as and for the first semiannual dues with semiannual dues of \$2.50 payable each six months thereafter, and further provided for an assessment of \$1 on each member upon notice of the death of another policyholder in the association. Chappel paid all dues and assessments on these certificates until an assessment of \$2 was levied on June 15, 1932, of which he had notice. This assessment was not paid by July 15, 1932, at which time the certificates became lapsed and forfeited according to their terms. On July 19, 1932, Chappel paid the \$2 and submitted to the

association a written application for reinstatement for these certificates, and the association accepted the payment and reinstated and renewed the certificates. Chappel died on September 29, 1932, and due and timely proof of death was made but the defendant refused to pay the amount of the certificates although it tendered to the plaintiff the amount which had been paid in for dues and assessments.

In this action which followed, the court found that the assessment levied on June 15, 1932, was not paid on or before July 15, 1932, that the same was paid on July 19, 1932, that the payment was accompanied by an application for reinstatement, that these were received and accepted by the defendant on July 19, 1932, and then found "that on the 19th day of July, 1932, at which time the said certificates of membership and insurance were reissued and reinstated by defendant, the said Viter Chappel was more than fifty-five years of age." As a conclusion of law, the court found that these certificates became lapsed and forfeited on July 15, 1932, and "that the attempted renewal or reinstatement thereof was illegal and void as a contravention of section 452e of the Civil Code of the State of California, for the reason that the said Viter Chappel was then over the age of fifty-five years, and more than fifty-five years of age." Judgment was entered that the plaintiff take nothing except a return of the dues and assessments paid as proffered in the answer. From this judgment the plaintiff has appealed.

[1] In his application Chappel gave his age as 54 years. His daughter, the wife of the appellant, testified that he told her he was born on April 7, 1877. If that is true, he would have been 55 years, 3 months, and 12 days old at the time he was reinstated by the respondent. While the respondent introduced the depositions of several people who testified that they thought he looked older at various prior times, these were all very indefinite and as one of the affiants testified, "he might have been 65 and he might have been 40." There is no proof worthy of the name that Chappel was more than 54 years of age at the time the certificates were issued, and it is fully apparent that the case was tried and decided in the trial court on the theory that since he had passed his fifty-fifth birthday at the time of his reinstatement, such reinstatement was void under the provisions of section 452e of the Civil Code. In submitting a statement of the questions in-

volved on this appeal both parties are in accord as to the issues and the respondent's statement is as follows: "Where a member of a mutual benefit and life association which is incorporated, organized and operating under the provisions of sections 452a to 453, inclusive, of the Civil Code, allows his certificate of membership and insurance to lapse and become fully forfeited in accordance with the terms thereof for non-payment of an assessment and he thereafter has no right, title or interest in said certificate or in the association or any right of reinstatement and such person later applies to the association in writing for reinstatement and the said certificate is renewed and reinstated and said person is more than fifty-five (55) years of age at that time, is such reinstatement void as being in contravention of section 452e of the Civil Code?"

Section 452e of the Civil Code provides that "no association organized under this chapter shall accept any member or issue any policy or certificate of insurance to any person who is more than fifty-five years of age." We seriously question whether it was the intention of the Legislature, in enacting this statute, to prohibit the issuance of such a certificate to a person who had passed his fifty-fifth birthday and not yet reached his fifty-sixth. In *Watson v. Loyal Union Life Ass'n of Muskogee*, 143 Okl. 4, 286 P. 888, in discussing a similar statute, the court said:

"A person is ordinarily not considered over 55 years of age until he arrives at the age of 56. It may safely be said that it is universally so understood, and it occurs to us that this must have been the sense in which the language was used by the Legislature.

"Defendant contends that the very moment one passes his or her fifty-fifth birthday, he or she is then over 55 years of age. If this contention be correct, the question naturally arises: At what period in a man's life would he be said to be only 55 years of age? He certainly would not be of that age until he reaches his fifty-fifth birthday. If the contention of defendant be correct, no one could legally give his age as 55 years one hour or one moment after he passes his fifty-fifth birthday. We cannot believe that the Legislature intended that the act should be so construed, but, on the contrary, are of the opinion that the language used should be construed in its ordinary sense and be given its ordinary meaning. We prefer to so construe it,

and in so doing arrive at the conclusion that insured was not over 55 years of age at the time she took out the certificate in question."

[2] In any event, and regardless of how this age limit shall be interpreted, we think this section was intended to apply to the original issuance of a certificate and that it was not the intention of the Legislature, in adopting the same, to prevent the reinstatement of a policyholder upon payment of an assessment and the acceptance of the same by the association a few days after the policy would otherwise have lapsed. The law does not favor forfeitures and this should be and is particularly true in the case of life insurance policies, which are intended to run for many years and where the equities are in favor of the insured. Under settled law an insurer may waive a forfeiture arising from a failure to promptly pay a premium (*Knarston v. Manhattan Life Ins. Co.*, 124 Cal. 74, 56 P. 773; *Bryson v. National Travelers Casualty Co.*, 206 Cal. 475, 274 P. 957), and the Code section here in question was not intended to prevent such a waiver by an association of this nature.

The respondent places its main reliance upon the contention that the reinstatement of these certificates constituted a new contract and the acceptance of a new membership and, as such, is in contravention of section 452e of the Civil Code. A number of cases from other jurisdictions are cited by both parties upon the question of whether such a reinstatement constitutes a new contract or merely a restoration of the old contract. While some of these cases have held that reinstatements constitute new contracts these holdings have been based upon the circumstances of the particular cases and have usually been for the purpose of interpreting and giving effect to particular provisions of the contracts. Neither these cases nor the principles therein discussed are helpful here, where the real question is whether such a reinstatement as the one now before us is to be considered a new contract within the meaning of section 452e of the Civil Code and forbidden thereby.

Assuming that the reinstatement of a lapsed policy constitutes a new contract under some circumstances and for some purposes, neither what was here done nor the wording of this statute indicates that such a result here follows within the meaning of this section. The statute merely

provides that such an association shall not accept a member or issue any policy or certificate of insurance to any person who is more than the age named. This association had accepted this member and issued these certificates some time before. When the insured paid this assessment four days late he accompanied it with an application for reinstatement and, on the same day, the respondent "received and accepted" both the payment and the application for reinstatement, as stipulated by the parties and found by the trial court. Upon this reinstatement no new policies or certificates were issued and it is significant that the initial payment of \$5 provided for in each policy or certificate was not again collected although from a reading of the certificates such a payment seems not only absolutely essential to membership in the association, but is apparently the most important requirement to that end.

[3] It is fully apparent that neither party to this reinstatement regarded it as a new contract and that none of the formalities of a new contract were observed on either side. What actually happened and all that happened was that the respondent waived the forfeiture for the delay, accepted the assessment, reinstated the insured on its books, and considered the contract still in force. As was said in *McDonald v. Chosen Friends*, 78 Cal. 49, 20 P. 41, 42: "For it is well settled that a forfeiture for delay in the payment of money may be waived, and, where there is no other condition imposed by convention of the parties, that acceptance of the money [after knowledge of the forfeiture] is such a waiver."

Had the insured lived, there can be no question that subsequent dues and assessments would have been requested from him by the respondent, and accepted if paid.

The waiving of this forfeiture and the reinstatement of the insured under the circumstances here existing did not constitute a new contract within the meaning of, or in violation of, section 452e of the Civil Code.

The plaintiff prayed for a judgment in the sum of \$3,000; that the defendant be required to levy an assessment upon all of its members who were in good standing on September 28, 1932; and that the proceeds from such assessment, together with any money in the death benefit fund not subject to prior claims, should be paid to the plaintiff and should be accepted by him

in full payment of his claim against the defendant.

The judgment is reversed, with instructions to enter judgment in favor of the plaintiff in accordance with the prayer of the complaint, but not to exceed the sum of \$3,000.

We concur: MARKS, J.; HARDEN, Justice pro tem.



8 Cal.App.2d 189

**NORTHROP v. PACIFIC ELECTRIC RY.
CO. et al.
Civ. 9874.**

District Court of Appeal, Second District,
Division 2, California.

June 28, 1935.

**Hearing Denied by Supreme Court
Aug. 26, 1935.**

1. Carriers ⇨247(1)

Pedestrian crossing from curb to designated car stop to wait for car held not "passenger" of street railroad as regards railroad's liability for injuries inflicted by negligent motorist.

[Ed. Note.—For other definitions of "Passenger," see Words & Phrases.]

2. Carriers ⇨287(1)

Street railroad company owed no duty to prospective passenger while traversing distance from curb to designated stops and was not obliged to anticipate that stranger over whom it had no control would be guilty of negligence resulting in prospective passenger's injury.

3. Carriers ⇨318(8)

In pedestrian's action against street railroad for injuries inflicted by passing motorist while waiting for street car, evidence that plaintiff had not yet boarded street car, but was waiting at designated stop and was struck while street car was still some distance away, held to show that motorist's negligence was proximate cause of injury precluding plaintiff's recovery from street railroad.

FRICKE, Justice pro tem., dissenting.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Alfred S. Northrup against the Pacific Electric Railway Company and another. Judgment for plaintiff, and named defendant appeals.

Reversed, with instructions.

Frank Karr, E. E. Morris, and C. W. Cornell, all of Los Angeles, for appellant.

Anderson & Anderson and W. H. Anderson, all of Los Angeles, for respondent.

CRAIL, Justice.

The plaintiff recovered damages for personal injuries against both defendants in the trial court, although the injury to him was from the collision of his body with an automobile driven by the defendant Braun, who had no relation with the railway company. The defendant Braun did not appeal. The Pacific Electric Railway Company appeals, raising as its principal ground for a reversal the total failure of the plaintiff to prove that said company was guilty of negligence or that its negligence, if any, was a proximate cause of the plaintiff's injuries. The accident occurred on the triangular intersection of South Lake avenue and Arden road in Pasadena. Both streets are paved with asphalt and the company's rails are laid flush with the pavement. The tracks of the defendant company enter the intersection from a private right of way, cross Arden road at practically a right angle, and gradually curve the few but necessary degrees until they run along the center of South Lake avenue. At a place in said triangle hereafter more clearly described, the company had designated a place for its cars to stop to take on passengers going in either direction by suspending a metal disk above the center of the pairs of tracks. This disk bore the legend, "Street Car Stop."

An inspection of Plaintiff's Exhibit 6, which is a map in detail and made to a scale, shows that the lines of the curb and property lines on the north side of Arden road as they enter said intersection curve around at what would ordinarily be the corners of the intersection, so that it is somewhat difficult to determine just where the projection of these lines would go to form the "unmarked crosswalk" for pedestrians. Nevertheless it is apparent that the company's "car stop disk" had been

hung at a point so that the most convenient place for intending passengers to cross from the sidewalks to get on board its cars would be in this "unmarked crosswalk." It will be remembered that under section 131½ of the California Vehicle Act (St. 1923, p. 517, as added by St. 1931, p. 2127), the driver of any vehicle is bound to yield the right of way to a pedestrian crossing the roadway within any unmarked crosswalk at the end of a block.

Under the established operating conditions the company's cars stopped at this point to take on passengers only on signal from the intending passengers. The disk was so located that an automobile traveling south on South Lake avenue between the west curb and the westerly pair of tracks, if it continued to travel in a straight line to Arden road through said large triangle, would cross almost at the point which would be, and in this case was, occupied by persons intending to enter a northbound car when such a car should arrive at the car stop.

The plaintiff was the holder of a monthly transportation ticket on appellant's lines and was thoroughly familiar with the streets and the stopping place, as he was accustomed to board the cars at this place nearly every day. About 8 p. m. on October 15, 1932, the plaintiff, who resided on the east side of South Lake avenue a short distance north of the car stop and who was waiting on the east side of said avenue opposite the car stop, saw the reflection of the headlight of the company's approaching northbound street car which was then back on the private right of way in a cut, and also saw a wig-wag signal located just east of the tracks and immediately south of Arden road start to operate, at which time he and his wife and two ladies walked out from the bench to the car stop in the street, intending to take passage on the northbound street car. The street car was still back on the private right of way 50 feet from where the tracks came into South Lake avenue or about 125 feet south of the car stop. The street car was still in the curve and the motorman could not yet see the point where the plaintiff was standing. There was no testimony that the plaintiff or anyone else had yet signaled the motorman to stop. At this very instant the automobile driven by defendant Braun coming south on South Lake avenue ran over and against the

plaintiff, inflicting injuries which are the basis of this action.

The plaintiff was not injured directly or indirectly by the defendant's street car nor by any negligent act of its motorman. The negligence complained of was specifically pleaded and no such negligence was set forth. In his brief the plaintiff complains of the defendant that: "Throughout they have persisted in advancing and holding the idea that plaintiff's complaint against the street railway company was based upon some direct negligence on the part of its employees in handling its particular street car which the plaintiff was seeking to board." The plaintiff's allegations of negligence against the company were, in substance: "That it located its 'car stop' sign 'at a point which compelled its intending northbound passengers to signal and board its cars at a point in the center of the line of northerly and southerly automobile traffic along South Lake Avenue * * *'" That it failed to provide sufficient lights for the street intersection and failed to provide other means of safety for the place; that it failed to provide any means whereby intending passengers could, from a safe place on the east curb of South Lake avenue, signal the company's cars to stop; and that it failed to install any means of warning the operators of automobiles that prospective northbound passengers intended to board its cars.

The jury returned a verdict in favor of the plaintiff, and before entry of the verdict and judgment the company moved the court to enter judgment in its favor notwithstanding the verdict, which motion was denied.

It is the contention of the company that the evidence fails to show any negligence on its part and that its negligence, if any, was not a proximate cause of the plaintiff's injuries. The case seems to have been tried upon the theory that the plaintiff was already a passenger of the street railway company and that the company owed to him the same duty as a commercial railway company which has provided its own stations and platforms.

[1-3] The case of *Choquette v. Key System, etc., Co.*, 118 Cal. App. 643, 5 P.(2d) 921, 925, is the California case most nearly in point. That was a case in which a passenger was injured after alighting from a street car and while walking

away therefrom. The court said: "A passenger upon such a car ceases to be such when he has safely alighted upon the public street and clears the car from which he alights." The court also quoted with approval in 118 Cal. App. 643, on page 655, 5 P.(2d) 921, 926: "Courts have differentiated between the duties of a street car company to its passengers and a commercial railway in so far as a duty rests upon them to furnish safe passage to and from a car. From the nature of things a street car company cannot discharge those duties with respect to passengers. It has no control over the streets or traffic upon the streets; it has no stations or platforms and can erect none upon the street. From the curb to the car is a public place open to travel by all, and over it the company has no control or jurisdiction."

Under the circumstances of this case the plaintiff did not yet sustain to the company the relation of passenger. He was a pedestrian upon the highway to whom all other travelers owed the reciprocal duty of reasonable care. But the company did not owe him the duty of anticipating that strangers over whom it had no control would be guilty of negligence which would result in plaintiff's injuries upon a street over which it had no control, but with which the plaintiff was as familiar with conditions as the company; and especially the company was not obliged to anticipate that such strangers in order to commit such negligence would violate a state statute. There was no negligence on the part of the Street Car Company and for this reason alone the motion of the company for judgment should have been granted.

The company's next contention is that the proximate cause of the accident was the negligence of the defendant Braun, the driver of the automobile which struck the plaintiff; that his negligence constituted an efficient intervening cause; and that if the company was negligent, which it was not, nevertheless said negligence was the remote and not a proximate cause of the injuries to the plaintiff. We are satisfied that the company is correct in this contention also. *Schwartz v. Cal. Gas & Elec. Corp. et al.*, 163 Cal. 398, 125 P. 1044; *Olsen v. Standard Oil Co.*, 188 Cal. 20, 204 P. 393; *Reynosa v. Pickwick Stages System*, 115 Cal. App. 383, 1 P.(2d) 548. The plaintiff relies largely upon the case of *Tobin v. Seattle*, 127 Wash. 664,

221 P. 583, but that case is not in line with the California cases.

It is apparent from what we have said that the court should have granted the company's motion for a directed verdict and for judgment thereon. The case is reversed, with instructions so to do.

I concur: STEPHENS, P. J.

FRICKE, Justice pro tem. (dissenting).

I dissent. There is testimony in the record that the headlight of the approaching street car almost blinded Braun, the driver of the automobile which struck the respondent; that Braun, who was driving in a straight line south on the west side of South Lake avenue, did not see respondent until he was too close to avoid striking him; and that the low degree of visibility of persons standing at the street car stop was in part due to the fact that the street at this point was poorly lighted. The court and jury were warranted in concluding that appellant, by reason of its repeated operation of cars on this line, had knowledge that the rays of light from its cars would produce this effect upon drivers of automobiles proceeding south on South Lake avenue, and that this might occur, and in this case did occur, while prospective passengers were at the designated car stop; that the maintaining of the car stop at the particular point, in preference to other available locations where such danger did not exist and without making any provision for the protection of intending passengers against this particular hazard, constituted a failure to use ordinary care toward its prospective passengers, who were, by the placing of the "Street Car Stop" sign, invited to stand at that spot, and that such failure constituted a proximate cause of respondent's injuries.

The case is not analogous to the cases involving injuries to passengers about to board or who have alighted from a street car, and where the condition of the streets and traffic are beyond the control of the carrier. Here the carrier chose the conditions and surroundings of its car stop, and the point chosen included a particular hazard with which appellant must have been familiar. The case most nearly in point is that of *Tobin v. Seattle*, 127 Wash. 664, 221 P. 583, which supports the principle of the liability of a street car company because of its failure to protect its prospective passengers from dangers peculiar to the place adopted as a car stop.

8 Cal.App.2d 75

PEOPLE v. TALKINGTON.

Cr. 1421.

District Court of Appeal, Third District,
California.

June 26, 1935.

Hearing Denied by Supreme Court July 25,
1935.**1. Homicide ☞253(1)**

Evidence *held* sufficient to sustain verdict finding wife guilty of murder in first degree of husband.

2. Constitutional law ☞199

Constitutional amendment giving court power to comment on evidence *held* not an *ex post facto* law as applied to prosecution for offense of murder in first degree committed prior to adoption of amendment, since it did not deprive accused of any substantial right (Const. Cal. art. 6, § 19, as adopted in 1934; Const. U. S. art. 1, § 10).

An "*ex post facto* law" is a law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; a law that aggravates the crime or makes it greater than it was when committed; a law that changes the punishment, and inflicts a greater punishment than was annexed to the crime when committed; a law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense to convict the offender.

[Ed. Note.—For other definitions of "*Ex Post Facto*," see Words & Phrases.]

3. Criminal law ☞865(1)

Inquiry by court, on report by jury of disagreement, as to status of jury on question of guilt or innocence of accused in homicide prosecution, and remarks in relation thereto which included statements that court agreed almost absolutely with district attorney, and that jury need not talk about getting away if they did not agree, *held* reversible error because coercing jury and error was not cured by subsequent admonition that jury was sole judge of facts as against comment of court (Const. art. 6, § 19, as adopted in 1934).

4. Criminal law ☞865(1)

Reversible error is committed if trial court, in addition to asking numerical division of jury, also asks as to how they voted with reference to guilt or innocence of accused.

5. Criminal law ☞865(2)

Court cannot coerce jury reporting its inability to agree outside force of reason and advice as to facts, as by threatening to keep them together until they agree.

6. Criminal law ☞720(9)

Defense had right to address jury on assumption that account by accused of homicide was correct.

7. Criminal law ☞656(8)

Comments of court on testimony must not be argumentative in form (Const. art. 6, § 19, as adopted in 1934).

8. Criminal law ☞656(8)

Comments of court on testimony must be made in such manner that court does not assume role of an advocate, and comments must be temperately and fairly made, and if testimony is reviewed, it must include testimony offered in favor of, as well as against accused (Const. art. 6, § 19, as adopted in 1934).

9. Criminal law ☞665(4)

Permitting witnesses to testify who had remained in courtroom contrary to admonition not so to do *held* not error, since state was entitled to their testimony though such witnesses may have rendered themselves subject to charge of contempt.

10. Criminal law ☞388, 404(1)

In murder prosecution, admission of hat used as an exemplar and testimony of witnesses who made experiments therewith *held* not prejudicial error.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Bertha Talkington was convicted of murder in the first degree, and she appeals.

Judgment and order reversed and cause remanded for a new trial.

E. H. Zion, of Modesto, and A. R. Schottky, of Merced, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Stephen P. Galvin, of Merced, *amicus curiæ*.

PLUMMER, Justice.

The appellant was tried and convicted upon an indictment found by the grand jury of the county of Merced, charging that the appellant did, on or about the 15th day of October, 1934, in the county of Merced, state of California, murder one Lamar Talkington. The verdict of the jury is in

the following words: "We, the jury in the above entitled cause, find the defendant, Bertha Talkington, guilty of murder in the first degree, and fix the penalty at imprisonment in the State Prison of the State of California, for life, with mercy and leniency." From the judgment of conviction and the order of the court denying her motion for a new trial, the defendant appeals.

The defendant and her husband, Lamar Talkington (also known as "Bob Talkington"), had for some two years prior to October 15, 1934, been residents of the town of Watsonville. The evening preceding leading up to the shooting of Lamar Talkington the defendant and her husband had planned a trip to Modesto. They left Watsonville about 6 o'clock on the morning of the 15th of October, and drove from Watsonville to Gilroy, and from Gilroy through the Pacheco pass to a station called "Wagner Station." This station is at the intersection of the highway extending from Pacheco pass to Merced, with the highway running south from Newman and Gustine. They turned at Wagner station to the north, and shortly afterwards the shooting occurred.

It appears that Lamar Talkington was a man addicted to the excessive use of liquor, and carried liquor with him for use on the trip. From Watsonville to Gilroy, through what is known as "Heckler Pass," Mr. Talkington took a rear seat in the automobile. The car was an old "Oldsmobile Coach," having only two doors. The front seats were of a collapsible type, the backs of which could be pushed forward and down on the seats. It appears that Mr. Talkington desired to have his wife drive very fast, and complained about her driving. The defendant, up to the place of the shooting, had been driving the car all day. After driving about two miles from Wagner station, and according to the defendant's story, her husband having quarreled with her and complained about her slow driving, the defendant stopped the car, got out, and told him to get in the driver's seat and do the driving himself; that she would not drive the car any faster; whereupon he arose from the back seat, took a position on one of the front seats, and after arguing with her, finally said he would kill her, and reached into the back of the car in the direction of the back seat, or the pocket for the gun which was kept, and had been placed in the rear of the car. In the scuffle that ensued for the possession of the gun, five shots were fired. One bul-

let went through the hat of the defendant; another bullet went through her left arm near the elbow on the inside of the arm; another bullet pierced the left ear lobe of the deceased; one bullet struck him below the right eye; another hit him in the chest, traveled across his chest in a parallel direction, and landed under the arm. Two bullets were later found in the body of the deceased; one bullet was found in the upper part of the automobile. The gun was a 22-automatic, known as a "Woodsman." The defendant then drove the car to Gustine, arriving there about 8:30 p. m.; was taken to a doctor's office, her wounded arm was dressed, and Lamar Talkington was found to be dead.

The first story told by the appellant was that they had been held up and shot by bandits. The second story, and the one she told upon the witness stand, was along the lines of what we have here set forth.

The gun with which the shooting was done was purchased by the appellant a few days before the 15th day of October, 1934, being procured at a secondhand store in Santa Cruz. Upon purchasing the gun, the defendant gave a fictitious name. The record shows other circumstances in the case indicating that the shooting was the result of a plan conceived and carried out by the appellant. Two letters written by the appellant, addressed to herself, and signed by the name of "Bob," in which the deceased purported to set forth his worthlessness, were found in the home of the appellant and the deceased some days after the shooting.

[1] Upon this appeal the first contention made by the appellant that the evidence is not sufficient to sustain the verdict appears to be wholly without merit. In addition to what we have said, it appears that after the shooting, the appellant first opened the suitcase in which they had placed a few of their belongings to be used upon their visit to Modesto, and scattered them about the bottom of the automobile. After driving a short distance from the scene of the shooting, the appellant stopped the car, and threw the gun which we have mentioned, under a culvert. The appellant told the bandit story to the arresting officer, and also upon the inquest. After the discovery of the gun, it appears that she changed her story and testified at the trial along the lines which we have set forth. Further comment upon the insufficiency of the evidence seems to us unnecessary.

Upon this appeal eleven different grounds of error are assigned for reversal, all of which have been considered, but only a few which we consider serious will be set forth in this opinion.

After the cause had been submitted to the jury for deliberation, and the jury had retired to consider their verdict, the exact hour of which does not appear in the record, the jury, at 11:10 p. m., returned to the courtroom, and the following occurrences took place:

"The Court: Mr. Foreman, have you agreed upon a verdict?

"Foreman Schockley: No, sir, we have not, and there don't seem to be any chance to agree so far.

"Court: There doesn't seem to be any chance to agree?

"Schockley: It don't look like it.

"Court: How are you divided numerically?

"Foreman Schockley: Nine to three.

"Court: A difference over the degree of crime, probably?

"Foreman Schockley: Yes.

"Court: Well, at 12:00 o'clock the rest of us will be wanting to retire, but we can stick around here until about that time. Of course this jury should agree. Of course. We have made provisions for the remainder of the night, but I will give you an opportunity to have a little while longer here. You will have to retire; just retire, ladies and gentlemen of the jury."

At 11:25 p. m. the jury again returned into court, and the following took place:

"Court: Mr. Foreman, did you have something to say?

"Foreman Schockley: Well, Mr. Navon don't understand what was meant by the degree of crime; he wanted to know what you meant by the degree of crime.

"Court: Well, I just asked you if you had all agreed, but what it meant is this, that if you had all agreed, have you all agreed on the guilt of the defendant?

"Foreman Schockley: No, sir.

"Court: Some of them are for not guilty?

"Foreman Schockley: Three of them for not guilty and nine for guilty.

"Court: Well, ladies and gentlemen of the jury, I want to say this: I have tried a great many cases in this court, and now I have the right to state to you what I believe in reference to the evidence in this

case, and comment upon it, and you heard the argument of the District Attorney. I believe I agree with him almost absolutely. Now, as far as the penalty that should be inflicted, I don't want to say anything, and I don't believe I will at this time. I cannot see how anyone can, after hearing this evidence, can raise a very strong argument, or make an argument in defense, that is, to the extent that there is no crime committed here. To me, it appears impossible that these gunshot wounds could have been inflicted as the defendant contends,—yes, that is one thing. As far as motive is concerned, there are several things that are brought up here, and charged as motives for the commission of the offense, and the testimony of the defendant, you know, her statements are very conflicting here, given in many respects in reference to letters and the procuring of the gun at that particular time, and the insurance on her own life in his behalf just a few days before. Now, all of those things lead very strongly that she deliberately committed this act. Much has been said about Talkington, her husband, as to what manner of a man he was; it could be considered, maybe, for but one thing from a legal standpoint, maybe; you could regard it as to his conduct and the type of man he was, as they allege here, for mitigation or extenuation, maybe, but we cannot, as good citizens, tolerate the idea that one, anyone, can take the law in his own hands and kill any human being, unless that person is absolutely outlawed by the Governor of the State. Now, ladies and gentlemen of the jury, it looks to me, and as I told you before, I have tried a great many cases, and this is as clear as any case tried in this courtroom. That is all I have to say at this time.

"Juror Watson: I think an agreement can be had.

"Court: Well, if it can be reached within the next two hours—well, as far as that is concerned you are not going to get away from here for some time; you need not worry about that at all; you need not talk about that if you don't agree; as far as talking to me about getting away, forget it; just retire."

At 12:05 a. m. the jury again returned into court to make some inquiry about the disposition of automobiles which belonged to the jurors. At this time counsel for the appellant asked that the record show that they had taken exceptions to the comments of the court, whereupon the court ad-

ressed the jurors as follows: "The Court: I feel that the jury should be instructed, under our law, is the sole judges of the facts in the case, and they are entitled to their individual opinions upon the evidence, yes, as against the comment of the judge. The court has already admonished the jury that they are the sole judges of the facts in this case; of course, I would not send you back to the jury room, as far as that is concerned, if that was not the law; I haven't any right to command you, but I have the right to comment upon the testimony. Of course, at our last election here that power was given to the judge, and I have expressed my reason for my comments here, but of course the jurors are the sole judges and arbiters, finally, as to their verdict; the jury has already been so instructed. As I take it, it makes no difference during the trial, before rendering a verdict, the judge has a right to give his views."

[2] The first contention made by appellant is that the amendment to the Constitution known as section 19 of article 6, adopted at the general election on November 6, 1934, did not give the court authority to comment upon the testimony introduced in the case, in any instance where the offense was committed prior to the adoption of the amendment. The section of the Constitution referred to reads: "The court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them, and of the credibility of witnesses."

As applied to an offense committed on the 15th day of October, 1934, it is urged that the amendment comes within the provisions of section 10 of article 1 of the Constitution of the United States, which prohibits the passing of an *ex post facto* law.

A somewhat similar question was presented to the court in the case of *People v. Edenburg*, 88 Cal. App. 558, 263 P. 857, 860, in which the court held that an amendment to section 1078 of the Penal Code, changing the method of examining prospective jurors, was not an *ex post facto* law, in that it did not deprive the

defendant of any substantial right. In that case the opinion contained a quotation from *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648, setting forth four specifications constituting an *ex post facto* law applied to criminal cases, to wit: "1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2. Every law that aggravates the crime or makes it greater than it was when committed. 3. Every law that changes the punishment, and inflicts a greater punishment than was annexed to the crime when committed. 4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense * * * to convict the offender." A number of cases are cited supporting the propositions just quoted, from which it appears that unless some substantial right is taken away, the objection that a later act is *ex post facto* is untenable. There is nothing in the amendment to the Constitution which deprives the defendant in this case of any substantial right. The same testimony was required to convict as would have been required without the amendment; the punishment is not increased; the crime is not aggravated; the act committed by the appellant was punishable, if a crime, when committed, if punishable at all. The fact that the amendment to the Constitution accorded the privilege to the court to comment upon the testimony and credibility of any witness did not lessen the degree of evidence necessary to convict, and did not take from the jury their exclusive right to judge all questions of fact, and also to pass upon the credibility of witnesses, irrespective of the comments of the court.

In *People v. Mortimer*, 46 Cal. 114, it was held that a law giving the prosecution the right to open and close the argument was not *ex post facto*, or alter the situation of the accused to his disadvantage. It was further held that such an act was a mere matter of procedure.

In *People v. O'Bryan*, 165 Cal. 55, 130 P. 1042, by a divided court it was held that section 4½ of article 6 of the Constitution, though applicable to offenses committed prior to its adoption, is not obnoxious as against the Federal Constitution prohibiting the passing of an *ex post facto* law; that it did not require any additional testimony to establish the guilt of the defendant, but merely altered a rule rela-

tive to the disposition of the case upon appeal after trial and conviction. The change affected by the Constitution authorizing comment by the trial court upon testimony simply re-established the mode of trial deemed proper at common law. Under such circumstances it has been held that such change is not prohibited by the Federal Constitution. *Beazell v. Ohio*, 269 U. S. 167, 46 S. Ct. 68, 70 L. Ed. 216.

The question we are now discussing was under consideration in the case of *Kolkman v. People*, 89 Colo. 8, 300 P. 575, 579, and was considered at length by the Supreme Court of Colorado. It was there held by a majority of the court that the adoption of a rule authorizing comments upon testimony by the trial judge is not violative of the constitutional inhibition set forth in section 10 of article 1 of the Federal Constitution.

[3] Did the court commit error in its inquiry of the jury as to how they stood numerically, and in its remarks in relation thereto, and as to what the court said concerning their further reporting a disagreement? We repeat again what took place covering the inquiry of the court as to how the jury stood, and as to how they were voting on the guilt or innocence of the defendant:

"The Court: Have you agreed upon a verdict?

"Foreman: No, sir, we have not, and there don't seem to be any chance to agree so far.

"The Court: There don't seem to be any chance to agree?

"Foreman: It don't look like it.

"The Court: How are you divided numerically?

"Foreman: Nine to three.

"The Court: A difference over the degree of the crime, probably?

"Foreman: Yes."

The jury was thereupon sent back for further deliberation, and at 11:25 p. m. the jury returned and the record shows the following:

"Mr. Foreman, did you have something to say?

"Foreman: Well, Mr. Navon here don't understand what was meant by the degree of crime; he wanted to know what you meant by the degree of crime.

"The Court: Well, I just asked you if you had all agreed, but what it meant is

this: That if you had all agreed, have you all agreed on the guilt of the defendant?

"Foreman: No, sir.

"The Court: Some of them are for not guilty?

"Foreman: Three of them are for not guilty and nine for guilty."

Thereupon, the court made the remarks which we have set forth herein, at the conclusion of which juror Watson remarked: "I think an agreement can be had.

"The Court: Well, if it can be reached within the next two hours, well, as far as that is concerned, you are not going to get away from here for some time, and you needn't worry about that at all; you needn't talk about that if you don't agree. As far as talking to me about getting away, forget it; just retire."

[4] While a number of cases might be cited to the effect that reversible error was not committed when the trial court simply asked as to the numerical division of a jury, the great weight of authority is to the effect, however, that reversible error is committed if the trial court, in addition to asking the numerical division of the jury, also asks as to how they have voted with reference to the guilt or innocence of the defendant. *Brasfield v. U. S.*, 272 U. S. 448, 47 S. Ct. 135, 136, 71 L. Ed. 345; *Burton v. U. S.*, 196 U. S. 283, 25 S. Ct. 243, 250, 49 L. Ed. 482.

In addition to the rule set forth in the foregoing cases from the Supreme Court of the United States, a number of federal cases to this same effect might be cited. In an extended note to the case of *Kesley v. U. S.*, reported in 85 A. L. R. 1418, beginning on page 1450, so many cases are collected that we can only call attention to the law as there laid down. First, it is held by a number of cases that if the inquiry is limited only as to the numerical division of the jury, while erroneous, is not reversible. The law is then declared to the effect that if the inquiry is coupled with the purpose to ascertain how the jury is divided as to the guilt or innocence of the defendant, the province of the jury has been invaded, and reversible error has been committed.

As said in the case of *Brasfield*, *supra*, speaking of the practice: "It can rarely be resorted to without bringing to bear in some degree, serious, although not measurable, an improper influence upon the

jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned." And as again said in the case of Burton, supra: "All that the judge said in regard to the propriety and duty of the jury to fairly and honestly endeavor to agree could have been said without asking for the fact as to the proportion of their division; and we do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge." In the same annotation are collected a large number of cases showing that the statements and instructions which have the effect of unduly hastening the rendition of a verdict should never be made or given. On page 1452 of the annotations referred to are collected a number of cases in which it is held that the action of the court in so hastening the rendition of a verdict is improper. None of the California cases cited by the respondent show that the trial court went to the extent of inquiring as to how the jury voted on the guilt or innocence of the defendant.

In *People v. Piscitella*, 90 Cal. App. 528, 266 P. 349, 351, we find the following in the opinion: "After the jury retired for deliberation they reported that they were unable to agree, and, according to the bailiff, requested further instructions. When brought into court their foreman announced that they had been unable to agree and that they stood eleven to one for conviction. The latter portion of the statement was not made in response to any question asked by the court. The court thereupon instructed the jury, the material portion of its instructions being as follows: 'There was not any intimation whatever as to how you stood. I indicated to you that I did not think you had been out long enough. There is one instruction that I should perhaps have given you, but I looked into your faces and perhaps concluded that it was not necessary. And that was that while it was your duty, the duty of each one of you, to have your individual opinion in a case upon reason, upon the law, don't be arbitrary. You cannot be arbitrary. Eleven cannot be arbitrary; one cannot be arbitrary. You should be tolerant. You should listen to the arguments of your

fellow jurors. You should listen to the statement of the facts of the case as produced here on the witness stand, and after a full consideration of all the facts and upon the reasoning of your fellow jurors, if any one of you should be convinced—it makes no difference whether for conviction or against conviction—if you should be convinced you are wrong, then it is your duty upon your oaths to change your vote and vote in accordance with your conviction in the case, honest conviction."

It clearly appears from the above quotation that the court had not invaded the province of the jury or sought to invade the secrecy that should surround the deliberations of the jury, and ascertain from them how they stood in relation to the guilt or innocence of the defendant, and then endeavor to induce them to bring in a verdict of guilty.

In the case of *People v. Lee*, 34 Cal. App. 702, 168 P. 694, 697, the jury was simply asked as to the numerical division. The jury reported that they stood eight to four. The court said: "The court is not satisfied, gentlemen, that you cannot agree on a verdict in this case. It realizes, gentlemen, it is your bounden duty to agree on a verdict, if you can conscientiously do so within the law and the evidence. The court is not satisfied that you cannot agree. It is the instructions of the court that you be returned to the jury room for further deliberation and discussion of the case." No inquiry was made by the court as to how the jury stood on the question of the guilt or innocence of the defendant; no word said by the court informing the jury that they were not going to get away unless they agreed upon a verdict, and that they need not talk to the court again about getting away unless they agreed upon a verdict.

In *People v. Rhodes*, 17 Cal. App. 789, 121 P. 935, no inquiry was made by the court as to how the jurors stood in relation to the guilt or innocence of the defendant.

In *People v. Conboy*, 15 Cal. App. 97, 113 P. 703, the jury, after having deliberated for seven and one-half hours, came into court and requested further instructions. The court said: "Now, gentlemen, I think I have read to you about all the instructions you desire upon these points, and I suggest to you that there is no rea-

son why 12 honest, intelligent, reasonable men should not reach a conclusion in this case, and I am surprised that you have not done so already. And I want to say to you that you should consider the evidence offered and admitted here, and the law as given you by the court, and decide this case upon that, and not upon any personal observation or relations or experience that any of you may have had. Now, go out and do your duty." Judgment reversed.

We find from the language of the court in the Conboy Case a statement showing a further instruction to the jury, as follows: "In a subsequent part of the charge the learned judge did inform the jury that they were the sole judges of all questions of fact and of the credibility of the witnesses, and that the court had no right to trench upon their province in this respect; but the error already noticed in the previous part of the charge was not cured by this subsequent statement. The fact still remained impressed upon the minds of the jurors that there ought to be no disagreement, and that the testimony would justify but one verdict."

In the case of *People v. Baker*, 94 Cal. App. 687, 271 P. 777, the record shows that no inquiry was made as to how the jury stood or how the jury was divided on the question of the guilt or innocence of the defendant. It was there held that it was within the province of the court to admonish the jury as to their duty to reach a verdict if they could conscientiously do so.

In *People v. D'A Philippo*, 220 Cal. 620, 32 P.(2d) 962, no inquiry was made by the trial court as to the division of the jury upon the question of the guilt or innocence of the defendant.

In the case of *People v. Miles*, 143 Cal. 636, 77 P. 666, there was no intimation in the charge as to the remarks of the court with reference to how the jury should decide the case, but they should give the testimony fair consideration, and that the protracted character and expense of the litigation necessitated on their part the duty of honestly and faithfully arriving at a verdict. This was held not to invade the province of the jury. Justice McFarland, concurring in the opinion, added that such expressions were hazardous, and it would be better for the court to say nothing on the subject.

In *State v. Clark*, 38 Nev. 304, 149 P. 185, the Supreme Court of Nevada held that it was error for the trial court to inquire as to the numerical division of the jury. The remarks of the court in that case that it looked as though it might be easy for the jury to arrive at a verdict were held improper, and the judgment of conviction reversed.

In the case of *People v. Sheldon*, 156 N. Y. 268, 50 N. E. 840, 41 L. R. A. 644, 66 Am. St. Rep. 564, it was held that an obvious effort of the court to compel an agreement of the jury required a new trial. The Sheldon Case, however, shows that the trial court went much further in its attempt to coerce the jury than is shown by the record in the instant case.

On the question of the hazard in urging the jury to reach an agreement, we may further cite 8 California Jurisprudence, page 394, § 423.

In 16 C. J. page 1091 the rule is thus stated: "It has been held that it is improper for the court to ask the jury as to how they stand numerically in regard to the verdict. But, on the other hand, it has been held that it is not error to make such an inquiry without inquiring whether the division is for or against the defendant."

In none of the cases called to our attention, or which we have been able to find, is the implication contained in the language of the court addressed to the jury in the instant case, approved. In response to the statement of juror Watson, "I think an agreement can be had"—the language of the court—"Well, if it can be reached within the next two hours—well, as far as that is concerned you are not going to get away from here for some time, and you need not worry about that at all, you need not talk about that if you don't agree, as far as talking to me about getting away, forget it, just retire," the first eleven words of this statement indicated to the jury, conclusively, following the inquiry as to how it stood upon the question of guilt or innocence of the defendant, that the court expected the jury to bring in a verdict of guilty inside of two hours, and then the jury is informed that if they do not do so, they are not going to get away for some time, and further that they need not think about that, or rather, that they need not worry about that, need not talk about it if they did not agree, and that they need not talk

to the court about getting away if they did not agree. Such language, we hold, necessarily tended to coerce the jury, and induce the belief in the minds of the jurors that they were not going to get away unless they agreed upon a verdict of guilty, such as outlined by the court in its comments, before the jury would be discharged.

[5] In "Bowers on Judicial Discretion of Trial Courts," the language found in paragraph 371 appeals to us as being pertinent to the question here being considered: "It is a well-settled canon of practice that a trial judge has no authority, either by threat, intimidation, undue urging, or inapt suggestions, to affect the fair, conscientious and impartial deliberations of the jury. The fact-finding body of the mixed tribunal should be as unhampered and unfettered in the performance of its proper function as is the judge in his. As the presiding officer of the forum, the administrator of the proceedings, the trial court may advise an unagreed jury of the importance of their reaching a verdict if they can do so without surrendering their conscientious convictions, but he cannot go beyond this and say anything to the prejudice of either party." See, also, *Kesley v. U. S.*, *supra*. That there can be no coercion of a jury reporting its inability to agree in a criminal case outside the force of reason and advice as to the facts, as by threatening to keep them together until they agree.

In the case of *State v. Place*, 20 S. D. 489, 107 N. W. 829, 830, 11 Ann. Cas. 1129, the Supreme Court of South Dakota had before it some questions which we are here considering. After the jury in that case had been out for a few hours, it reported to the court, and the following occurred: The court thereupon asked, "What seems to be the matter?" To which the foreman replied, "We are shy on evidence." The court thereupon replied that he could not help them out any on the evidence; that if it were matters of law he could give them further instructions; "but," he said, "you will have to agree in this case, for I will keep you together until you do agree." This occurred, it appears from the record, some time before noon. At about 1:30 p. m. of the same day the jury came in with a verdict finding the defendant guilty as charged. The comments of the court were held error, and a new trial was ordered. In holding the comments of the

court erroneous, the following language was used: "In this enlightened age no one will contend that a verdict should stand which does not, at least presumptively, express the free and deliberate judgment of those who rendered it. The old rule permitting the coercion of juries has been swept away. Under modern methods of procedure the independence of the jury is, and it should be, respected. *People v. Sheldon*, [156 N. Y. 268] 50 N. E. 840, 41 L. R. A. 644, 66 Am. St. Rep. 564. 'No juror should be induced to agree to a verdict by a fear that a failure to so agree would be regarded by the public as reflecting upon either his intelligence or his integrity. Personal considerations should never be permitted to influence his conclusions, and the thought of them should never be presented to him as a motive for action.' *State v. Bybee*, 17 Kan. 462. Nor should the decision of a juror be influenced by a fear of indefinite confinement in a jury room, to his own and his associates' inconvenience and discomfort. This, in effect, is conceded by the learned Attorney General; but he insists (1) that coercion cannot be inferred from any fact disclosed by the record in this case, and (2) that, if any of the jurors were unduly influenced, our rules of criminal procedure afford no means by which the error may be reviewed."

In view of the authorities cited and what is disclosed by the record as hereinabove set forth and considered, we think it must necessarily be held that the court erred in its inquiry as to the status of the jury on the question of the guilt or innocence of the defendant, and also in the statement to the jury that they need not talk about getting away if they did not agree; and that such errors were prejudicial and tended to prevent the appellant from having a fair and impartial trial.

While we have held that under the provisions of section 19 of article 6 of the Constitution as amended in 1934, the court in this case had a right to comment upon the evidence, the testimony and credibility of any witness, that section of the Constitution does not admit of an argument being made by the court to the jury under the appellation of "comments." The contention of the appellant that the comments of the court were not within the purview of the amended section, but simply constituted an additional argument, appears to us to be well taken. This conclusion results from an analysis of the comments.

After addressing the jury, the court said: "I have tried a great many cases in this court, and now I have the right to state to you what I believe with reference to the evidence in this case, and comment upon it, and you heard the argument of the District Attorney. I believe I agree with him almost absolutely." There is nothing in the amended section of the Constitution authorizing the court to express its approval of the argument made by prosecuting officers. The address of the district attorney to the jury is too lengthy to be incorporated herein, but as an illustration of what was approved by the language of the court, we quote from the district attorney's argument the following: "Now, ladies and gentlemen of the jury, I am getting tired, and probably I have tired you long enough, but I submit to you that the evidence in this case produced by the prosecution that the facts show, the physical facts, that this must have happened as outlined to you, and from the defendant's own testimony, her own story, the most of it proves to a moral certainty, to a certainty as any fact was ever proven to you, and beyond a reasonable doubt, that Bob Talkington, or Lamar Talkington, was wilfully and deliberately, maliciously and with premeditation, killed and murdered, and that the murderess is the defendant, Bertha Talkington, and as the District Attorney of this County on behalf of the State of California, and the People of the State of California, I ask of you a verdict of guilty of murder in the first degree."

We do not wish to criticize in any manner the impassioned appeal of the district attorney, or to intimate that he traveled outside of the legitimate range accorded him, in his remarks to the jury, but there is nothing in the amended section of the Constitution authorizing the court to make such an impassioned appeal, nor in approving such an appeal when made by the district attorney.

The appellant contends that the indorsement by the court of the argument of the district attorney constituted an approval of the language of the deputy district attorney wherein the jury was requested to find a verdict of murder in the first degree without recommendation upon its first ballot. To so hold, however, is unnecessary to a decision of this case. The court then continued: "Now, as far as the penalty that should be inflicted, I do not want to say anything, and I don't believe I will at

this time. I cannot see how anyone can after hearing this evidence, can raise a very strong argument, or make an argument in defense, that is, to the extent that there is no crime committed here."

[6] If the second account of the tragedy given by the appellant is true, that the deceased reached for the gun first, after making a threatening remark to the appellant, and that the deceased came to his death by the gun being discharged during a scuffle for its possession, a verdict of not guilty would have been proper. The defense had a right to address the jury on the assumption that the appellant's account was correct, and if a juror conscientiously believed the account given by the appellant, then he had a good basis upon which to build an argument. This language of the court is not a comment upon the evidence, but a comment upon an argument that either had been, or might be used. If the court desired to comment upon, and call to the attention of the jury testimony in the case which should be considered as controverting the truthfulness of the appellant's account, and as indicating a premeditated purpose to terminate the life of the deceased, attention might very properly have been called to the testimony showing the purchase of the gun by the appellant just a few days previous to starting on the trip from Watsonville to Modesto; the giving of a fictitious name at the time of the purchase of the gun, and what was said by the appellant at the time as to the purpose for which it was being procured; likewise, attention might have been called to the two letters written by the appellant to herself, signed by the name of the deceased, purporting to have been written by the deceased in which he set forth, among other things, his worthlessness; also, attention might have been called to a letter written by the appellant indicating her high regard for another man; and the fact that at least a \$4,000 insurance policy on the life of the deceased was made out in favor of the appellant; in addition to appellant's first story as to bandits; and the attempted concealment of the gun under a culvert; the disarrangement of the contents of a suitcase; followed by the change in the account of the affair after the discovery of the concealed weapon. We quote further: "To me it appears impossible that these gunshot wounds could have been inflicted as the defendant contends. Yes, that is one

thing." (And this language is simply a conclusion, and is not the exposition of any testimony.) "As far as motive is concerned, there are several things that are brought up here and charged as motives for the commission of the offense, and the testimony of the defendant, you know, her statements are very conflicting here, given in many respects with reference to letters and the procuring of the gun at that particular time, and the insurance on her life in his behalf just a few days before." The insurance, of course, on the life of the appellant in favor of the deceased which was taken out a short time before the 15th of October, 1934, could have no bearing upon the criminality of the appellant.

The record shows an insurance on the life of the deceased in favor of the appellant, as we have said, and likewise, an insurance on the life of the appellant in favor of the deceased. So far as we have been able to discover, the only recent insurance policy is that relating to the life of the appellant in favor of the deceased. What we have last quoted of the court's comments does refer to letters without mentioning their purport, and also to the procuring of the gun, and the insurance on appellant's life. It is probable that the court intended to refer to the insurance on the life of the deceased, but the fact that it was taken out long previous to October 15, 1934, might properly be considered.

The court then continued: "Now, all of those things lead very strongly that she deliberately committed this act. Much has been said about Talkington, her husband, as to what manner of man he was, it could be considered, maybe, for but one thing from a legal standpoint, maybe; you could regard it as to his conduct and the type of man he was, as they allege here, for mitigation or extenuation, maybe, but we cannot, as good citizens, tolerate the idea that one, any one, can take the law in his own hands and kill any human being, unless that person is absolutely outlawed by the Governor of the State." The appellant contends that this language conveyed to the jury the idea that no one had a legal right to take the life of another in necessary self-defense, if it does not mean that, we are somewhat at a loss to understand what thought was intended to be conveyed. The words, "unless that person is absolutely outlawed by the Govern-

or of the State," have no place either in legal language or in the realm of jurisprudence. The court then concluded: "Now, ladies and gentlemen of the jury, it looks to me, as I have told you before, I have tried a great many cases, and this is as clear as any case tried in this courtroom." That is not a comment upon the testimony in the case, but a comparison of this case with previous trials over which the court had presided. We revert to the language used by the court relative to penalty, to wit: "Now, as far as the penalty that should be inflicted, I don't want to say anything, and I don't believe I will at this time." The use of these words, while not within the authority given the trial court by the amended section of the Constitution, we consider harmless.

Following the return of the jury, as we have stated, to make some inquiries regarding the care of their automobiles, and an exception taken by the appellant to the comments of the court, the court admonished the jury that they were entitled to their individual opinions, as against comments of the court, as we have hereinbefore set forth.

While a number of the federal cases cited show that the court may express an opinion as to the guilt or innocence of the accused, the Supreme Court of the United States in an opinion handed down December 11, 1933, in the case entitled, *United States v. Harry Murdock*, 290 U. S. 389, 54 S. Ct. 223, 225, 78 L. Ed. 381, has ruled adversely to the right of the court to express such an opinion. In that case the trial court used the following language: "So far as the facts are concerned in this case, Gentlemen of the Jury, I want to instruct you that whatever the Court may say as to the facts, is only the Court's view. You are at liberty to entirely disregard it. The Court feels from the evidence in this case, that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt." Considering this language, the Supreme Court said: "In the circumstances we think the trial judge erred in stating the opinion that the respondent was guilty beyond a reasonable doubt. A federal judge may analyze the evidence, comment upon it, and express his views with regard to the testimony of witnesses. He may advise the jury in respect of the facts, but

the decision of issues of fact must be fairly left to the jury." Citing a number of cases.

In *United States v. Murdock*, supra, after citing *Quercia v. U. S.*, 289 U. S. 466, 53 S. Ct. 698, 77 L. Ed. 1321, the court said: "Although the power of the judge to express an opinion as to the guilt of the defendant exists, it should be exercised cautiously and only in exceptional cases. Such an expression of opinion was held not to warrant a reversal where, upon the undisputed and admitted facts, the defendant's voluntary conduct amounted to the commission of the crime defined by the statute." In the instant case the language of the district attorney which we have quoted, and which was approved by the court in its comments, goes far beyond the language of the trial court in the *Murdock* Case, which was held by the Supreme Court of the United States to be error.

In the case of *O'Shaughnessy v. U. S.* (C. C. A.) 17 F.(2d) 225, 228, the court, considering the fact that the comments of the court were only upon evidence tending to show the guilt of the accused, ruled as follows: "While it is permissible for a federal judge, presiding in the trial of a criminal case, to comment on the evidence and to express his conclusions as to the guilt or innocence of the accused, he is under a duty to be impartial in doing so, not to make his comments in favor of or against one side only, and, if he states the evidence, he should state it fairly and accurately, both that which is favorable to the accused and that which is unfavorable. When there is evidence supporting a verdict of not guilty, argumentative statements, based on recitals of incriminating evidence only, are not warranted, and what is said as to evidence referred to should not be misleading as to the relevancy or probative value of such evidence. *Starr v. United States*, 153 U. S. 614, 14 S. Ct. 919, 38 L. Ed. 841; *Hickory v. United States*, 160 U. S. 408; 16 S. Ct. 327, 40 L. Ed. 474; *Weare v. United States* (C. C. A.) 1 F.(2d) 617. We are of opinion that exceptions to parts of the court's charge were well taken. The court's recital of the evidence with reference to *O'Shaughnessy* lacked impartiality, as only evidence of his guilt was referred to and stressed; that tending to prove his innocence not being stated or commented on. The part of the charge dealing specifically with the evidence as to *Donoghue* is subject to similar criticism. It was not

set out, because it was similar to the part of the charge dealing with the evidence as to *O'Shaughnessy*."

There is not a word in the comments of the court in the instant case relative to the testimony in favor of the appellant, and it necessarily lacked impartiality, just as held by the court in the *O'Shaughnessy* Case, supra.

In the case of *Sunderland v. U. S.* (C. C. A.) 19 F.(2d) 202, 216, the following comments of the trial court were held argumentative, to wit: "'The evidence justifies the claim of the government,' 'The government is justified apparently in claiming.'" The evidence further discloses: "'It is further shown to me clearly by the evidence,' 'The evidence would further indicate to me,' 'I find little dispute about it in the testimony.'" Here we have an expression of the court saying: "I believe I agree with him almost absolutely." (Referring to the argument of the district attorney in this case.) There is no difference between an indorsement or approval or expression of an agreement with the argument and claims of a district attorney, and the words used in the *Sunderland* Case. The evidence justifies the claim of the government, save and except that in the instant case the language of the trial court was not based upon the evidence.

In *Graham v. United States* (C. C. A.) 12 F.(2d) 717 (we quote from the syllabus) the holding of the court was: "While a federal judge may properly sum up the evidence, and may express his opinion as to its effect, it should be done in such manner that every one shall recognize that what is said from the bench is the cool and well-balanced utterance of an impartial judge, and has in it naught of the heat and partisanship of the advocate."

[7] We do not deem it necessary to comment upon the uncertainty of ideas injected into the trial court's comments by the use of the word "maybe," further than to say it is likewise argumentative in form, and does not contain a clear and explicit statement of the law. That the remarks or comments of the court on the testimony must not be argumentative in form is shown by the long list of cases cited in the annotations beginning on page 793, following the case of *State of Michigan v. Wudarski*, as reported in 95 A. L. R. 782. The citations to which we refer begin with that of *Starr v. United States*,

153 U. S. 614, 14 S. Ct. 919, 38 L. Ed. 841. We quote from the annotations as follows: "There is a line of cases which, in a holding that the instructions and comments of the trial judge should not be argumentative in favor of the guilt of the defendant, assign as a reason for such holding, that inasmuch as the judge cannot direct a verdict of guilty in criminal cases, even where the facts are undisputed he should not be permitted to do indirectly what he cannot do directly, and by his instructions argue the jury into a verdict of guilty."

In the case of *Malaga v. United States* (C. C. A.) 57 F.(2d) 822, 825, 828, we find the following in the opinion: "We think a trial judge should hesitate in expressing his opinion on the guilt of a respondent in a criminal case, though he may be permitted to give his opinion on the evidentiary facts. Argumentative discussion on the effect of evidence as proof, or the inference to be drawn from the acts of witnesses, or of the respondent in a criminal case, are universally recognized as out of place from the bench." It is further held in that case, and also in the case of *O'Shaughnessy*, supra, that: "General statements in the charge, to the effect that the jury were at liberty to disregard the court's views as to guilt or innocence, and to base their verdict on their own conclusions from the evidence, did not cure the fault in the charge of a lack of impartiality in submitting the evidence to the jury, or justify the court in making one-sided recitals of evidence, or in furnishing arguments in behalf of only one side of issues as to which the evidence was conflicting."

In the *Graham Case*, supra, the court ruled as follows: "Moreover, it is always the right of the federal judge to review and marshal the testimony, and it is often his duty, for in no other way can he more effectively promote the doing of justice. In any particular case, it may be that the evidence is such that to sum it up fairly and intelligently is to come close to a demonstration of the guilt of the accused. That is no reason why the summing up should be omitted, or the conclusion to which it points evaded or obscured. In the discharge of this high function, it is, however, of the first importance, both to the particular defendant who may be on trial and to the administration of justice generally, that everyone shall recognize that what is said from the bench is the

cool and well-balanced utterance of an impartial judge, and has in it naught of the heat and partisanship of the advocate."

In *Hunter v. United States* (C. C. A.) 62 F.(2d) 217, 220, it is said: "If the trial judge comments on the evidence * * * he should call attention to the evidence in favor of as well as that against the accused."

In *Weare v. United States* (C. C. A.) 1 F.(2d) 617, 619, we find the following which has a direct bearing upon the comments of the court in the instant case, to wit: "The jury can easily be misled by the court. Its members are sensitive to the opinion of the court, and it is not a fair jury trial when the court turns from legitimate instructions as to the law to argue the facts in favor of the prosecution. The government provides an officer to argue the case to the jury. That is not a part of the court's duty. He is not precluded, of course, from expressing his opinion of the facts, but he is precluded from giving a one-sided charge in the nature of an argument."

In *Minner v. United States* (C. C. A.) 57 F.(2d) 506, 513, where the trial court undertook to sum up and comment on the evidence and narrate only the important facts testified to by the witnesses for the government, and wholly failed to sum up the evidence in behalf of the defendant, his comments were held to be in the nature of an argument to the jury, rather than a fair and dispassionate statement of what the evidence showed. It was further held that: "In doing so, he assumed the role of an advocate rather than an impartial judge."

In the case of *Kesley v. United States*, supra, it was held that it was not error for the court to comment upon the testimony after the jury had reported a disagreement, provided it was done dispassionately and fairly. Other cases have held that the comments on the testimony should be made in connection with the charge to the jury as to the law involved in the action. No case has been called to our attention, however, holding that reversible error is committed when the comments are not made until after the jury has reported a disagreement.

In the case of *Kolkman v. People*, supra, it was held by a divided court that the following comments by the trial judge did not warrant a reversal, to wit: "Gentlemen of the Jury: There are four de-

fendants named in the information. All four of these defendants have testified in this trial. Only two of the defendants, viz: John Kolkman and Roy Kolkman are on trial. The two Morrisons who are named as defendants are not on trial here. There is a direct conflict between the evidence offered by the two Kolkmans, who are on trial and that given by the two Morrisons who are also defendants. The two Morrisons have testified for the State. The Court believes that the evidence when taken as a whole and all the circumstances as they have been presented here show that all four of these defendants are equally involved in the crime charged in the information and all four stand equally before the law in the same position. These comments that the Court makes are not binding upon you. You are to make your finding and return your verdict as you may find the evidence warrants." The court did not purport to approve an argument made by the district attorney, but simply went to the effect that all of the parties were involved in the same transaction; and in the same comments, and as the concluding paragraph thereof, admonished the jury that what the court said was not binding upon them. In some particulars this case seems to be in conflict with the cases which we have cited, and also with the *Murdock Case*, *supra*, decided by the United States Supreme Court.

In the case of *Simmons v. United States*, 142 U. S. 148, 12 S. Ct. 171, 35 L. Ed. 968, the comments were made after the jury had reported a disagreement. The propriety of making comments after the jury had reported a disagreement was not, however, passed upon by the court in that case.

[8] We conclude our review of the cases with the statement that the overwhelming weight of authority is to the effect that comments in an argumentative form constitute reversible error; that comments must be made in such a manner that the court does not assume the role of an advocate; that the comments must be temperately and fairly made; and if the testimony is reviewed, it must include the testimony offered in favor of, as well as against the accused.

The verdict of the jury in this case, after finding the appellant guilty of murder in the first degree and fixing the penalty at imprisonment for life, and concluding with the words, "with mercy and leniency," is inexplicable, except upon the theory that the comments of the court to the effect that he would not at that time say anything about the penalty, led the jury to believe that the court possessed power to comply with the words which we have quoted, or that after the comments of the court, the jurors who had voted not guilty agreed to a verdict of guilty after the quoted words were added to the verdict.

From what is said in the foregoing, we find no escape from the conclusion that the court erred in adopting the argumentative form in its comments to the jury, and that as held in some of the cases, the error having been committed, the subsequent admonition of the court did not remove the effects thereof.

[9] The court did not err in permitting witnesses to testify who had remained in the courtroom contrary to the admonition given at the beginning of the trial not so to do. The state was entitled to their testimony, even though such witnesses may have rendered themselves subject to a charge of contempt.

[10] We do not find any prejudicial error in the admission of a certain hat used as an exemplar in the case, or in the testimony of the witness who made experiments therewith.

Our somewhat lengthy discussion of this case has been rendered necessary for the reason that it is the first case arising under section 19 of article 6 of the Constitution as it now stands amended.

We do not think that the provisions of section 41½ of article 6 of the Constitution applies to the errors committed by the trial court in this case, but if such is the case, we hold, nevertheless, that the errors complained of were prejudicial.

The order and judgment of the trial court are reversed, and the cause remanded for a new trial.

We concur: THOMPSON, J.; PULLEN, P. J.

8 Cal.App.2d 760

C. R. BELL, Petitioner, v. The SUPERIOR COURT OF the State of CALIFORNIA IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent.

Civ. 9931.

**District Court of Appeal, First District,
Division 1, California.**

July 9, 1935.

Certiorari to Superior Court, City and County of San Francisco.

Murphy & Doherty, of Los Angeles, for petitioner.

PER CURIAM.

Petitioner seeks by certiorari to review a certain order of the superior court. The petition is denied on the authority of *Cassidy v. Norton*, 25 Cal. App. 433, 143 P. 1057, and *Camp v. Oakland Mortgage, etc., Co.*, 205 Cal. 380, 270 P. 865.



8 Cal.App.2d 760

C. R. BELL, Petitioner, v. The SUPERIOR COURT OF the State of CALIFORNIA IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent.

Civ. 9932.

District Court of Appeal, First District, Division 1, California.

July 9, 1935.

Certiorari to Superior Court, City and County of San Francisco.

Murphy & Doherty, of Los Angeles, for petitioner.

PER CURIAM.

Petitioner seeks by certiorari to review a certain order of the superior court. The petition is denied on the authority of *Cassidy v. Norton*, 25 Cal. App. 433, 143 P. 1057, and *Camp v. Oakland Mortgage, etc., Co.*, 205 Cal. 380, 270 P. 685.

bank stopped payment on draft which it had originally sent in fulfillment of its promise (Civ. Code, §§ 1582, 1583).

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Pacific Finance Corporation against the First National Bank of Puente, Cal. Judgment for plaintiff, and defendant appeals.

Reversed with directions.

Prior opinion, 38 P.(2d) 167.

Harry J. McClean, of Los Angeles, for appellant.

John L. Rush, of Los Angeles (Gene G. Curry, of Los Angeles, of counsel), for respondent.

PRESTON, Justice.

Plaintiff, as the payee of a draft or bill of exchange drawn by the defendant, presented it to the drawee for payment, but was refused and, after protest, this action was begun for its face value. The amount of the draft was \$9,702.28, but the parties stipulated that in the event of judgment for the plaintiff the true amount should be \$4,902, with interest and costs. The court made findings in favor of plaintiff and gave judgment for the stipulated amount. Defendant has appealed upon a full record.

The facts necessary to a determination of the dispute are without conflict. They are to the effect that plaintiff held a chattel mortgage upon the dairy herd of one Houston and wife. Defendant, intending to take a mortgage upon said chattels, and as the agent of the mortgagor, on October 8, 1930, wrote the plaintiff requesting that the note and mortgage and a proper release thereof be sent to it for collection. On October 9, 1930, plaintiff responded advising defendant it would not send the instruments "before they are paid in full," further stating the amount due and the rate of interest, and then saying, "upon the payment of this amount we will immediately send you all necessary papers, together with releases." On October 17, 1930, defendant replied inclosing the above-mentioned draft or bill of exchange and requesting plaintiff to forward the releases and other papers to it. Within less than an hour after mailing this draft defendant experienced a

4 Cal.2d 47

**PACIFIC FINANCE CORPORATION v.
FIRST NAT. BANK OF PUENTE,
L. A. 15167.**

**Supreme Court of California.
July 1, 1935.**

Rehearing Denied July 30, 1935.

Bills and notes ☞63

Letter of chattel mortgagee stating, in answer to bank's request to forward mortgage and note for collection, that it would send the papers and release on receiving full payment held merely an offer to release on payment in full, and insufficient to support bank's promise of payment, and to permit recovery by mortgagee against bank where

change of mind for some undisclosed reason, and sought eagerly to procure the letter and its contents from the post office but failed in this effort. It immediately phoned plaintiff and asked it to return the bill of exchange to which request plaintiff responded over the phone as follows: "In reply I said I would look into it, that I saw no reason why it should not be returned." On arrival of the draft plaintiff did not return it, but instead proceeded to execute a release and to transmit it and the other incident papers to defendant, who returned them by the next mail in a letter recounting its position. Contemporaneously with the execution of said release plaintiff attempted to collect the proceeds of the bill of exchange or draft and ascertained at that time that defendant had stopped payment thereon; hence this suit.

Plaintiff seeks to sustain the judgment upon the ground that the letter of October 9th constituted a counter offer which was accepted by defendant's letter and draft of October 17th and became a binding contract between the parties when the documents were placed in the course of transmission by the defendant and as a result the acceptance became irrevocable. Sections 1582, 1583, Civ. Code. Appellant's position seems to be that the letter of October 9th was not an offer, but that the letter of October 17th was an offer, not an acceptance, and being an offer could be revoked at any time before acceptance by plaintiff. Its further contention is that if the letter of October 9th be treated as an offer and the letter of October 17th as an acceptance, nevertheless the right of revocation existed before the actual collection of the proceeds of the draft. Lastly, it contends that defendant was acting as agent for the mortgagor and for that reason there was no consideration for its promise to pay.

It seems to us, however, that the controlling question lies a bit deeper than either or any of these propositions. The letter of October 9th clearly specified that plaintiff would not release unless and until the note and mortgage were paid in full. No contention is made that the obligation is not due and payable. It was not a proposal to sell and transfer the mortgage to defendant, but was merely an offer to release upon payment in full and a discharge thereby of the obligation. Is such a promise of sufficient vitality to constitute a valid consideration for the promise made by the defendant? We do not think it is any

more than a promise to do what the law requires. Plaintiff, therefore, hazarded nothing by tendering such a promise. If this be so, defendant cannot be held on its promise. Payment having been stopped upon the draft, plaintiff is without standing in court to enforce its payment.

The case of *Sullivan v. Sullivan*, 99 Cal. 187, 33 P. 862, 864, seems clearly in point. Michael Sullivan died having a life insurance policy in which his widow was the beneficiary. John Sullivan claimed he had furnished to his brother some \$854 to pay premiums on said policy. The plaintiff, Frank Sullivan, as the executor of the will of John Sullivan, then deceased, had in his possession the policy. He exacted from the widow a written promise to pay this debt of her husband in consideration of his finding and delivering the policy to her. She refused to carry out this agreement, and the court said: "The only consideration expressed in the agreement, other than the alleged moral obligation, is plaintiff's promise to look for, find, and surrender the policy. This it was his duty to do, on demand of defendant, without compensation. After the maturity of the policy by the death of her husband, if not before, the defendant was entitled to the possession of it, unless the plaintiff, in his character of executor, had a lien on it. Whether the finding of the policy among the papers of the estate required more or less labor must have depended upon the degree of care or negligence with which the plaintiff had kept it, for which the defendant was not responsible. But it does not appear why a search of more than 10 minutes was necessary to find it. It is well settled that neither a promise to perform a duty, nor the performance of a duty, constitutes a consideration of a contract." This holding has been approved. *Weidner v. Ziegler*, 218 Cal. 345, 351, 23 P.(2d) 515.

A case very similar in its facts to the instant case and relating to the release of a mortgage is *Chilson v. Bank of Fairmount*, 9 N. D. 96, 81 N. W. 33, 35, where the bank agreed to reconvey under an instrument intended to be a mortgage, upon the payment to it of certain rentals by the debtor. The rentals were paid, and after the mortgage was satisfied, the debtor sued for a return of the rentals. The defendant defended upon the ground that the agreement to reconvey was a sufficient consideration for retaining the rentals received. This position was held untenable. The

court said: "It must be apparent that, if plaintiff performed the conditions entitling him to a repayment of the \$105 and to a conveyance, namely, the payment of the mortgage debt, the execution and delivery of the deed by the bank was merely the performance of its obligation and legal duty to do so, and that the doing of that which it had legally bound itself to do could not furnish a consideration for the exaction of a greater sum of money than theretofore agreed upon. On this, Bishop, in his work on Contracts (section 48), says: 'One, by undertaking to do or by doing what the law or a previous agreement requires of him, merits nothing, and it is not a consideration for anything.'"

For a further discussion of this principle, see Restatement of the Law of Contracts, vol. 1, § 76a, page 83; 13 Corpus Juris, page 351, § 207; Page on Contracts, vol. 1, § 585; Williston on Contracts, vol. 1, § 132, page 291; Parson on Contracts (9th Ed.) page 474.

The findings in favor of plaintiff for the above reasons are unsupported by the record. The judgment is reversed with directions to the court below to proceed with a disposition of the cause consistent with the holding here announced.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; THOMPSON, J.



4 Cal.2d 1

BELLON v. SILVER GATE THEATRES, Inc.
L. A. 15090.

Supreme Court of California.
June 27, 1935.

Rehearing Denied July 25, 1935.

1. Landlord and tenant Ⓒ169(11)

Whether sublease of "premises," described by street number and as situated in named building, included basement, not expressly mentioned, so as to relieve tenant of entire building of any duty to plumber killed in basement when "plumber's snake" came in contact with electric drop cord, defectively insulated contrary to ordinance, *held* for jury.

A "plumber's snake" is a flexible spring steel tape about 60 feet long commonly used to clean out obstructed pipe drains.

2. Landlord and tenant Ⓒ122

Whether rent of storeroom described as "premises" includes basement depends upon surrounding facts and circumstances.

[Ed. Note.—For other definitions of "Premises," see Words & Phrases.]

3. Landlord and tenant Ⓒ124(1)

A lease of a part of a building passes with it, as an incident thereto, everything necessarily used with or reasonably necessary to the enjoyment of the part demised.

4. Landlord and tenant Ⓒ124(1)

General rule is that where a store is leased, everything in use for the store as an incident or appurtenance passes by the lease.

5. Landlord and tenant Ⓒ124(1)

A lease of a particular building gives the lessee no rights outside of such part, except such as were intended to be included as appurtenant to the beneficial enjoyment thereof, or such as it was manifest had been designed and appropriated for the benefit of the leased premises.

6. Landlord and tenant Ⓒ124(1)

Generally, everything which belongs to the demised premises or is used with or appurtenant to their enjoyment passes as an incident to them, unless specially reserved.

7. Appeal and error Ⓒ1002

Verdict on conflicting evidence is binding on appeal.

8. Appeal and error Ⓒ930(1)

On appeal, all conflicts in evidence must be resolved in respondent's favor, and all legitimate and reasonable inferences indulged to uphold the verdict.

9. Appeal and error Ⓒ989

Where verdict is attacked as unsupported by the evidence, appellate court's power begins and ends with determination whether there is any substantial evidence, contradicted or uncontradicted, which will support verdict.

10. Appeal and error Ⓒ996

When two or more inferences can reasonably be deduced from the facts, reviewing court may not substitute its deductions for those of trial court.

11. Landlord and tenant Ⓒ167(1)

Tenant of entire building owed duty to exercise reasonable care to see that basement remaining in its possession, though beneath storeroom subleased to another, was in rea-

sonably safe condition as regards plumber called to work in basement.

12. Landlord and tenant ⇨169(11)

Whether plumber killed in basement when snake used by him came in contact with electric drop cord, defectively insulated contrary to ordinance, was called to work by tenant of entire building retaining possession of basement beneath subleased storeroom *held* for jury.

13. Landlord and tenant ⇨167(1)

Tenant of entire building retaining possession of basement beneath subleased storeroom owed duty to exercise reasonable care to see that basement was in reasonably safe condition as regards workmen who might reasonably be expected to enter basement.

14. Landlord and tenant ⇨169(11)

Contributory negligence of plumber, killed when his snake came in contact with electric drop cord, defectively insulated contrary to ordinance, in basement remaining in possession of tenant of entire building though storeroom above was subleased to another *held* for jury.

15. Appeal and error ⇨996

To establish contributory negligence as against verdict, appellate court must be able to say that there is no substantial conflict in the evidence, and that all reasonable men could draw only the inference that plaintiff's negligence proximately contributed to his injury.

16. Landlord and tenant ⇨168(1)

Plumber called to work in basement remaining in possession of tenant of entire building though storeroom above it was subleased to another *held* entitled to assume that basement was reasonably safe in which to do his work.

17. Landlord and tenant ⇨169(10)

Where evidence was conflicting as to whether basement in which plumber was killed when his snake came in contact with electric drop cord, defectively insulated contrary to ordinance, remained in control of tenant of entire building or subtenant of storeroom above, instruction that tenant was not liable if control of basement was surrendered to subtenant, and instructions covering tenant's liability if basement remained in his control *held* proper.

18. Trial ⇨219

In action for death of plumber, killed in basement, involving question whether basement was under control of tenant of entire building or of subtenant of storeroom above, failure to give instruction defining "premises" and what constituted "control" *held* not error.

19. Appeal and error ⇨215(1)

Failure to give instructions on certain matters could not be complained of on appeal, where no request for instructions relating to such matters was made in trial court.

20. Death ⇨31(3, 5)

Action for wrongful death of adult must be brought by decedent's personal representative or by decedent's heirs (Code Civ. Proc. § 377).

21. Appeal and error ⇨1036(1)

In widow's action for wrongful death of adult husband, allowance of amendment at beginning of trial alleging that widow was sole heir and later amendment joining decedent's father and mother as parties and filing of waiver of all claims to damages by them *held* not prejudicial error, in view of fact that widow and father and mother were the only heirs (Code Civ. Proc. § 377).

22. Death ⇨99(4)

\$20,000 *held* not excessive for wrongful death of plumber, 28 years old, earning \$250 monthly and substantial bonus and about to succeed to father's business with net earnings of \$30,000 for year prior to death and between \$8,000 and \$9,000 in the year of death.

23. Appeal and error ⇨805

Failure of plaintiff recovering judgment against one defendant to discuss portion of judgment appealed from in favor of other defendants *held* abandonment of appeal requiring its dismissal.

In Bank.

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by Ione C. Bellon against the Silver Gate Theatres, Inc., and others. From a judgment for plaintiff against the named defendant, the named defendant appeals, and from a judgment for other defendants, plaintiff appeals.

Judgment appealed from by defendant affirmed, and plaintiff's appeal dismissed.

Prior opinion, 36 P.(2d) 672.

Wright & McKee, C. M. Monroe, and Wright, Monroe, Thomas & Glenn, all of San Diego, for appellant.

Stearns, Luce & Forward, of San Diego, for respondent.

PRESTON, Justice.

This action was instituted by respondent against appellant and others to recover damages for the death of her husband,

Raymond C. Bellon, who was killed on April 4, 1932, while doing plumbing work in the basement of the Balboa building in the city of San Diego. The appellant is the lessee of the entire building. Located in the building are a theater, stores, offices, and several basements. Seven persons or corporations were originally joined as defendants, but the action was dismissed as to one, a nonsuit granted as to two, and a motion for directed verdict granted as to three. A verdict was returned by the jury against the sole remaining defendant, appellant herein, in the sum of \$20,000.

The deceased was a plumber. At the time of his death he was engaged in cleaning out an obstructed drain pipe located in the basement of the Balboa building. In performing this task, he was using an implement commonly used by plumbers for such purposes, known as a "plumber's snake," which is a flexible spring steel tape about 60 feet long. While using this tape, one end of it came into contact with a defectively insulated electric drop cord, admittedly maintained in the basement in an unsafe condition and in a manner in violation of a city ordinance. Bellon was standing in a shallow pool of water, and, as a result of the electric shock, was instantly killed. The main question involved on this appeal is whether or not appellant, under the facts disclosed by the record, owed a duty to Bellon to maintain the basement, in general, and the electric drop cord, in particular, in a reasonably safe condition. The solution of this problem largely turns upon whether the basement where the injury occurred was under the legal control of appellant, as landlord, or under the legal control of the tenants who had leased the stores above.

The Balboa building is located at the southwest corner of Fourth and E streets in the city of San Diego. The fee of the property is in the Balboa Building Company, and the building is leased to appellant. Both the Balboa Building Company and appellant are wholly owned subsidiaries of the Fox West Coast Theatres Corporation. The building is several stories in height. The main portion of the building is occupied by the Balboa Theatre, the entrance to which is at the corner of Fourth and E streets. To the south of the theater entrance, and facing Fourth street, on the first or ground floor of the building, are certain stores. Above the stores are offices. The stores and offices are all leased

to separate tenants. At the time of the death of Bellon, appellant had leased the first store adjoining the theater entrance to Mrs. Walsh, who conducted a confectionary there under the name of the "Sweet Shop"; her son, J. C. Milne, acting as manager. The street number of the Sweet Shop is 866 Fourth street. Next, adjoining the Sweet Shop, is a restaurant, occupying two stores and leased to Harding and Calvert. Adjoining the restaurant is the lobby of the Balboa building, serving as an entrance to the offices located above the stores. In the lobby is located an elevator. Underneath the lobby, restaurant, and Sweet Shop are four basement rooms, each exactly the same in size as the room above, except that each basement room extends under the sidewalk to the curb line of Fourth street. Access to the basement room underneath the lobby is had by means of the elevator. Under the restaurant are two basement rooms, divided by a partition, but with an open archway leading from one to the other. There is also a doorway between the lobby basement and the adjoining restaurant basement. The basement under the Sweet Shop, as originally constructed, had no access to any other basement room, the only means of access being by a trap door in the floor of the Sweet Shop and an iron stairway located in the basement. A prior tenant of the Sweet Shop who was in possession during 1925-1929 testified that she had no use for this basement and had covered the entire floor of the Sweet Shop, including the trap door, with linoleum, and had erected a semipermanent structure in the Sweet Shop over the trap door. Mrs. Walsh, when she took possession, placed new linoleum on the floor and also installed a fixture over the trap door. As a result of these acts the basement under the Sweet Shop was left without any means of ingress or egress. Some time between 1925-1929 some one knocked a hole in the partition dividing the restaurant basement from the basement under the Sweet Shop. This hole was about $2\frac{1}{2}$ feet square; its base being several feet from the basement floor. This hole was in the wall when the Sweet Shop was leased to Mrs. Walsh, August 24, 1931. After this hole was put in the wall it was possible to enter the basement under the Sweet Shop by first entering the lobby basement, then crossing the two restaurant basements, and then crawling through the hole above described.

In fact, after the trap door was closed, this was the only means of ingress to this room.

Crossing the basement room under the Sweet Shop, near the ceiling thereof, are certain exposed steam pipes serving the building generally. In the partition dividing the Sweet Shop from the restaurant is a drain pipe which serves the various offices above, and the restaurant. This drain pipe comes down the partition and into the basement, then crosses the two restaurant basements, and then connects with the main line leading to the sewer. This drain pipe is not exposed in the room under the Sweet Shop, but near the ceiling and in that room is a small hole in the partition, through which a clean-out plug in the drain pipe can be reached. In the restaurant basements are other clean-out plugs.

In a corner of the basement under the Sweet Shop there was installed during the tenancy of Mrs. Walsh, in October, 1931, a carbonating machine, attached by pipes to the soda fountain directly above in the Sweet Shop. This machine was installed by one Howerton, a contractor. He placed this machine in the basement on his own responsibility. Neither Mrs. Walsh nor the appellant gave him express permission to use the basement for this purpose. In order to get the carbonating machine into the basement, he enlarged the hole in the partition above described. The carbonating machine was operated by electricity. The current was obtained through two heavily and properly insulated wires which ran from the motor on the machine to an outlet box located in the ceiling of this basement room. The switch operating the machine was located in the Sweet Shop. A short distance from the ceiling the insulation had been cut from each of the wires leading to the motor, and an electric drop cord attached thereto, on the other end of which was a socket for a light globe. This drop cord was quite long, and was looped several times around the steam pipes, and hung, in a loose loop, to within a short distance from the floor of the basement. The cord was an old one, being at least three or four years old, and the insulation on it was badly worn, in several places being entirely worn off and the wire exposed. It is an admitted fact that this drop cord was maintained in a negligent condition and in a manner in violation of a city ordinance. There was some

evidence that a similar cord was present in the basement under the Sweet Shop prior to October of 1931, when the carbonating machine was installed. The record is silent as to who connected, or authorized the connection of the drop cord in the fashion above described, every one connected with this case denying responsibility therefor.

On April 4, 1932, the drain pipe above described became obstructed, resulting in the accumulation of a large pool of water about $\frac{1}{2}$ inch deep in one of the restaurant basements. The evidence shows that three telephone calls were made to the plumbing establishment where deceased was employed, requesting that a plumber be sent to clean out the drain pipe. One of these calls was made by the janitor of the Balboa building, an employee of an independent contractor. At the coroner's inquest, the janitor testified unequivocally that Mr. Kendrick, the manager of appellant, requested him to call the plumber. At the trial he changed this story and testified that Mr. Bassett, one of the proprietors of the restaurant, requested him to call the plumber. The Balboa plumbing shop, owned by the decedent's father, and for which decedent worked, had previously done considerable work at the Balboa building. This work had been ordered and paid for by appellant or its agents. Mrs. Bellon, mother of the deceased, and in charge of telephone calls at the plumbing shop, testified that one of the three calls was from Mr. Kendrick; that the man telephoning stated he was Mr. Kendrick; that on previous occasions some one stating that he was Mr. Kendrick had telephoned for plumbing service. Kendrick denied that he had telephoned or authorized a telephone call to the plumbing shop on April 4th, and likewise denied making the prior calls. Though there is some uncertainty as to who made or authorized the telephone calls, it is certain that no one connected with the Sweet Shop ordered the plumbing work to be done.

The deceased responded to the request for a plumber. He was apparently first observed by the janitor of the building. When first observed, Bellon was standing on a stepladder belonging to the building, in the basement under the Sweet Shop. He had removed the clean-out plug in the drain pipe located in that room, as above described, and had inserted the plumber's snake into the drain pipe. The janitor in-

formed Bellon of the existence of the other clean-out plugs in the restaurant basement and pointed out one located in the basement room adjoining the lobby basement. The janitor then left. It was in this last-named basement room that the pool of water had accumulated. A short time later, Bellon was found lying on the floor of this room. One end of the plumber's snake was inserted in the drain pipe where the clean-out plug in that room had been removed. Bellon was holding the plumber's snake in one hand. The steel tape led from this room, through the adjoining restaurant basement and through the hole in the partition separating the restaurant basement from the basement under the Sweet Shop. The free end was found to be in contact with the defectively insulated drop cord. Apparently, when Bellon went into the restaurant basement, he had carried one end of the tape through the hole in the wall, then through the adjoining basement room and into the room where he was found. Apparently while inserting the tape in the clean-out plug, the free end thrashed about and came into contact with the drop cord. Inasmuch as Bellon was then standing in water, the force of the shock was intensified and he was electrocuted.

[1, 2] This action, brought by the widow of deceased, is predicated upon the theory that Bellon was an invitee; that appellant owed Bellon a duty of due care; and that appellant was negligent in permitting the defective drop cord to be maintained upon the premises. Appellant concedes that the wiring was defective and that the evidence is sufficient to establish negligence on the part of some one in the maintenance of the drop cord, but strenuously contends that it owed no duty to appellant and that it was not negligent. It is appellant's theory that possession and control of the basement under the Sweet Shop passed under the lease of the Sweet Shop to Mrs. Walsh; that appellant had neither possession nor control of this basement room; that the premises were in a safe condition when leased to Mrs. Walsh; that it did not install nor know of the installation of the drop cord; that Mrs. Walsh was in exclusive possession and control of the basement under her shop; and that, therefore, it owed no duty to appellant. Mrs. Walsh was not made a party to this action. Respondent argues that whether the right to the possession and control of the basement

passed under the lease to Mrs. Walsh, or whether the right to possession and control was retained by the appellant as landlord, under the facts of this case, was a question of fact for the jury, and that that question has been determined in respondent's favor by the verdict.

We are of the opinion that respondent's position is sound. In the lease to Mrs. Walsh, the property demised was described as "Those certain premises more particularly known and described as 866 Fourth Street, situate in the Balboa Building." The basement is not referred to in the lease. Under the terms of the lease, the tenant agreed to make all necessary repairs "on the premises" leased. The landlord, however, retained a right of entry to the "premises" leased for the purpose of making certain repairs. The evidence shows that there were certain stores in the building, other than the ones described above, and that these other stores had no basements under them. In the leases to the tenants of these other stores, the demised property was described in the same fashion as it was described in the Walsh lease. The word "premises," as used in the Walsh lease, is of no particular assistance in determining whether or not the basement passed under the lease. Whether such term was intended to include the basement turns upon the surrounding facts and circumstances. *Cohen v. Simon Strauss* (Sup.) 139 N. Y. S. 929; *Hirsh v. Valloft*, 121 La. 66, 46 So. 103; *Robinson v. State*, 143 Miss. 247, 108 So. 903.

[3, 4] Both parties to this appeal cite and rely upon the case of *Runyon v. City of Los Angeles*, 40 Cal. App. 383, 180 P. 837, 839, and both agree that it correctly states the principles determinative to this appeal, but differ as to the application of those principles to the facts of this case. In that case, a barber shop on the first floor of a building was leased to Cooley under a lease describing the premises as "That certain storeroom known and numbered 212 West First Street. * * *" Under the barber shop was a basement. A third party, the plaintiff, was injured by reason of a defective grating leading to the basement. This condition did not exist when the premises were leased. When the lease was entered into the agent of the owners told Cooley that the basement was included, and gave him a key to the door leading to the basement. A directed verdict was granted as to the owners of the building on

the theory that the basement passed under the lease to Cooley. An appeal was taken on a bill of exceptions containing only a portion of the evidence. As a result, the appellate court held that it was bound "to resolve every material question of fact against appellants." All that remained to determine was whether as a matter of law, under the above description, the basement was excluded from the lease. In effect, the court held that this was a question of fact, and, therefore, must be determined in favor of respondent owner. During the course of its opinion, the appellate court stated (40 Cal. App. 383, page 387, 180 P. 837, 839): "The written lease does not expressly mention the basement under Cooley's barber shop. The language of the lease is: 'That certain storeroom known and numbered as 212 West First Street, * * * said storeroom hereby leased being the room now occupied by the party of the second part. * * * The said storeroom is to be used by the party of the second part for the purpose of conducting a barber shop therein, for which said purpose it is now occupied by the party of the second part.' A lease of a part of a building passes with it, as an incident thereto, everything necessarily used with or reasonably necessary to the enjoyment of the part demised. *Miller v. Fitzgerald Dry-Goods Co.*, 62 Neb. 270, 86 N. W. 1078; *Kitchen Bros. Hotel Co. v. Philbin*, 2 Neb. (Unof.) 340, 96 N. W. 487; *Herpolsheimer v. Funke*, 1 Neb. (Unof.) 471, 95 N. W. 688. The general rule is that where a store is leased, everything then in use for the store, as an incident or appurtenance, passes by the lease. *Hall v. Irvin*, 78 App. Div. 107, 79 N. Y. S. 614; *Browning v. Dalesme*, 3 Sandf. [5 N. Y. Super.] 13. From the testimony to which reference already has been made, it may be inferred that the basement was necessarily used with, and was reasonably necessary to the use of, the barber shop occupied by Cooley. A fortiori, it may well be that the evidence that was introduced in the court a quo, but not brought up by the record on this appeal, showed that the basement necessarily was used with the barber shop, and that therefore it passed by the lease as an incident or an appurtenance to the storeroom described in the written document itself."

[5] The above principles are well settled. Supported by many authorities, the principles are stated as follows in 36 Cor. Jur. 29, § 630: "A lease of a particular

part of a building gives the lessee no rights outside of such part, except such as were intended to be included as appurtenant to the beneficial enjoyment thereof, or such as it was manifest had been designed and appropriated for the benefit of the leased premises."

[6] In 36 Cor. Jur. 30, § 632, it is stated: "As a general rule everything which belongs to the demised premises or is used with, and appurtenant to, them and which is reasonably essential to their enjoyment passes as an incident to them, unless specially reserved. This rule, for example, applies to a lease of a part of a building."

[7] Applying the above principles to the present case, we must conclude that whether the basement passed under the lease to Mrs. Walsh was a question of fact, and, further, that since the evidence is conflicting, we are bound by the determination of the jury on this point. It is true that as originally constructed the basement was obviously intended to be used by the tenant of the Sweet Shop. As already pointed out, as originally constructed, the only means of ingress and egress to the basement was through the trap door located in the floor of the Sweet Shop and down the iron stairway located in the basement. It is also true that the basement room in question is directly under the Sweet Shop and, except that it extends under the sidewalk, is exactly of the same dimensions. It is also true that the carbonator was installed in the basement and that the carbonator was for the use and benefit of the Sweet Shop. All these are facts which tend to indicate that the basement was included in the lease. If the jury had found for appellant, the above evidence and the other evidence offered by appellant, would undoubtedly have supported an implied finding that the basement was included in the lease. But there is substantial evidence that supports a contrary conclusion. It is an undisputed fact that when the lease between Mrs. Walsh and appellant was entered into in August, 1931, the basement room was not then in use as a part of the Sweet Shop and had not, in fact, been used by any tenant of the Sweet Shop since about 1925. Mrs. Reardon testified that she operated the Sweet Shop from 1925 to 1929; that when she first went into possession she went into the basement and found that she could not use it; that "we didn't use the basement while I had possession

of the shop"; that she covered the floor with linoleum and built a booth over the trap door; that some time during her occupancy the hole between the restaurant basement and the basement under the Sweet Shop was put into the partition; that she did not authorize the placing of the hole there nor know who did it; that after the hole was placed in the partition she did not use the basement for any purpose.

When the property was leased to Mrs. Walsh in August, 1931, nothing was said by either party to the lease as to whether the basement was included. When this lease was entered into, the basement was not then in use as part of the Sweet Shop. To use the exact language of the Runyon Case, *supra*, the basement was not then "necessarily used with or reasonably necessary to the enjoyment of the part demised." The trap door was covered with linoleum. Mrs. Walsh immediately had the entire floor, including the trap door, covered with a solid piece of linoleum and immediately erected in the Sweet Shop over the trap door a semipermanent structure. During the tenancy of Mrs. Walsh, the trap door was never opened. Milne, her manager, testified that from the beginning of the tenancy until the death of Bellon, he had been in the basement only twice, and both times went in through the hole in the partition to observe the carbonator; that the first visit was at least two months after the carbonator was installed. He further testified that he did not use the basement "for any purpose." It is admitted that from 1925 to 1932 the trap door was never used.

The only possible use made of the basement by Mrs. Walsh was for the carbonator, which was installed in October, 1931. Milne testified that he did not authorize the installation of the drop cord; that he did not authorize Howerton to install the carbonator in the basement; that he did not tell Howerton where to install it; that the old carbonating machine that was superseded by the new machine was entirely located in the Sweet Shop; that he, Milne, left the location of the machine entirely to Howerton; that he did not authorize Howerton to connect the machine to any electric wiring; that he did not show Howerton how to get into the basement; that he did not know who connected the wiring; that he left all these matters to Howerton; that he carried on the negotia-

tions for the lease; that during those negotiations the basement was never mentioned; that, as far as he knew, no one requested permission from any one to put the carbonator in the basement; that he did not place in the basement any of the refuse or other material the basement contained. Howerton corroborated Milne in every respect. He testified that he asked permission from no one to install the carbonator and asked no one's permission to enlarge the hole in the wall. He further denied having connected the carbonator to the electricity and particularly denied having connected the drop cord. Every one connected with this case denied not only responsibility for the installation of the drop cord, but also any knowledge of who connected it. Milne testified that when he went into the basement two months after the carbonator was installed, the drop cord was then connected. Kendrick, manager of appellant, testified that he had been manager of the Balboa Theatre since April 1, 1931, and manager of the appellant since December 9, 1931; that during the period he had been connected with the building he had never been in the basement under the Sweet Shop until the time of the death of Bellon.

[8-10] We think enough of the evidence has been summarized to indicate that, although the question is a close one, there is substantial evidence to sustain the implied finding of the jury that the basement did not pass under the lease. Under such circumstances, we are without power to disturb the verdict. As was said in *Crawford v. Southern Pacific Company* (Cal. Sup.) 45 P.(2d) 183, 184: "In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."

[11-13] Having established that the implied finding of the jury that the basement

under the Sweet Shop did not pass under the lease and so remained in the possession and under the control of appellant, it of course, follows that appellant owed Bellon, who was admittedly an invitee, a duty to use reasonable care to see that the premises under its control were in a reasonably safe condition. We think the evidence is sufficient to sustain the theory that Bellon was directly invited to the premises by appellant, but even if the invitation was made by the proprietors of the restaurant, appellant was under a duty to use reasonable care in protecting the premises still under its control when such invitees might reasonably be expected to enter. *Davis v. Pacific Power Co.*, 107 Cal. 563, 40 P. 950, 48 Am. St. Rep. 156; *Brown v. Pepperdine*, 53 Cal. App. 334, 200 P. 36; 15 Cal. Jur. 741, § 153.

[14, 15] The next major contention of appellant is that Bellon was guilty of contributory negligence as a matter of law. It is contended that the wire was in such a defective condition that he should have seen to its condition; that he should have reasonably anticipated the very injury that occurred; that permitting the free end of the tape to thrash about the room where electric equipment was present must be held to be negligence as a matter of law. This contention is without merit. As was said in *Crawford v. Southern Pacific Company*, supra, 45 P.(2d) 183, 184: "To establish the defense of contributory negligence as against the verdict of a jury, the evidence must be such that the appellate court can say that there is no substantial conflict on the facts, and that from the facts reasonable men can draw but one inference, which inference points unerringly to the negligence of the plaintiff approximately con-contributing to his own injury."

[16] Tested by this standard, we cannot say as a matter of law that the defect was so obvious and patent that Bellon should have seen it and guarded against it. As an invitee, Bellon was entitled to assume that the premises he was invited to enter were reasonably safe for the purpose for which the invitation was extended. This rule is well settled. One of the most recent cases so holding is *Mendelsohn v. Van Herick*, 133 Cal. App. 612, 24 P.(2d) 878.

[17-19] Appellant also complains of the giving of certain instructions and of the

failure to give others. Appellant asked for an instruction tantamount to a request for a directed verdict, to the effect that there was no evidence tending to prove it had control of the basement. For reasons already discussed, that instruction was properly refused. The trial court properly instructed the jury that a landlord is not liable for injuries resulting from a tenant's failure to keep the leased premises in repair, and further instructed the jury that: "If you find from the evidence that the defendant Silver Gate Theatres, Inc., a corporation, exercised no control over the premises in question, then your verdict must be in favor of defendant." This was a correct statement of the law. Appellant also objects to a series of instructions discussing the landlord's liability when it retains control over a portion of the premises for the mutual benefit of the all the tenants. These were proper instructions. The jury, under the evidence, could have found either that the basement did not pass under the lease, or, if it did so pass, that the landlord retained sufficient control to bring it within the rule contained in the above instructions. Respondent was entitled to have the jury fully instructed on both theories. Appellant also complains that no instruction was given on what constituted "control" or what was meant by the word "premises." Under the circumstances, such instructions were not necessary. Appellant also complains that other instructions were not given. In many of these cases, the appellant failed to offer an instruction on the point, and so cannot complain. We have examined the entire charge. We think it correctly and properly stated the law applicable to the facts and is entirely free from error.

The charge that the trial court improperly excluded evidence is also without merit.

[20, 21] Appellant also complains that the wife brought this action in her own name, when she knew that she was not the sole heir of the deceased, the father and mother of the decedent surviving him. It is contended that under section 377 of the Code of Civil Procedure, the action for the wrongful death of an adult, when not brought by the personal representative of the decedent, must be brought by the heirs of the decedent. That is undoubtedly the law. This action was brought by plaintiff as the widow of Bellon. The latter's

mother and father were not joined as plaintiffs. The complaint did not allege that plaintiff was the sole heir of the deceased. At the beginning of the trial, the trial court properly permitted plaintiff to amend to supply this deficiency. Later, when it was made to appear that she was not the sole heir of the deceased, the trial court permitted her to amend, over defendant's objections, to join as parties the mother and father. Contemporaneously therewith, the father and mother were permitted to file a document by which they waived all claim or interest in the action and specifically waived all claims to damages. The procedure may have been somewhat irregular, but just how appellant suffered injury thereby is not pointed out. The only heirs were the respondent and Bellon's mother and father. The latter two having waived their claim to damages, the respondent was the proper party to maintain the action. See generally *Rabe v. Western Union Tel. Co.*, 198 Cal. 290, 244 P. 1077; *Salmon v. Rathjens*, 152 Cal. 290, 92 P. 733.

[22] The appellant also urges that the award of \$20,000 is excessive. The point is without merit. The decedent was 28 years of age, with a life expectancy of 36.73 years. He was a trained plumber and was about to succeed to the established business of his father. The latter testified that he intended retiring and turning the business over to his son. The net yearly earnings of this business for the year prior to Bellon's death were over \$30,000 and, in the year of his death, were between \$8,000 and \$9,000. He was earning at the time of his death about \$250 a month, plus a substantial bonus. Under such circumstances, the award is well within the limits of reasonableness.

The judgment appealed from by defendant is affirmed.

[23] Plaintiff has appealed from that portion of the judgment entered in favor of three of the defendants on a directed verdict. No mention is made in the briefs on file of the issues involved in plaintiff's appeal. This appeal, having apparently been abandoned, is hereby dismissed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.

4 Cal.2d 28

HAYNES v. ANNANDALE GOLF CLUB.

L. A. 13930.

Supreme Court of California.

July 1, 1935.

Rehearing Denied July 30, 1935.

1. Clubs ⇨5

Golf club may impose only reasonable restrictions on member's right to resign (Civ. Code, §§ 602, 598, pars. 4, 5).

2. Clubs ⇨5

Payment of all obligations and turning in of certificate of membership properly indorsed held to have entitled member of golf club to resign, since by-law withholding right to resign in absence of acceptance of resignation by board of directors was invalid because unreasonable and arbitrary (Civ. Code, §§ 602, 598, pars. 4, 5).

3. Clubs ⇨5

By-law requiring assignment and delivery of certificate of membership and providing that until transfer of certificate of membership on books of golf club membership should continue held not to require assignment of a new candidate for membership as condition of resignation (Civ. Code, §§ 602, 598, pars. 4, 5).

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action for declaratory relief by John R. Haynes against the Annandale Golf Club. From a judgment for defendant, plaintiff appeals.

Reversed and remanded for further proceedings not inconsistent with opinion.

Prior opinion, 38 P.(2d) 447.

J. Wiseman Macdonald, of Los Angeles, for appellant.

O'Melveny, Tuller & Myers, and Graham L. Sterling, Jr., all of Los Angeles, for respondent.

PRESTON, Justice.

This action is by a golfer against his club for declaratory relief. He wishes to resign as a member of the club and be allowed to go in peace, after paying all obligations levied against him and turning in his certificate of membership properly indorsed. Doubtless this is the only case in history where a golf club has failed to

heed the plaintiff cry of one of its flock. And the court below indorsed its action by refusing to say that plaintiff was entitled to any balm at all. The judgment of the court was that he was "stymied" and must so remain forever and aye unless perchance the board of directors might experience a change of heart and vote him a furlough. Hence this appeal upon an agreed statement of facts.

[1] We must review the action in a manner becoming the importance of the issue and the prominence of the litigants. Plaintiff fails to appreciate the implied compliment to him in defendant's desire to retain him as a member. But the record pointedly suggests that plaintiff in the "twilight dim" is bridging this chasm "dark and grim" for some "forlorn" or "shipwrecked" brother who may follow after him. Defendant insists that unless and until it changes its mind and consents to plaintiff's release, and follows it by a suitable entry in its book of life, plaintiff must gracefully submit and continue to "roll in the fiery gulf." However, when we consult the statute under which defendant is organized, we are forced to hold that it requires defendant to provide a way of escape for members, imposing only such restrictions upon the right of resignation as may be just and reasonable.

Defendant was organized in 1916 as a nonprofit corporation under title 22, part 4, division 1 of the Civil Code (section 653t et seq.). Later in the same year plaintiff became a regular member of defendant corporation and continued as such until September 18, 1931, on which date he paid all dues and assessments against him, indorsed his certificate of membership in blank, and tendered it, along with his written resignation, to the club. Defendant, acting through its board of directors, declined to release him, relying upon a by-law which reads: "The resignation of any member shall be made in writing addressed to the Board of Directors. No resignation of a member shall be effective until accepted by the Board of Directors, nor shall the same be accepted while such member is in anywise indebted to the Club nor until he has assigned and delivered his certificate of membership. Until the transfer of the certificate of membership on the books of the corporation, or until the date of the expulsion of a mem-

ber, the record owner of each membership shall be and remain liable for all dues, fees or other charges which have accrued or which may thereafter accrue."

Section 653w of the Civil Code (as added by St. 1909, p. 855), as it read when defendant was organized, clearly contemplated that any member might resign upon such just terms as the corporation might impose. The language of this section was that the by-laws of such a corporation may provide, among other things, for "the conditions upon which and the time when membership of any member in the corporation shall cease." Subd. 2. This is confirmed also by the amendment of the statute made in 1931 (St. 1931, pp. 1850, 1851), when said section 653w was replaced by the present sections 598 and 602 of the Civil Code. Paragraphs 4 and 5 of section 598 state that the by-laws of a nonprofit corporation, such as respondent club, may contain provisions for "the admission, election, appointment, withdrawal, suspension and expulsion of members" and for "the transfer, forfeiture and termination of membership. * * *" Section 602 in part provides: "Memberships may be terminated in the manner provided in the articles or by-laws."

[2,3] By paying the dues and turning in his certificate, plaintiff did every substantial thing required by the by-law. For defendant to hold him as a perpetual member on its mere fancy or caprice would be obnoxious to the spirit as well as to the clear meaning of the statute. The contention that an assignment of a new candidate for membership is required by the by-law is clearly untenable. An indorsement of the certificate and delivery thereof to the club satisfies the provision of the by-law on that subject.

So much of said by-law as allows defendant to deny the right of resignation on the ground that it has merely withheld its consent or has declined to make the necessary book entries is invalid because unreasonable and arbitrary.

The judgment is reversed and the cause remanded for proceedings not inconsistent with this holding.

We concur: WASTE, C. J.; THOMPSON, J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.; SHENK, J.

4 Cal.2d 56

**TITLE GUARANTEE & TRUST CO. et al. v.
CITY OF LONG BEACH et al.
S. F. 15259.**

Supreme Court of California.

July 1, 1935.

1. Mandamus ☞116

Where demand by judgment creditor of city to have tax levy for the year include a sum sufficient to pay at least one-tenth of judgment as provided by statute was, without notice to creditor, refused and tax rate fixed did not make provision for such payment, writ of mandate could issue to compel a cumulative levy of two-tenths amount of judgment to be made the following year where it was too late to amend tax levy for current year (Gen. Laws 1931, Act 3918).

2. Counties ☞150(1)

Constitutional provision prohibiting city from incurring indebtedness in any year exceeding income provided for that year without assent of two-thirds of electors at election for that purpose held not to bar levy in subsequent years for payment of judgment obtained on contract claim in prior year where there was money provided for payment of obligation under which judgment arose when obligation was incurred and funds provided were not exhausted at end of fiscal year in which obligation was incurred (Const. art. 11, § 18).

3. Mandamus ☞143(2)

Contractor held not barred by laches from seeking by mandamus to compel city to make tax levy to pay judgment of contractor, where prompt demand had been made for payment of claim and judgment obtained when demand was refused, because of contractor's failure to attempt to enjoin city from expending for other purposes fund contractor knew was available to pay its claim.

In Bank.

Application for writ of mandate by the Title Guarantee & Trust Company and another prayed to be directed to the City of Long Beach (a municipal corporation) and others.

Peremptory writ of mandate issued.

Richard J. O. Culver, of Los Angeles, and Denio, Hart, Taubman & Simpson, of Long Beach, for petitioners.

George W. Trammell, Jr., City Atty., Harlan V. Boyer, Asst. City Atty., and Henry D. Lawrence, Deputy City Atty., all of Long Beach, for respondents.

LANGDON, Justice.

This is a petition for a writ of mandate to compel the levy of a tax sufficient to pay a portion of a judgment against respondent city.

In 1928 bonds in the sum of \$2,700,000 were voted by the electors of the city for certain harbor improvements. In 1929, a contract for certain of the work was let to C. J. Kubach Company, for the price of \$838,034.09. The contractor notified the city of certain alleged defects in the plans and specifications, but was ordered to proceed with the work, and did so. Between May and July of 1930, a number of bulkheads constructed under the contract gave way. The contractor claimed that their failure was caused by defective plans and specifications, and ceased performance. In August, 1930, the city, after notice to the contractor, took over the work and completed it subsequently at a greater cost than the contract price.

On November 14, 1930, C. J. Kubach Company filed with the city a claim under its contract for \$213,970.22. The city refused payment, and suit was filed April 28, 1931. Judgment was given in favor of the contractor for \$117,822.59, together with costs, the total amounting to \$118,433.09. No appeal was taken by the city and the judgment became final. It was assigned by the contractor to Title Guarantee & Trust Company for collection. Execution was had on certain real property in 1933, and a net return of \$34,707.52 was credited on the judgment. The balance is still unpaid.

On or about July 1, 1934, demand was served on the city that a sum sufficient to pay at least one-tenth of the judgment be included in the tax levy for the year 1934-1935. In the meantime the city council was recalled. On August 31, 1934, the said demand was repeated. Under the provisions of section 257 of the city charter, the council had until the first Tuesday in September to fix the tax rate, and under the statute providing for payment of judgments against counties and municipalities (St. 1901, p. 794, 2 Deering's Gen. Laws, 1931, Act 3918) at least 10 per cent. of the judgment should be included in the tax levy for the purpose of paying an aliquot part thereof. Without any notice or intimation to petitioners that their demand would be refused, the tax rate was

fixed without making any provision for such payment.

Petitioners then sought a writ of mandate in this court to compel the amendment of the tax levy to include the said sum, and praying for general relief. A demurrer and an answer was filed by respondent city, but the essential facts, as above stated, are not in dispute.

[1] The first objection raised by respondent city is that it is too late to amend the tax levy for the year 1934-1935. This is true, but under the statute a cumulative levy should be made in the following year, that is, a levy of two-tenths the amount of the judgment. Respondents have flatly asserted that they do not intend to levy any tax for this purpose. It is accordingly proper, and not premature, to order the cumulative levy to be made for the year 1935-1936, provided that the city has no other defense. *Le Clerg v. San Diego*, 218 Cal. 672, 24 P.(2d) 819.

[2] The chief contention of the city is, however, that the judgment cannot be paid out of taxes without violating article 11, § 18, of the California Constitution, which provides in part: "No * * * city * * * shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose." It is argued that the indebtedness or obligation of the city to the Kubach Company was not incurred in the fiscal year 1934-1935, and cannot therefore be paid from revenues of that year or of any subsequent year; that each year's income and revenue must pay each year's indebtedness and liability; and that where the revenue for the fiscal year or years in which the indebtedness was incurred has become exhausted, the creditor is unable thereafter to enforce his claim by a tax levy. In connection with this argument it appears that the entire amount of the bonds voted for the purpose of the harbor work was subsequently expended, without retaining any portion thereof to meet the Kubach Company judgment.

We are unable to agree with the reasoning of respondents herein, for in our view no indebtedness was incurred in excess of the revenue provided. In the fiscal year in which the obligation to compensate for harbor work was incurred, 1928-1929, over

a million dollars, proceeds of the bond issue, were available for payment; and at the end of the following fiscal year ample funds still remained. Eventually this money was expended by the city, that is, for obligations incurred in subsequent years. In such a situation there is no justification in principle or authority for the application of the constitutional provision. There were, in fact, ample funds provided for the very obligation incurred, and the subsequent expenditure of those funds in their entirety, either for harbor work or for other purposes, cannot be permitted to defeat the rights of the creditor. The cases relied upon by respondents deal with situations where the funds were exhausted before the end of the fiscal year in which the obligation was incurred. Even if the rule contended for might be applied to a judgment, nevertheless where, as here, funds still remained in that year, but were expended for other purposes in subsequent years, the moneys thus expended are considered as still in the treasury so far as the inhibitions of article 11, § 18, are concerned. *Brooks v. Gilroy*, 219 Cal. 766, 29 P.(2d) 212; *Bilby v. McKenzie*, 112 Cal. 143, 44 P. 341; see, also, *Martin v. Fisher*, 108 Cal. App. 34, 291 P. 276; *Montague & Co. v. English*, 119 Cal. 225, 51 P. 327.

[3] The city makes the final contention that the contractor was guilty of laches in that with knowledge of its claim, and the availability of funds to pay it, it nevertheless stood idly by and permitted the city to expend the money in subsequent years without making any attempt to enjoin the city from doing so. But the contractor could not know of course, that over a million dollars would be spent without reserving the small sum necessary to pay its claim; and it is not clear upon what theory he could enjoin expenditures by the city. In any event, in view of the proper and timely demand for payment, the failure to attempt this extraordinary remedy cannot constitute laches.

Let a peremptory writ of mandate issue, directing respondents to levy a tax for the fiscal year 1935-1936, sufficient to pay at least two-tenths of the amount of the balance due on the above-mentioned judgment, and to pay the funds thus obtained to petitioners.

We concur: WASTE, C. J.; PRESTON, J.; THOMPSON, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.

4 Cal.2d 60

SIMPSON v. CITY OF LOS ANGELES et al.
L. A. 14127.

Supreme Court of California.

July 1, 1935.

1. Constitutional law ☞81

Exercise of police power is subject to judicial review, and property rights cannot be wrongfully destroyed by arbitrary enactment.

2. Constitutional law ☞70(3)

If constitutional limits of exercise of police power are not transcended, or if there is any rational basis for its exercise in particular case, the motive actuating the legislative body is not proper subject of inquiry, and court will not substitute its opinion for that of legislative body.

3. Municipal corporations ☞661(2)

Evidence held to show that ordinance closing street to vehicular traffic was not an invalid exercise of police power as against abutting owner when access to property was thereby impeded, where evidence showed that by closing street movement of vehicular traffic on nearby main arteries would be greatly facilitated (St. 1931, p. 2131, § 145).

4. Municipal corporations ☞661(2)

Motor Vehicle Act held to authorize city council to close a street to all vehicular traffic (St. 1931, p. 2131, § 145).

In Bank.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Constance D. Simpson against the City of Los Angeles and others. From an adverse judgment, plaintiff appeals.

Affirmed.

Prior opinion, 38 P.(2d) 174.

J. Wiseman Macdonald and Harold J. Cashin, both of Los Angeles, for appellant.

Faries & Williamson, of Los Angeles, for respondents.

Ray L. Chesebro, City Atty., F. Von Schrader, Asst. City Atty., Erwin P. Werner and Don Kitzmiller, all of Los Angeles, for respondent City of Los Angeles, etc.

SHENK, Justice.

This is an appeal by the plaintiff from a judgment favorable to her in part.

The plaintiff is the owner of real property in the city of Los Angeles which abuts on North Main, Marchessault, and Olvera streets. The property has a frontage of 227.24 feet on North Main street, and 235.32 on Olvera street. It covers the full frontage on Marchessault street between North Main and Olvera streets. The property is improved with store buildings and is used for business and light industrial purposes. The front entrances of these improvements are on North Main and Marchessault streets, and the rear entrances on Olvera street.

Olvera is a street one block long, dedicated to the public use. At its southerly terminus it forms an intersection with Marchessault street, and at its northerly terminus, with Macy street. It has a length of approximately 525 feet, and a width varying from 48 to 57 feet. On Olvera street and across from the plaintiff's property is situate Avila Adobe, claimed to be the oldest and most historic building in the city. Facing the southerly terminus of Olvera street is a circle known as the Los Angeles Plaza. Marchessault street, the northerly boundary of the plaza, is a continuation of Sunset boulevard, which enters it from the west. The Plaza and Marchessault street are intersected on the east by Los Angeles street, which about 360 feet northerly from Marchessault intersects Alameda street. Alameda street intersects Macy street about 15 feet from the northly terminus of Olvera street. Olvera street at its northerly and southerly extremities is about 83 feet from North Main street, which runs parallel with it on the west, and its southerly extremity is about 85 feet from Los Angeles street on the east. All of this section is situate in the central traffic district of Los Angeles.

In 1929, ordinance numbered 64715 (N. S.) of the city of Los Angeles was enacted. That ordinance provided: "It shall be unlawful for the operator of any vehicle to drive said vehicle in, out of, or upon Olvera Street between Marchessault Street and Macy Street."

Since the closing of Olvera street to vehicular traffic, and through the offices, efforts, and activities of Plaza de Los Angeles, a corporation, and its secretary, Mrs. Christine Sterling, Olvera street has been converted into what might be termed a "Mexican Village," and Avila Adobe has

been placed in a state of repair and preservation as a permanent landmark. Before and at the time of the passage of the ordinance Olvera street was unpaved and insanitary. Now it is paved its entire length and width with padre tile, with provision for proper drainage, and has been made clean and attractive with booths, balconies, awnings, canopies and other structures where Mexican wares and food are offered for sale by people of the Mexican races. Chains were put across either entrance to the street, and the street was then used only by pedestrian traffic. The vendors in the street have not received any permit from the city nor do they pay a license fee to the city, but each contributes specified sums for the upkeep and maintenance of the street. In so far as the record shows, the city has had no part in the creation of the Mexican village on Olvera street, except to afford the opportunity for its creation by the passage of ordinance 64715 (N. S.).

The plaintiff brought the present action against the city and various boards and officials and against Plaza de Los Angeles, Mrs. Christine Sterling, and others, for the purpose of enjoining the enforcement of said ordinance and for the removal of the trees, booths, chains, and other structures and obstructions on Olvera street. The basis for the action was and is that the ordinance is an unconstitutional exercise of the police power of the city and deprives the plaintiff, as an owner of real property abutting on a public street, of the property right of ingress and egress to and from her property without compensation first being paid therefor.

The trial court, after hearing the evidence and after personally viewing the premises, found the conditions generally as herein described. It found further that the council of the city of Los Angeles referred the matter of the closing of Olvera street to the traffic and lighting committee of the city council without recommendation; that the traffic and lighting committee thereupon referred the matter to R. P. Dorsey, traffic engineer of the street traffic engineering department of the city of Los Angeles, without recommendation; that Dorsey, after an independent investigation, recommended to the traffic and lighting committee that the closing of Olvera street to vehicular traffic was advisable from the standpoint of the regulation of vehicular travel and traffic

within the central traffic district of the city; that the committee thereupon recommended that an ordinance closing Olvera street to vehicular traffic be adopted by the city council; and that the report and recommendation was adopted by the city council, which instructed the city attorney to draft an ordinance prohibiting the use of Olvera street for vehicular traffic. The facts stated in this finding are not in dispute. The court also found that the closing of Olvera street injured the plaintiff's property rights by depriving her of vehicular access to her property over and across Olvera street, for which no compensation has been paid or received. Nevertheless, the court made the following finding: "It is true that the closing up of Olvera street to vehicular travel was done by the City Council of the city of Los Angeles under its police power for the purpose of protecting the lives, health, safety and general welfare of the people of the city of Los Angeles, and was done in order to facilitate the movement of traffic in the central traffic district of the city of Los Angeles, and particularly the movement of traffic on Sunset boulevard, Marchessault, Macy, Main and Los Angeles Streets, all of which streets are among the most heavily traveled streets in the city of Los Angeles."

In addition, the court found that pedestrian traffic and access to the plaintiff's property from Olvera street was impeded by the maintenance of certain structures in front of her property. The court entered its judgment against the plaintiff and in favor of the defendant city to the effect that Ordinance No. 64715 (N. S.) is valid and enforceable; and in favor of the plaintiff and against the Plaza de Los Angeles and other nonofficial defendants for the removal of the chains at either end of the street and of the booths and structures from certain described areas within Olvera street, including the area in front of the plaintiff's property; and awarded costs accordingly. The plaintiff appeals from that portion of the judgment which was rendered in favor of the city and against her.

On the appeal it is not questioned that any injury to the plaintiff's right of vehicular ingress and egress to her property from Olvera street is *damnum absque injuria* if the ordinance is a valid exercise of the police power. What is seriously urged is that there is no evidence to sup-

port the finding hereinabove quoted, but that in line with the principles announced in such cases as *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220, and *Dobbins v. Los Angeles*, 195 U. S. 223, 25 S. Ct. 18, 49 L. Ed. 169, the evidence shows conclusively that under the guise of enacting and enforcing a police regulation, the city has committed an unwarranted and arbitrary interference with the plaintiff's constitutional right to the use and enjoyment of her property.

[1] That the plaintiff has such a property right as she claims is not questioned. *Lane v. San Diego Electric Railway Co.*, 208 Cal. 29, 280 P. 109. By the decisions of the United States Supreme Court hereinabove cited it was established that the exercise of the police power is subject to judicial review and that property rights cannot be wrongfully destroyed by arbitrary enactment. It is pertinent to note that the facts involved in those cases indicated that the sole purpose of the exercise of the police power was the destruction of the plaintiffs' property, that is, that the enactment of so-called police measures was a blind for the sole purpose of discriminating against the plaintiffs, or the classes of persons involved in the respective cases, and of depriving them of substantial property rights.

[2] Can that be said to be the factual situation in the present case? The plaintiff concedes, as she must, that if there is in the record evidence of any substantiality to support the exercise of the police power involved on any rational basis, her appeal necessarily falls. It is recognized in the United States Supreme Court cases hereinabove cited, and it must be obvious, that if the constitutional limits of the exercise of the power have not been transcended, that is, if there be any rational basis for its exercise in the particular case, the motive actuating the legislative body becomes immaterial and not a proper subject of inquiry, and the court will not substitute its opinion or judgment for that of the legislative body. See *Hadacheck v. Alexander*, 169 Cal. 616, 147 P. 259; *In re Sumida*, 177 Cal. 388, 170 P. 823; *Zahn v. Board of Public Works*, 195 Cal. 497, 234 P. 388, affirmed 274 U. S. 325, 47 S. Ct. 594, 71 L. Ed. 1074; 5 Cal. Jur., p. 640; 2 *McQuillin*, Mun. Corp. (2d Ed.), pp. 737 et seq.

[3] We cannot agree with the plaintiff that the record shows that the enactment

is without any warrant or reason within constitutional limits, and therefore that it is devoid of any showing of substantial support for the finding of the court. Olvera street, situated in the central traffic district of Los Angeles, is intersected by two of the principal thoroughfares of the city, viz., Sunset boulevard or Marchessault street, and Macy street. It is in evidence that Los Angeles street is one of the heaviest traveled north and south bound arteries in the city; that Los Angeles, Macy, Marchessault or Sunset, and Alameda streets are counted among the ten heaviest traveled or major arteries in the city; and that other streets surrounding the Plaza are also heavily traveled. Traffic signals are maintained in this area at the principal intersections formed by these arteries. The court could believe from its view of the premises and the surrounding arteries and the traffic thereon, and from the evidence in the record, that the movement of traffic on these surrounding arteries would be less interfered with and therefore facilitated by the closing of Olvera street to vehicular traffic; that to permit the movement of vehicular traffic over Olvera street was not essential to the orderly flow of traffic in that section; but in fact would be an interference therewith; that the highest use to which the street could be put was for pedestrian traffic; and that to allow vehicular traffic thereon would interfere with such use and endanger the safety of pedestrian traffic. There is also support for the conclusion that prior to the closing of Olvera street to vehicular traffic there was but little vehicular traffic on it, and that the use of the street for through vehicular traffic was then and is now neither necessary nor convenient for the purpose of arriving at any stated destination; and further, that the street was used principally for the all day parking of commercial vehicles which prevented any substantial use by the plaintiff or her lessees of the Olvera street entrances to her property by vehicular ingress or egress.

From the foregoing recital it must be manifest that it is, without more, a sufficient support for the finding which in turn supports the judgment of the validity of the ordinance in question.

[4] It is contended that the provisions of the California Vehicle Act do not give the city council the power to close a street to all vehicular traffic. Section 145 of that

act (St. 1923, p. 563, as amended by St. 1929, p. 546), at the time of the trial of the action expressly stated that the provisions of the act were not intended to prevent legislative bodies of incorporated cities enacting ordinances to prohibit the use of streets by particular classes of vehicles. It is true that it did not at that time in express terms assume to confer the power to prohibit all vehicular traffic on any particular street when reasonably necessary to facilitate the flow of traffic or to promote the public health, safety, or general welfare. The right to exercise the police power generally has been conferred upon the city by its charter, including the power to enact measures in the use and control of its streets not in direct conflict with general law. We may say that a proper interpretation of the section of the California Vehicle Act does not compel a conclusion that the particular exercise of the power which is involved here was necessarily intended by the Legislature to be excluded by the provisions of the act. It may also be said that the intent not to exclude it was made manifest when the Legislature in 1931 (St. 1931, p. 2131) recognized its existence by adding to section 145 a provision that the city may close any street or highway to vehicular traffic when, in the opinion of its legislative body, such street or highway is no longer needed for vehicular traffic. Any remaining doubt, therefore, of the correct disposition of the present appeal should be dispelled when it is considered that the present condition and use of Olvera street by pedestrian traffic, when added to the consideration that the exercise of the police power otherwise had a rational basis in fact, indicate that a reversal of the judgment herein would avail the plaintiff nothing, inasmuch as the city council could immediately validly re-enact the ordinance. Furthermore, it is represented in the record that the very purpose of enacting the 1931 amendment to section 145 was to preserve the validity of the ordinance in question.

Our conclusion is that it is within the police power of the city to close Olvera street to vehicular traffic; that the closing of the street to that extent does not deprive the plaintiff's property of all vehicular access, but in fact leaves her property with such access on other street frontage; that damage to the property of the plain-

tiff by reason of such limited closing is insubstantial and incidental to the exercise by the city of its lawful powers; and that the judgment of the trial court sufficiently protected the plaintiff as to the other street uses to which she was entitled under the law.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.



8 Cal.App.2d 209

MacDUFF v. EARLE C. ANTHONY, Inc.

Civ. 10271.

District Court of Appeal, Second District,
Division 2, California.

June 29, 1935.

Master and servant ☞72

Under contract of employment whereby corporation hired employee to sell automobiles, for indefinite period, at compensation, definite for first year and left open for discussion for succeeding years, and providing that if business relations should be terminated at any time, then corporation should pay employee a specified lump sum to cover expense of relocation, employee *held* entitled to such lump sum on termination of employment after six years by mutual consent, as against contention that there must be a showing of removal to recover lump sum.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Ralph E. MacDuff against Earle C. Anthony, Inc. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Overton, Lyman & Plumb and William R. James, all of Los Angeles, for appellant.

Hanna & Morton, of Los Angeles (James M. McRoberts, of Los Angeles, of counsel), for respondent.

STEPHENS, Presiding Justice.

Action for damages on contract of employment. Plaintiff was awarded judg-

ment, and defendant appeals on the judgment roll.

Prior to February 9, 1928, plaintiff-respondent and Earle C. Anthony, president of appellant corporation, held conversations, regarding the employment of respondent by appellant. Upon the date named, respondent wrote the following letter to Mr. Anthony, as such president, certain nonessentials having been deleted: "Confirming wire sent you today. I have decided to accept your proposition to become connected with your organization in accordance with our several conversations. These are, according to my understanding, as follows: The responsibility and authority for the sale of new cars at wholesale and new and used cars at retail will be vested in me, and that I will report directly to you. That other responsibilities may be assigned to me from time to time as circumstances may in your judgment warrant. My residence, until circumstances justify a change, will be in the vicinity of San Francisco, and that my time will be divided as nearly equally between Northern and Southern California as may be expedient for the good of the business. The compensation for the first year to be at a salary of \$20,000.00, plus 2 per cent. of the net earnings of the company after the deduction of income tax but before deduction of other bonuses; also a lump sum of \$5,000.00 to cover the expense of changing my place of residence. Further, if our business relations should be terminated at any time you will pay me a lump sum of \$5,000.00 to cover the expense of relocation. The compensation for the second, third and succeeding years is to be left open for future discussion and agreement on the theory that the connection will either be mutually satisfactory or the reverse, and if satisfactory my decision to join your organization has been influenced by your assurance that my compensation will be increased proportionately and equitably to the point where it will be comparable with what could reasonably be anticipated if I were to remain East and become a distributor. I appreciate that this is quite indefinite from both your standpoint and mine, but I think it will express the thought which was under discussion during our conference in San Francisco, that if I did join your organization my compensation would be equitably adjusted from year to year so that, providing my work was satisfactory to you,

I could anticipate substantially increased earnings."

To this letter Mr. Anthony responded, affirming the terms of employment set out therein. The employment was entered into and continued for something over six years, when it was terminated by mutual consent.

The judgment would seem to have been awarded upon the theory that a contract of employment for an indefinite period of time had been entered into, in which the terms of compensation for the first year were definite and the terms of compensation for the succeeding years was left open for agreement of the parties, but that the agreement to pay \$5,000 to cover expense of relocation, together with all of the other terms of the agreement, continued throughout the employment. Of this we are in full approval. The complaint contains the allegation: "That on or about the 1st day of March, 1928, pursuant to the terms of said contract, plaintiff entered the employment of the defendant and continued in the employment of the said defendant up to and including the 4th day of August, 1934. That during said period of employment the compensation of the plaintiff for his services was fixed from year to year, and agreed upon by mutual agreement between the plaintiff and the defendant. That on or about the 4th day of August, 1934, employment of the plaintiff by the defendant was terminated by mutual agreement." Although we have only the judgment roll before us, we know that no evidence was received to explain any ambiguity, for the court was of the opinion and so found "that the terms of said written contract concerning said employment and the rights and obligations of the parties thereunder are clear, intelligible and unambiguous." The question, then, before us concerns the legal construction of the letter, without collateral aid.

There is a recitation in the findings of fact that: "Thereafter on said day [the trial date] the parties presented their proof, oral, documentary and by stipulation, and upon the completion of the evidence the cause was argued by counsel for the respective parties." We must take it that the court was in possession of evidence supporting its findings, unless they are unsupported. The finding that the \$5,000 item under controversy was due presupposes that the evidence shows that the

yearly fixing of compensation left unchanged the conditions under which such item was to be paid, to wit, when the employment ended.

We think there is no merit in the claim that there must be a showing of removal to recover the \$5,000. This item is in the nature of stipulated damages or compensation. It does not purport to be confined to simple expenses of physical removal from one place of employment to another. "Further, if our business relations should be terminated at any time you will pay me a lump sum of \$5,000 to cover the expense of relocation." This provision could well cover loss of salary between employments, expense of seeking new employment, actual removal, etc., expenses difficult to accurately estimate and impossible to compute in advance; hence the fixing of a "lump sum."

The judgment is affirmed.

I concur: CRAIL, J.



8 Cal.App.2d 213

ESPINOSA v. HASLAM.

Civ. 10067.

District Court of Appeal, Second District,
Division 2, California.

June 29, 1935.

Rehearing Denied July 24, 1935.

Hearing Denied by Supreme Court
Aug. 26, 1935.

1. Death ☞31(7)

Test of father's right to maintain action for death of minor child is whether statutory condition of desertion of family existed at time of death of minor, regardless of whether state of desertion existed at some previous time (Code Civ. Proc. § 376).

2. Death ☞31(7)

Where husband cared for children including deceased for fifteen years after husband and wife separated, evidence held insufficient to establish desertion of family by husband so as to preclude his maintenance of suit for death of child, although deceased voluntarily went to live with mother when 18 years old after he had been in care of husband for 15 years (Code Civ. Proc. § 376).

3. Death ☞31(7)

Contention that plaintiff lost right to maintain action for death of minor child, by ratification of settlement by defendant in action brought by mother for same death held unavailable, where evidence of asserted ratification was conflicting and point was not supported by argument or authority (Code Civ. Proc. § 376).

4. Death ☞99(3)

\$1,500 to father for death of son 20 years old held excessive where liability of father for \$11 and \$265 only, due on hospital and funeral bills for deceased was shown, and deceased had earned between \$3.50 and \$4.50 a day when he worked, but number of days deceased did work was not shown, and deceased had earned very little money in year preceding his death (Code Civ. Proc. § 376).

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by Leonardo Espinosa against Carl W. Haslam. Judgment for plaintiff, and defendant appeals.

Reversed.

Charles F. Blackstock, of Oxnard, for appellant.

Maxwell Nichols and A. W. Robertson, both of Santa Barbara, for respondent.

FRICKE, Justice pro tem.

Action for the death of a son, Raymond, 20 years of age, by reason of the wrongful act of defendant, brought under the authority of section 376 of the Code of Civil Procedure, which provides that: "A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child."

[1] This action was commenced February 8, 1934. It appears that on October 3, 1933, Mary Espinosa, the wife of respondent and mother of deceased, commenced a similar action against appellant, predicated her right to do so upon the alleged desertion of the family by the father, and which action was settled by appellant paying to her the sum of \$1,500. Appellant herein contends that respondent had no legal right to maintain the present action, because he had deserted his family. The test is whether the condition specified in the statute, and which gives the right of action to the mother, existed at the time of the death of the minor regardless

of whether a state of desertion existed at some time prior thereto (*Frazzini v. Cable*, 114 Cal. App. 444, 448, 300 P. 121); and as stated in the cited case and in *American R. Co. v. Santiago* (C. C. A.) 9 F.(2d) 753, involving a statute identical with section 376, the fact that as to the wife, there may be a desertion, even where it includes a divorce secured by her, does not preclude the father from maintaining an action where at the time of the death or injury of the minor the father was not guilty of a desertion "of his family," he having maintained a home for and supported and educated the children, including the deceased minor.

[2] The evidence shows that respondent and his wife separated in 1917 and have never since lived together. From 1918 to the end of 1920 the children of this marriage were not living with the mother, but were at the city of Anaheim under some arrangement which does not clearly appear, but which imposed a financial responsibility for their care upon respondent. Following this period the children came back into the care and custody of respondent and he took care of them until 1925, at which time the deceased went to Eldon until the latter part of 1929, when he returned to his father and lived with him until the latter part of 1932. During this period the mother seems to have written no letters nor made any inquiries concerning her children. In September of 1932, Raymond, the deceased son, apparently took exception to the fact that his father objected to his coming in late at night and to his not disclosing where he went, and left the paternal domicile and adopted that of his mother, with whom he lived up to the time of his death. Under these circumstances, it cannot be said that respondent had deserted his family. It may be conceded that the circumstances under which his wife left him in 1917 amounted to such desertion as would be the basis for a divorce had the wife prosecuted such an action, but in view of the care of the children by respondent from 1917 to 1932, the fact that the 18 year old son voluntarily left his father's home because of limitations placed upon his nocturnal ramblings and went to live with his mother does not establish "desertion of his family" by respondent.

[3] Appellant also urges that since respondent did not begin this action until three months after he had knowledge of

the settlement made by appellant of the action brought by the mother, and respondent had ratified such settlement, the latter lost whatever right he might have to maintain this action. But the evidence as to the asserted ratification is conflicting, and we cannot therefore make such assumption. The point is not supported by argument nor by authority and we do not believe it is meritorious.

[4] The record, however, fails to support a judgment in the sum of \$1,500, awarded herein. Beyond the liability of \$11 for a hospital bill and a balance of \$265 due on the funeral bill, the basis for the judgment is limited to evidence that, while living with his father, deceased had earned between \$3.50 and \$4.50 a day when he worked. But there is no evidence as to the number of days he did work, and there is evidence from a brother of deceased that the latter, during the year preceding his death, earned very little money. This state of the record, coupled with the fact that the deceased was approximately 20 years old at the time of his death, falls far short of supporting the finding of the court that the damages suffered by the father were sufficient in amount to sustain a judgment in the sum of \$1,500.

The judgment is reversed.

I concur: STEPHENS, P. J.

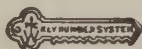
CRAIL, Justice (concurring).

I concur in the judgment but assign different and additional reasons. In 1917, the respondent, the father of the decedent, pleaded guilty to assault and battery against his wife and was convicted of the crime. This cruelty made it impossible for her to live with him and they never lived together again. That was desertion on his part. Civ. Code, sec. 98; *White v. White*, 86 Cal. 219, 24 P. 996; *Benton v. Benton*, 122 Cal. 395, 55 P. 152; *Grierson v. Grierson*, 156 Cal. 434, 105 P. 120, 134 Am. St. Rep. 137; 9 Cal. Jur. 667, 668. Similarly in the case of *Delatour v. Mackay*, 139 Cal. 621, 622, 73 P. 454, where the husband's habitual intemperance amounted to extreme cruelty, the court said: "These facts clearly establish a desertion of the family, within the meaning of the Code, and the action was therefore properly prosecuted by the wife alone." The court records show that the respondent was so convicted. The appellant Haslam, not being a clairvoyant, relied upon the records. He could not fore-

see that the respondent would claim that while respondent pleaded guilty to the assault and battery he really was not guilty; and appellant did not have imagination sufficient to conceive that a trial court 17 years later would take as substantial evidence against an innocent third party the oral testimony of respondent, made in his own interest, that he was not guilty.

"* * * Section 376, supra, has reference to the conditions existing at the time of the death of the minor child. * * *" Frazzini v. Cable, 114 Cal. App. 444, 448, 300 P. 121, 123. At the time of the death of the minor child in the instant case the child was living with his mother and had been living with her for more than a year, which selection he had a right to make; being over 14 years of age. The boy was not only living with his mother, but was contributing to her support. During all of said year he had not been supported by his father; neither had he contributed to his father's support. When the boy was killed the father refused to pay the funeral bills. The mother took this responsibility and paid at least a part of them.

All of the above facts are undisputed, and I believe that within the meaning of section 376, and for the purposes of this action, the mother and the minor child whose death was involved constituted "his family"; that the father had deserted his family; that the mother was entitled to maintain the action for the death of her minor child; and that the appellant should not be required to pay a second time. I believe that there was no substantial evidence to support the finding of the trial court with regard to the lack of desertion.



8 Cal.App.2d 195

FIRST TRUST & SAVINGS BANK OF PASADENA v. COE COLLEGE.

Civ. 5346.

District Court of Appeal, Third District,
California.

June 28, 1935.

Hearing Denied by Supreme Court
Aug. 26, 1935.

f. Subscriptions ⇨21(5)

Trust company suing to determine its rights in regard to trust fund left by deceased

ed who had subscribed to college endowment before her declaration of trust and seeking to have subscription declared invalid had burden to show want of consideration for the subscription (Code Civ. Proc. § 1060; Civ. Code, §§ 1614, 1615).

2. Subscriptions ⇨3

Consideration is supplied so as to uphold subscriptions to charity when on good faith of the subscriptions moneys have been expended, liabilities incurred, or work performed.

3. Subscriptions ⇨4

A subscription to charity which is not accepted or acted on in any way and which is not one of many making up aggregate sum is mere offer to make gift and is revoked by death of its maker.

4. Subscriptions ⇨5

Where subscription to college endowment was one of many, though not conditioned on securing any certain sum, and was used with other personal subscriptions by the college to help induce other subscriptions to endowment, subscription was binding on trustee of subscriber's estate though consideration was supplied after the subscription was executed.

5. Subscriptions ⇨5

Where subscription to college was to be used as memorial fund to subscriber's husband and such memorial fund was set up, the subscription was enforceable against trustee of subscriber's estate, since consideration for the subscription contract was supplied by compliance with subscriber's request for memorial fund.

6. Subscriptions ⇨4

An offer to make unilateral contract to pay money into memorial fund in which offeror has particular interest is accepted and becomes binding when donee obligates itself to create the memorial fund or actually does create it.

7. Subscriptions ⇨5

Where proposed gift is stipulated by donor to be devoted to particular purpose and is accepted with that condition attached, a special obligation with respect to that fund ensues and will satisfy requirements of consideration.

8. Contracts ⇨90

Where intent of party is evident from written instrument, mere use of words "gift" or "donation" will not be accepted as conclusive evidence of an absence of consideration.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by First Trust & Savings Bank of Pasadena against Coe College, an Iowa corporation, which filed a cross-complaint. From a judgment dismissing defendant's cross-complaint and from an order denying motion for new trial, defendant appeals.

Affirmed in part, reversed and remanded with instructions in part. Appeal from order denying appellant's motion for new trial dismissed.

G. A. Gibbs, of Pasadena, for appellant.

Cruickshank, Brooke & Evans, of Pasadena, for respondent.

Mr. Justice pro tem. ROSS delivered the opinion of the court.

Dr. Robert A. Condit was professor of ancient languages at Coe College, Cedar Rapids, Iowa, from 1881 to 1906. After his retirement, he and his wife, Margaret E. Condit, moved to California. A pension was received by him, and, after his death, by his widow. It appears that what property Dr. Condit accumulated, and which his widow succeeded to on his death, was savings from his salary at Coe College, and from his pension obtained for him by the college.

About February, 1925, Coe College was endeavoring to raise a fund of \$500,000 for its endowment. On February 24, 1925, Lloyd Morris, vice president of the college, paid a social call on Mrs. Condit, then a widow, at her Pasadena home, and on that occasion she volunteered to subscribe \$2,500 payable on her death, and executed the following instrument:

"\$2,500.00 1920 Fund 5196

"Endowment Note

"Feb. 24, 1925.

"With the desire to aid the cause of Christian education in Coe College, and with the purpose not only that the endowment of the College shall be increased by this gift, but also that it may be used in securing gifts from others to the same object, I promise to pay to Coe College, Cedar Rapids, Iowa, Twenty-five Hundred & 00/100 Dollars on or before Jan. 1-1960. Provided, in the event of my death prior to said date of maturity, this note shall become due upon the date of my death, and shall thereafter bear interest at the rate of five per cent per annum. This gift is to provide a memorial endowment to be known as the Dr. Robert A. Condit

Scholarship Foundation. The principal to be kept forever intact, and the income to be used toward the maintenance of the college.

"(Mrs.) Margaret E. Condit.

"Witness: Lloyd Morris

"C. W. Harris."

On April 1, 1930, Mrs. Condit made a declaration of trust by which she conveyed all her property to First Trust & Savings Bank of Pasadena, the respondent herein, with the provision that she should receive all the income during her lifetime, and on her death, her funeral expenses and all debts which were presented as claims to the trustee within sixty days of her death were to be paid, and the balance was to go to certain beneficiaries, about eleven in number, some being nephews, some cousins, and one a friend only.

Mrs. Condit died December 1, 1931, and Coe College presented its claim within sixty days. Objections to its validity being voiced by some of the beneficiaries under the trust, respondent brought this action under section 1060, Code of Civil Procedure, asking the court to determine its rights, duties, and powers with respect to said claim. Coe College answered and filed a cross-complaint alleging that the note was valid, and asking payment. Most of the beneficiaries appeared in the action and answered, asking that the claim be not paid.

At the trial respondent put in evidence the declaration of trust, the note of Mrs. Condit, and the claim filed by the college, and rested. Coe College called one witness, and presented the deposition of four others, all persons being connected with the college and having knowledge of the Condit note transaction. The beneficiaries were represented at the trial, but produced no evidence.

The trial court found that the claim was filed within the required sixty days, but found that no consideration passed to Mrs. Condit at the time she executed the note, and, as a conclusion of law, that the note was not a just debt of decedent. Appellant claims that the declaration of trust was void as against creditors under the authority of *McColgan v. Walter Magee, Inc.*, 172 Cal. 182, 155 P. 995, Ann. Cas. 1917D, 1050, and, also, that a new trial should have been granted on the showing by affidavit that Mrs. Condit was incompetent at the time she made the declara-

tion. These points need not be considered as respondent alleges that it stands ready to pay appellant's claim if the court holds it valid. Appellant, as a creditor, could not then complain of the alleged invalidity of the declaration of trust.

[1] The sole point is whether the finding of lack of consideration of the endowment note is supported by the evidence. The appellant had the benefit of the presumption of consideration given by section 1614, Civil Code, and by section 1615, Civil Code, the burden of proof was on the party seeking to invalidate the written instrument to show a want of consideration.

[2] The trend of modern authorities is to uphold subscriptions to charity, and similar causes, whenever that can be done without overstepping entirely established rules requiring consideration. Consideration is supplied where, upon good faith of the subscriptions, moneys have been expended, liabilities incurred, or work performed. Other courts have found consideration in the mutual promises of the subscribers. 38 A. L. R. 869, note; University of Southern California v. Bryson, 103 Cal. App. 39, 283 P. 949.

[3] A subscription which is not accepted or acted upon in any way, and which is not one of many making up an aggregate sum, is a mere offer to make a gift, and is revoked by the death of its maker. Grand Lodge I. O. G. T. v. Farnham, 70 Cal. 158, 11 P. 592; Board of Home Missions and Church Extension v. Manley, 129 Cal. App. 541, 19 P.(2d) 21.

[4] In the instant case, however, Mrs. Condit's subscription was one of many, although it was not conditioned upon the securing of any particular sum in the aggregate. It was used by Coe College with other personal subscriptions to induce the Carnegie Corporation and General Education Board to contribute funds to the college, and these bodies made their contributions on the strength of the various personal subscriptions, including Mrs. Condit's. This was consideration for the note, although supplied after the note was given. University of Southern California v. Bryson, 103 Cal. App. 39, 283 P. 949; Calvary Presbyterian Church v. Brydon (Cal. App.) 41 P.(2d) 377; Horan v. Keane, 164 Minn. 57, 204 N. W. 546.

[5] In addition, the note requested that the subscription be used in a memorial fund to Dr. Condit. The evidence shows that such a fund was actually set up to the extent of \$30,000, other cash subscriptions apparently being diverted to this fund. Carrying out Mrs. Condit's wish that her husband's name be remembered, and compliance with her request that a memorial fund be created, supplied a consideration for the giving of the note.

[6] An offer to make an unilateral contract to pay money into a memorial fund in which the offeror has a particular interest is accepted and becomes binding when the donee either obligates itself to create such memorial fund or actually does create it. Allegheny College v. National Chautauqua County Bank, 246 N. Y. 369, 159 N. E. 173, 57 A. L. R. 980.

[7] Where a proposed gift is stipulated by the donor to be devoted to some particular purpose, and is accepted with that condition attached, a special obligation in respect to that particular fund ensues, and will satisfy the requirements of a consideration. Central Maine General Hospital v. Carter, 125 Me. 191, 132 A. 417, 44 A. L. R. 1333; Buchtel College v. Chamberloix, 3 Cal. App. 246, 84 P. 1000.

[8] Where the intent of the party is evident from a written instrument, the mere use of the words "gift" or "donation" will not be accepted as conclusive evidence of an absence of consideration. University of Southern California v. Bryson, supra.

For these reasons, it appears that the testimony in the instant case not only did not rebut or dispel the presumption of consideration, but showed that there was ample consideration, and the claim of Coe College on the note should be paid.

As appellant has no interest in the trust, except that its claim be paid, the cause is remanded with instructions that judgment as prayed for be entered for appellant on its cross-complaint, and that otherwise the judgment be affirmed.

The purported appeal from the order denying appellant's motion for a new trial is dismissed.

We concur: THOMPSON, J.; PLUMMER, Acting P. J.

7 Cal.App.2d 703

CENTRAL CONST. CO. v. HARTMAN et al.
Civ. 9630.District Court of Appeal, First District,
Division 1, California.

June 21, 1935.

Hearing Denied by Supreme Court
Aug. 19, 1935.**1. Assignments** **⌚87**

Rule that where person entitled thereto assigns fund in hands of third person, notice to holder of fund is necessary to render assignment valid as against subsequent assignees without notice and for valuable consideration, *held* limited in its operation to successive assignments of choses in action, and does not apply between assignees of interest in realty (Civ. Code, § 1093).

2. Vendor and purchaser **⌚214(1)**

Executory contracts to convey realty and assignments thereof *held* to transfer interest in realty and were not transfers of mere chose in action as respects priority of rights of subsequent assignees (Civ. Code, § 1093).

3. Assignments **⌚87**

Where transfer is of an interest in realty, assignment is entitled to recordation, which is constructive notice to subsequent assignee.

4. Assignments **⌚87**

Where assignment covers interest in realty, failure of first assignee to give notice of his assignment to debtor or holder of fund will not necessarily defeat first assignee's claim as against subsequent assignee, who gives such notice, and subsequent assignee's right to priority is dependent upon his being a bona fide purchaser for value, without notice of prior assignment (Civ. Code, § 1093).

5. Deeds **⌚117**

Absolute warranty deed from vendor in land contract will operate as assignment of all his rights in land.

6. Trusts **⌚125**

Deed of trust transfers for purpose of trust all possible claims of trustor in property conveyed.

7. Assignments **⌚87**

Where vendor's assignment of executory contracts for conveyance of realty was not recorded and subsequently vendor executed to another deed of trust which was recorded and trustee assigned such deed of trust which assignment was not recorded, deed of trust operated as assignment of all interest which vendor had in realty, including interest in executory contracts, and was constructive notice to vendor's assignee of claim under deed of trust.

8. Trusts **⌚203**

Sale of property under trust deed operated to make purchaser at sale owner of executory contracts executed by trustor, transferring to purchaser all rights which trustor may have had therein, and title derived from such sale related back to date of execution of trust deed.

9. Trusts **⌚357(2)**

Constructive notice of trust deed is binding in same manner as actual notice.

10. Assignments **⌚87**

Where vendor's assignment of executory contracts for sale of realty was not recorded, and vendor's deed of trust to another was recorded and subsequently trust deed was assigned by trustee but such assignment was not recorded, rights of trustee's assignee *held* superior to rights of vendor's assignee, notwithstanding vendor's assignee gave notice to holder of contracts before trustee's assignee, since recordation of deed of trust conveying all of vendor's interest in property was constructive notice to vendor's assignee.

11. Vendor and purchaser **⌚214(4)**

Assignment of executory contract worked a transfer of interest in realty, notwithstanding assignment was by way of security, since assignee to extent of his interest is owner of thing assigned as security.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by the Central Construction Company against E. A. Hartman and others. From a judgment, plaintiff appeals.

Affirmed.

Sterling Carr, of San Francisco, for appellant.

Shelton, Gray & McWilliams, of San Francisco, and Miller & Ellis, of Los Angeles, for respondent.

TUTTLE, Justice pro tem.

This action was brought to determine the rights of the parties in respect to certain executory contracts for the sale of real property; appellant and respondent being successive assignees of the vendor under said contracts.

Capuchino Golf Corporation, in 1926, was the owner of a tract of land in San Mateo county, and during that year engaged Stansbury Contracting Company to furnish materials and perform labor in improving said tract. In 1929 the golf cor-

poration owed the contracting company approximately \$152,000.

During this time the golf corporation had entered into executory contracts with various parties for the sale of some 39 lots, which were a portion of said tract. None of said contracts was ever recorded.

Thereafter, and on June 1, 1928, the golf corporation, as security for the payment of said indebtedness, executed to the contracting company its note and gave its trust deed upon a portion of said land which included one of said lots. This trust deed was recorded June 4, 1928. On December 14, 1928, the golf corporation assigned to the contracting company, according to the findings, all of said executory contracts. On January 12, 1929, the golf corporation executed its note and deed of trust in favor of the contracting company as beneficiary and the said instrument was recorded on January 18, 1929. This trust deed covered all the said 39 lots under contract of sale. On December 2, 1929, the contracting company assigned to respondent Hartman the said contracts and all moneys owing thereunder, and also said deeds of trust. Neither the assignment of the contracts nor of the trust deed were recorded. Sale after default was had pursuant to said trust deeds, wherein respondent was beneficiary and the latter at such sale purchased and became the legal owner of all of said lots covered by said contracts in question. As appellant admits that the assignment under which it claims was made for security only, and as respondent, ever since the date last mentioned, has held the record title to said lots, the utmost relief which could be granted appellant would be a judgment that it has a right to the proceeds received from the purchasers under said contracts, until the indebtedness to appellant is discharged. The foregoing is a deraignment of respondent Hartman's title. In connection with the transaction, the trial court found that "E. A. Hartman, without notice of any alleged assignment to the said plaintiff, and without notice of any indebtedness due or owing from the Capuchino Golf Corporation, to plaintiff, purchased from said Stansbury Contracting Company, the said contracts, aforesaid notes and deeds of trust all and singular, in good faith, and for a valuable consideration, and all the right, title and interest in and to the same, together with all moneys then owing or to become owing

thereunder." This finding is not attacked by appellant.

Prior to the times mentioned, and on May 25, 1927, the golf corporation borrowed from Anglo California Trust Company the sum of \$10,000, and gave as collateral security the said 39 contracts of sale. These contracts were delivered to the trust company, and ever since have been, and still are, in its possession.

The trial court found that respondent Hartman was the owner and entitled to the possession of said executory contracts of sale, and entitled to collect the payments due thereunder. Judgment was entered accordingly. Plaintiff in said action, and appellant here, appeals from the judgment, and first attacks the findings as unsupported by the evidence.

Coming to appellant's claim and his source of title to said contracts, they are likewise based upon assignments of said contracts from the golf corporation. It appears from the record that for some reason the Stansbury Company ceased work upon the property early in the year 1929. On March 8, 1929, appellant contracted with the golf company to continue the work for certain considerations, among which was the assignment to it by the golf company of said 39 contracts of sale, and the execution of a trust deed covering the same. On that date the contracts were duly assigned to appellant, and the trust deed executed. This work was completed by appellant about July 12, 1929, when it was agreed that there was an additional sum of \$10,624.66 due. Thereafter, and on July 12, 1929, and as security for the payment of said sum, the golf corporation gave *another assignment* to appellant covering these 39 contracts. On July 26, 1929, appellant notified the trust company, holder of the contracts, of the two assignments from the golf company, which it held.

[1-4] It is the contention of plaintiff and appellant that, as it was the first assignee to give notice to the holders of the contracts, it had a prior right to the same, even though its assignment was *subsequent* in point of time to that of Stansbury Company, the first assignee and the assignor of respondent. It relies upon the well-settled law of this state that: "Where * * * a person entitled thereto assigns a fund in the hands of a third person, the rule is established in this state that notice to the holder of the fund is necessary to

render the assignment valid and effectual as against subsequent assignees without notice and for a valuable consideration." *Smitton v. McCullough*, 182 Cal. 530, 189 P. 686, 688; citing *Graham Paper Co. v. Pembroke*, 124 Cal. 117, 56 P. 627, 44 L. R. A. 632, 71 Am. St. Rep. 26. Respondent contends that the rule quoted must be limited in its operation to successive assignments of *choses in action*, and that it does not apply between assignees of an *interest in real property*. We are in accord with the view of respondent. An executory contract to convey real estate has been held to be a conveyance or transfer of real property, under the provisions of section 1093 of the Civil Code, and upon the ground that it effects a grant of the whole beneficial interest in the land. *Jackson v. Torrence*, 83 Cal. 521, at page 537, 23 P. 695, principle reaffirmed in *Keese v. Beardsley*, 190 Cal. 465, at page 473, 213 P. 500, 26 A. L. R. 1538. We therefore hold that these contracts and the assignments thereof were not transfers of a mere chose in action. They actually transferred an interest in real property. The distinction from the rule found in the *Graham Paper Co.* Case is pointed out in *Pomeroy's Equity Jurisprudence* (4th Ed.) vol. 2, where the author says, on page 1404, after discussing the *Graham Paper Co.* Case: "Finally the special rule requiring a notice to the trustee or other holder of the legal title in order to settle the priority among successive assignees, is confined to transfers of personal property, debts, money claims arising from contracts, funds, and the like; *it does not extend to nor embrace assignments of any equitable estates or interests in land. These latter are governed by the more general rules concerning priority, already stated.*" (Italics ours.) Where the transfer is of an interest in real property, the assignment is entitled to recordation, and this is constructive notice to a subsequent assignee. Transfers of the character involved in the cases cited are not entitled to recordation and constructive notice does not arise therefrom. Hence the holding in the *Smitton* and *Graham Paper Co.* Cases which requires actual notice to the holder of the fund in the hands of a third party, in an action between successive assignees. We therefore hold that where an assignment covers an interest in real property, the failure of the first assignee to give notice of his assignment to the debtor or holder of the fund will not necessarily de-

feat his claim as against a subsequent assignee, who gives such notice, and that the right of the latter to priority is dependent upon his being a bona fide purchaser for value, without notice of the prior assignment. 5 C. J., p. 956. Conceding that appellant purchased the assignments for value, did it take its assignments, which were subsequent by several weeks to those of respondent, without notice?

[5-10] The *first assignment*, as between these parties, was made by the golf corporation to Stansbury Company on December 14, 1928. It was not recorded. But shortly thereafter, and on January 12, 1929, the original vendor, the golf corporation, executed a trust deed covering all these lots to a trustee with Stansbury Company as beneficiary. This deed of trust was duly recorded on January 18, 1929. Thereafter, and on December 2, 1929, said deed of trust was duly assigned to respondent. This assignment was not recorded. "An absolute warranty deed from the vendor in a land contract will operate as an assignment of all his rights in the land." 18 C. J. p. 296, § 276. A deed of trust "transfers, for the purpose of the trust, all possible claims of the trustor in the property conveyed." 25 Cal. Jur., p. 39. We therefore hold that this deed of trust operated as an assignment of all interest which the golf corporation may have had in the real property, including any interest which the latter may have had in these 39 executory contracts of sale. All the foregoing facts with reference to the execution recordation, and sale by the trustee to respondent were found by the court. Thus it appears that respondent was not only prior in time in the matter of his assignment, but that his assignor also recorded its trust deed to the property several weeks before the assignment was executed to plaintiff, and this was constructive notice to the latter of the claim of the first assignee to these contracts. The sale under the trust deed operated to make respondent the owner of the contracts, transferring to him all rights which the golf corporation may have had therein. Title derived from such sale related back to the date of the execution of the trust deed. If plaintiff had taken the time to examine the records, all of this would have been readily disclosed to it. The president of appellant corporation testified that he had not consulted the records of San Mateo county prior to the assignment to appellant. He stated

that "the only information I had was that there was no other trust deed except ours." In a matter affecting title to real property appellant should have gone further than to rely upon "information" given him. Appellant is conclusively presumed to have notice of the trust deed on the public records. Such notice is binding in the same manner as actual notice. 20 Cal. Jur. p. 233. We therefore hold that the execution of the trust deed covering all of the real property described in said contracts of sale effected and operated as an assignment of said contracts to the trustee named in said trust deed; that the recordation of said trust deed was notice to appellant of such assignment; that appellant's loss, if any, was also occasioned by and through his own neglect in failing to examine the public records, and the rights of respondent in said contracts are superior to any rights which appellant may have acquired.

The case of *Mills v. Rossiter*, Eureka Oil Burner & Manufacturing Co., 156 Cal. 167, 103 P. 896, is relied upon by appellant. In that case the subsequent assignee took without notice, and prevailed because of the negligence of the first assignee in failing to record his assignment of the contract of sale. Here, although the regular assignment was not recorded, the trust deed from the owner to the first assignee, covering the property, was recorded shortly after the execution of the original assignment. As we have stated, our conclusion is that the trust deed itself operated as an assignment and the recordation thereof was notice to appellant, who therefore was a "taker with notice."

[11] It is contended that the assignment was by way of security and therefore did not work a transfer of an interest in real property. The assignee, to the extent of his interest, is the owner of the thing assigned as security. 5 C. J., p. 957; In re Phillips, 71 Cal. 285, page 289, 12 P. 169. There is no merit in this point.

It is next contended that the following finding lacks evidentiary support: "That the plaintiff in said transaction at all times dealt with J. B. Rogers solely and only as the agent and officer of the Capuchino Golf Corporation, and that at no time was the said J. B. Rogers the agent or partner of or in any fiduciary relation with the said Stansbury Contracting Company or said Charles Stansbury." We find

in the record ample evidence to sustain this finding, and to warrant this inference.

We find no error in the action of the trial court in denying the motion for new trial.

Each party to this appeal was innocent of any fraud or unfair dealing. The action of the golf corporation and its officers was most reprehensible in executing, successively, assignment after assignment to innocent parties who parted with valuable consideration and suffered loss through the failure of said officers to disclose the true situation. We believe that the trial court, in a difficult situation of this character, and as between these successive assignees, arrived at a conclusion which is just and equitable, and we see no valid reason for disturbing it.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.



KAUFMAN v. WALLS et al. *
Civ. 10218.

District Court of Appeal, Second District,
Division 2, California.
June 28, 1935.

Rehearing Denied July 25, 1935.

Hearing Granted by Supreme Court
Aug. 26, 1935.

1. Courts ☞ 122

Question of jurisdiction is not concluded by amount prayed for in complaint, but if facts alleged show that maximum amount of demand is less than court's jurisdictional minimum, court is without jurisdiction.

2. Courts ☞ 122

Superior court held without jurisdiction of action against indemnity company on real estate broker's bond where facts alleged showed maximum liability of \$2,000, notwithstanding plaintiff alleged damages against principal in excess of that amount (Gen. Laws 1931, Act 112; Code Civ. Proc. § 89. Repealed and re-enacted by St. 1933, p. 1811, § 13; Const. art. 6, § 5).

3. Courts ☞ 121(10)

In action against real estate broker, that broker and surety on bond were joined in same action wherein facts alleged authorized

judgment against principal in sum within jurisdiction of superior court and against surety in sum less than jurisdictional minimum did not empower court to render judgment against surety that it would have been without jurisdiction to render if action had been against surety alone (Gen. Laws 1931, Act 112; Code Civ. Proc. § 89. Repealed and re-enacted by St. 1933, p. 1811, § 13; Const. art. 6, § 5).

4. Courts 121 (10)

As respects jurisdiction of superior court in action against broker and surety wherein claim against surety was less than superior court's jurisdictional minimum, that statute authorizes injured party to maintain action against broker "and" sureties did not give superior court jurisdiction, since statute does not purport to modify limitations on jurisdiction as established by other laws and joint liability is not created (Gen. Laws 1931, Act 112, § 9a; Code Civ. Proc. § 89. Repealed and re-enacted by St. 1933, p. 1811, § 13; Const. art. 6, § 5).

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Charles L. Bogue, Judges.

Action by Paul Kaufman, executor of the last will of Adolphine L. Kaufman, deceased, against Emery J. Walls, the Pacific Indemnity Company, and others. Judgment for plaintiff, and last named defendant appeals.

Reversed.

Charles E. R. Fulcher, of Los Angeles, for appellant.

G. A. Bisbee, of Los Angeles (H. R. Spence, of Los Angeles, of counsel), for respondent.

WILSON, Justice pro tem.

This action was brought to recover damages for fraud alleged to have been perpetrated upon respondent by the defendants, other than Pacific Indemnity Company, in connection with the sale, exchange, and purchase of real property. Appellant, Pacific Indemnity Company, was surety upon the bond of defendant Cooperative Realty Corporation, Limited, a real estate broker, given pursuant to the California Real Estate Act. St. 1919, c. 605, p. 1252, and amendments thereto; 1 Deering's Gen. Laws, p. 25, Act 112. The penalty of the bond was \$2,000. Respondent alleged damages in a sum in excess of \$2,000, and prayed judgment for the total amount against all defendants. A ver-

dict was returned for respondent for the sum of \$4,500 against defendants Cooperative Realty Corporation, Limited, and Kelly, neither of whom has appealed, and for the sum of \$2,000 against appellant, and judgments were entered accordingly.

[1-3] The principal ground of this appeal is that the superior court did not have jurisdiction of the cause of action as to appellant. Municipal courts have original jurisdiction in cases at law in which the demand amounts to \$2,000 or less. Code Civ. Proc. § 89, repealed and re-enacted by St. 1933, p. 1811, § 13. The superior court has original jurisdiction in all civil cases except those in which jurisdiction is given by law to municipal courts, and except other proceedings not necessary to be noted here. Const. art. 6, § 5. In respondent's complaint she prayed for judgment against all defendants in an amount within the jurisdiction of the superior court. However, the question of jurisdiction is not concluded by the amount prayed for, without regard to the allegations upon which the prayer is based. If the facts alleged in the complaint show that the maximum amount of the demand is less than the court's jurisdictional minimum, then the court is without jurisdiction of the action. Consolidated Adjustment Co. v. Superior Court, 189 Cal. 92, 207 P. 552; California Cured Fruit Ass'n v. Ainsworth, 134 Cal. 461, 66 P. 586; Larson v. Du Bain, 135 Cal. App. 433, 27 P.(2d) 393. The complaint alleged that the bond was given pursuant to the California Real Estate Act, supra, and that the penalty thereof was \$2,000. This sum was the maximum liability of appellant. Wiggins v. Pacific Indemnity Co., 134 Cal. App. 328, 25 P.(2d) 898. If this action had been against the appellant only, with the same allegation as to the penalty of the bond, the court would have been without jurisdiction, even though the same amount of damages had been alleged and prayed for, because the allegation which disclosed the maximum amount for which appellant was liable would have determined the jurisdiction rather than the allegation as to the amount of damages suffered by respondent. The joinder of principal and surety in one action in which the facts alleged authorize judgment against the principal in a sum within the jurisdiction and against the surety in a sum less than the jurisdictional minimum will not empower the court to render judgment against the surety that it would have been without

jurisdiction to render if the action had been against the surety alone.

The cases cited by respondent do not sustain her position. In the case of *Paige v. Reinecke*, 139 Cal. App. 225, 33 P.(2d) 454, a judgment against a real estate broker's surety for \$2,000 and against the broker for a larger amount was affirmed, but the question of jurisdiction was not raised or discussed. In *Page v. Ellis*, 9 Cal. 248, the bond was for \$300, an amount within the jurisdiction of the district court, but judgment was reversed because the complaint showed that the damages were less than the minimum amount of the district court's jurisdiction. In each of the other cases cited by respondent (*Continental Casualty Co. v. Crook*, 157 Miss. 518, 128 So. 574, 72 A. L. R. 186; *Montgomery v. Martin*, 104 Mich. 390, 62 N. W. 578; *Rawles v. People*, 2 Colo. App. 501, 31 P. 941), the damages sought were less than penalty of the bond, each was brought in the court having jurisdiction of the amount of the damages, in each it was contended that the action should have been commenced in a higher court—the court having jurisdiction of the amount of the penalty—and in each it was held that the action was properly brought in the court which had jurisdiction of the amount of damages claimed. No case has been cited which intimates that jurisdiction is conferred by merely demanding a greater sum than is recoverable under the facts stated in the complaint.

[4] Concerning respondent's contention that the provision in section 9a of the statute that an injured party may maintain "an action" against the "broker and his sureties" means that he is restricted to one suit in which he must join the principal and the surety, it is only necessary to say that this provision does not purport to modify the limitations upon the jurisdiction of the courts as established by other statutes and by the Constitution. A joint liability is not created either by the language of the statute or by the fact that the cause of action against the surety arose synchronically with that against the principal. The action against the broker is the common-law action of fraud, while the action against the surety is statutory. If, in the respective courts having jurisdiction, separate judgments had been rendered against the broker and against the surety for the respective amounts for which each was li-

able, a provision in one or both judgments that the payment of one should operate as a discharge pro tanto of the other would have obviated the third action suggested by respondent as necessary to prevent a double payment.

Jurisdiction of a cause of action against the surety cannot be conferred by joining the surety in a cause of action against the principal, if the court is otherwise without jurisdiction.

The other questions raised by the appeal need not be considered.

The judgment against appellant is reversed.

We concur: CRAIL, J.; STEPHENS, P. J.



8 Cal.App.2d 312
JOHNSON v. MARR et al.
Civ. 9356, 9357.

District Court of Appeal, Second District,
Division 1, California.

July 3, 1935.

1. Action ☞59

Rendition of separate findings, conclusions, and judgments in action based on fraud and in action for attorney's fees which were consolidated for trial held not error, where both actions were separate and causes of action were not related except that they were between same parties and same witnesses testified in each (Code Civ. Proc. § 632, as amended by St. 1933, p. 1876, § 105).

2. Trial ☞395(2)

Findings held not uncertain where all facts necessary to support judgment were specifically found with exception of two findings made by reference to allegations of complaint, and there were no separate defenses, counterclaims, or cross-complaints involved.

3. Work and labor ☞29(1)

In action to recover reasonable value of services, amount, character, and value of which can only be established by evidence in court, plaintiff is not entitled to interest prior to verdict or judgment.

4. Interest ☞19(1)

In action for attorney's fees based on breach of employment contract, interest should not have been allowed where employment contract pleaded did not allege any

agreement as to value of services to be rendered and complaint was predicated on reasonable value.

5. Appeal and error ⇨1151(2)

Error in including interest in judgment for attorney's fees did not require reversal but might be corrected by modification of judgment.

Appeal from Superior Court, Los Angeles County; Robert H. Dunlap, Judge pro tem.

Actions by George C. Johnson against Howard Marr and Mrs. Howard Marr, also known as Annie S. Marr, and another, as consolidated. From judgments for plaintiff, named defendants take separate appeals.

Modified and affirmed in first case; affirmed in second case.

Jensen & Jensen, of Los Angeles, for appellants.

George C. Johnson, of Los Angeles, for respondent.

ROTH, Justice pro tem.

Respondent filed two several actions against defendants and appellants. One is based on fraud alleging damages in the sum of \$3,000 (action No. 319760); the other (action No. 318472) is predicated upon the reasonable value of services rendered to appellants by respondent as an attorney at law, pursuant to employment of respondent by said appellants, which employment respondent terminated when he discovered the fraud which appellants had perpetrated upon him, and which fraud forms the basis of the fraud action. Because the parties and witnesses to both actions were identical, a motion to consolidate them for trial based upon the convenience of all concerned was granted. Judgments in both cases went for respondent. From these several judgments, separate appeals were taken, but upon stipulation of the parties an order was made permitting the filing of one set of briefs for both cases.

[1] Appellants urge first, with respect to both of said actions, that it was error for the trial court to make and render separate findings, conclusions, and judgments in said actions, contending that there should have been but one consolidated set of findings, conclusions, and judgment in both cases, and citing the case of Stanton

v. Superior Court, 202 Cal. 478, 261 P. 1001, as authority for such assertion. There is nothing in said case which so holds. Both actions were separate and distinct, and the causes of action severally stated in each were in no manner related, except that they were between the same parties, and it happened that the same witnesses testified in each. A consolidation for purposes of trial does not merge the issues in separate cases when they are separate and thus change the requirement for several findings, conclusions, and judgment in each case in the absence of a stipulation therefor. Code Civ. Proc. § 632, as amended by St. 1933, p. 1876, § 105.

[2] With reference to action No. 319760, appellants contend that the findings are vague and uncertain. The findings generally follow specifically the language of the first amended complaint, to which no demurrer was taken. With reference to allegations V and IX thereof, the court found generally that they were true. Allegation V, it is true, does contain some matters by way of recital, but it also alleges sufficient facts upon which a judgment could be properly based, if the language of the allegation were set forth in the findings. In view of the other findings specifically made, there is nothing fatal in the finding which adopts allegation IX of the first amended complaint. It is true that if the reference to allegation IX stood alone and unaided, the judgment against appellant Annie S. Marr might possibly be defective, but it does not, there being ample facts found in the other findings to support a judgment against her. There is nothing in the cases of Kling v. Gustason, 101 Cal. App. 58, 281 P. 407, and Tasker v. Nieto, 108 Cal. App. 135, 151, 291 P. 688, applicable to the facts here, as all the facts necessary to support the judgments were specifically found with the exception of the two findings made by reference to allegations V and IX of the first amended complaint, and there were no separate defenses, counter claims, or cross-complaints involved.

[3-5] With reference to action No. 318472, appellants urge that the trial court erroneously allowed interest. Respondent contends that his action for fees was not based upon a quantum meruit, as was the case in Kling v. Gustason, *supra*, but upon a breach of contract for employment. The

contract of employment pleaded does not allege any agreement as to the value of services to be rendered, and the complaint definitely alleges and is unquestionably predicated upon "reasonable value." On the facts, therefore, the language of the Gustason Case, 101 Cal. App. 58, 60, 61, 281 P. 407, 408, is appropriate: "In an action to recover the reasonable value of services performed by a plaintiff, the amount, character, and value of which can only be established by evidence in court, * * * the plaintiff is not entitled to interest prior to verdict or judgment." Swinnerton v. Argonaut Land, etc., Co., 112 Cal. 375, 44 P. 719, 720; Cox v. McLaughlin, 76 Cal. 60, 18 P. 100, 9 Am. St. Rep. 164; Erickson v. Stockton & Tuolumne County R. Co., 148 Cal. 206, 82 P. 961; Edwards v. Arp, 173 Cal. 472, 160 P. 551. While we are in accord with appellant's contention that interest should not have been allowed, the error in including it is not one in itself necessitating a reversal, but is one which may be corrected by a modification of the judgment to that extent."

The judgment in case No. 318472 is therefore modified so as to eliminate therefrom the interest allowed on account of services to date of judgment. In all other respects said judgment is affirmed. Judgment in case No. 319760 is affirmed. Each of the parties to pay their own costs on appeal.

We concur: HOUSER, Acting P. J.; YORK, J.



8 Cal.App.2d 169

REINERT v. PROUD.
Civ. 10009.

District Court of Appeal, Second District,
Division 2, California.
June 28, 1935.

Rehearing Denied July 24, 1935.

Hearing Denied by Supreme Court
Aug. 26, 1935.

1. Pleading Ⓒ126

Denial on information and belief of paragraph of complaint alleging assignment to plaintiff on certain day of note and trust deed sued on *held* not a "negative pregnant" and an admission of assignment on some other

date, in view of statute permitting denials by reference to specific paragraphs or parts of complaint (Code Civ. Proc. § 437, as amended by St. 1927, p. 529).

[Ed. Note.—For other definitions of "Negative Pregnant," see Words & Phrases.]

2. Bills and notes Ⓒ524

Possession and production in evidence of note sued on, which bore indorsement signed with payee's name assigning all right, title, and interest in note and trust deed to plaintiff, *held* prima facie proof of ownership in plaintiff, requiring finding for plaintiff on issue as to assignment of note in absence of contrary proof (Civ. Code, §§ 3132, 3138, 3140; Code Civ. Proc. § 1963, subs. 11, 12, 25).

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by Jane V. Reinert against Richard T. Proud for balance due on a note secured by a deed of trust. From an adverse judgment, plaintiff appeals.

Reversed.

Prior opinion, 44 P.(2d) 360.

T. H. Canfield, of Santa Barbara, for appellant.

Ross MacLeod, of Santa Barbara, for respondent.

FRICKE, Justice pro tem.

Action by appellant for balance due on a promissory note secured by a trust deed.

[1] The first point urged is that no issue was raised as to the allegation of paragraph IV of the complaint "that on the 18th day of January, 1930," Jane J. Rosenquist assigned without recourse her entire interest in the note and trust deed to the plaintiff, and that "since said 18th day of January, 1930, the plaintiff has been and now is the sole owner and holder of the said note and deed of trust." The answer is as follows: "That defendant has no information or belief sufficient to enable him to answer the allegation of paragraph IV of said complaint, and basing his denial upon that ground he denies the allegation therein contained and the whole thereof." Appellant contends that this form of denial constitutes a negative pregnant and is in effect an admission that the facts pleaded occurred and is merely a denial that they occurred on the particular date named, and that the finding of

the trial court that no assignment was made is error.

This contention is not based upon the denial being based upon the lack of information or belief, but challenges the validity of a general denial of the allegations of a paragraph of the complaint and the whole thereof. The decision of the question depends upon the proper construction of section 437 of the Code of Civil Procedure, as amended in 1927 (St. 1927, p. 529). By that amendment the previously existing requirement that the denial of each allegation controverted must "be specific" ceased to exist and there was added to the section the provision that "the denials of the allegations controverted may be stated by reference to specific paragraphs or parts of the complaint; or by express admission of certain allegations of the complaint with a general denial of all the allegations not so admitted; or by denial of certain allegations upon information and belief, or for lack of sufficient information or belief, with a general denial of all allegations not so denied or expressly admitted." In *Del Fanta v. Sherman*, 107 Cal. App. 746, 290 P. 1087, 1088, the answer "denies each and every allegation and statement in said third cause of action contained" except certain matters which were specifically admitted. The court there says: "It may be doubtful whether the answer would have been sufficiently specific under the law as it existed prior to July 29, 1927. * * * We think the answer is sufficiently specific to conform to this section of the Code as amended." We believe that, under section 437 as it now reads, the denial in the answer here is sufficient to raise an issue as to the matters alleged in paragraph IV of the complaint.

[2] Appellant next contends that the possession and production in evidence of the promissory note in question by the plaintiff constituted prima facie proof of ownership in the plaintiff sufficient to shift to defendant the burden of producing evidence to the contrary, and, there being no other proof on this issue, to require a finding in accordance with such prima facie showing. It may be added here that the

note bears upon its reverse side an indorsement signed with the name of the payee assigning all right, title, and interest in the note and trust deed to Jane V. Reinert. In *Moore v. Craig* (Cal. App.) 42 P.(2d) 647, 649, defendant denied the indorsement and delivery of the note upon which action was brought, and took the position that the evidence of ownership was not sufficient, and the court, quoting from *Pugh v. Dawson*, 95 Cal. App. 505, 516, 273 P. 39, says: "Possession of commercial paper, with indorsement, makes a prima facie case of delivery by the indorser to the holder and of ownership of the latter." In *Linder Hardware Co. v. Pacific Sugar Corporation*, 17 Cal. App. 81, 118 P. 785, 789, the assignment of a promissory note was denied and objection made to the introduction thereof because there was no proof of the assignment. The court there followed the note to *Bedell v. Herring*, 77 Cal. 572, 20 P. 129, 11 Am. St. Rep. 323, and cases cited, holding that mere possession of a negotiable instrument by an indorsee, or by the transferee where no indorsement is necessary imports prima facie that he is the lawful owner. It should also be noted that "every holder is deemed prima facie to be a holder in due course" (Civ. Code, § 3140); that "a holder in due course * * * may enforce payment * * * against all parties liable thereon" (Civ. Code, § 3138), and "may sue thereon in his own name" (Civ. Code, § 3132); that it is presumed "that things which a person possesses are owned by him"; "that a person is the owner of property from exercising acts of ownership over it"; and that identity of person will be presumed from identity of name (Code Civ. Proc., § 1963, subs. 11, 12, 25). In the light of these authorities and in the total absence of proof to the contrary, there was sufficient proof herein to require the trial court to find in favor of appellant on the issue as to the assignment of the note, and the finding to the contrary was reversible error.

Judgment reversed.

We concur: CRAIL, J.; STEPHENS, P. J.

**OLDFIELD v. BANK OF AMERICA NAT.
TRUST & SAVINGS ASS'N.***
Civ. 10224.

District Court of Appeal, Second District,
Division 2, California.

June 26, 1935.

Hearing Granted by Supreme Court
Aug. 22, 1935.

1. Appeal and error ☞1208(1)

General rule is that party obtaining any advantage from judgment before reversal must make restitution to other party after reversal.

2. Appeal and error ☞1208(4)

Where court adjudged in interpleader proceeding that no lien existed in favor of either lien claimant, but that money and property belonged to two other parties, who procured court order permitting withdrawal of \$3,000 of such money and paid it to one lien claimant, who released judgment for like amount against judgment debtor and waived appeal and further claim to money or property in court, other lien claimant who failed to procure stay of execution, notwithstanding knowledge of proposed settlement, *held* not entitled to recover \$3,000 from other lien claimant, acting in good faith, on reversal of judgment and award of first lien on money and property, though money was withdrawn from court pursuant to stipulation and not after hearing as required by court rule (Code Civ. Proc. §§ 572-574; Superior Court Rules for Los Angeles County, rule 41).

3. Appeal and error ☞907(3)

Where appeal is based on judgment roll alone, trial court's findings of fact are binding on appellate court.

Appeal from Superior Court, Los Angeles County; Carl L. Stutsman, Judge.

Action by Barney Oldfield against the Bank of America National Trust & Savings Association. From a judgment for defendant, plaintiff appeals.

Affirmed.

A. E. McManus and Carroll Allen, both of Los Angeles, for appellant.

Louis Ferrari, of San Francisco, and Edmund Nelson and G. L. Berrey, both of Los Angeles, for respondent.

WILLIS, Justice pro tem.

This is an appeal by plaintiff from a judgment, and is based on the judgment roll alone. The facts of the case are therefore those reflected by the findings of fact, hereinafter stated, and the main

question herein is whether or not those findings support the conclusion of the court and its judgment based thereon.

On August 1, 1926, appellant obtained a judgment against one J. M. Danziger for \$10,000, on which two writs of execution were issued and levies made thereunder by the sheriff of Los Angeles county on California Bank, a banking corporation, on April 27, 1927, and January 28, 1929, respectively, garnishing certain property and money then in the possession of said bank and claimed by appellant to belong to said Danziger, but which money and property the trial court found in this case did not belong to him. Other persons made claim to part or all of said money and property, among them being Ivan R. Bean, whom the court found was an assignee of the respondent bank for the purpose of collecting the claim he represented. On February 19, 1929, the California Bank filed an interpleader action against the sheriff, this appellant, said Ivan R. Bean, Edith Wake Danziger, and Lina Danziger, and others, in which action an order was entered permitting the California Bank to deposit the money and property, subjected to the adverse claims of the parties, with the clerk of the superior court, said property including the sum of \$15,081.12 in cash. Upon deposit of the money and property, the California Bank was dismissed from the case.

In the interpleader action said Ivan R. Bean appeared and answered, with other defendants. On April 25, 1930, judgment therein was entered against this appellant adjudging that said money and property belonged to Edith Wake Danziger, subject to a lien thereon or interest therein in favor of Lina Danziger in the amount of \$4,400 and that said Ivan R. Bean had no interest therein or right thereto. The court further found that it was not true that said money and property of the value of \$40,000 were ordered by the court to be deposited with the clerk of said court pending the final determination of said cause. At that time there was a rule of the superior court in and for Los Angeles county, No. 41, providing the procedure for securing an order of court for withdrawal of moneys or property deposited under sections 572, 573, and 574 of the Code of Civil Procedure, by which it was in substance provided that upon filing by the claimant of his verified petition setting forth the basis of his claim and giving

the names of all parties interested therein, the presiding judge should order the custodian of said funds and all other persons interested therein and named in said order to show cause in the law and motion department at a time specified why an order should not be made directing the delivery or payment thereof to the petitioner, and that after such hearing the court should make such order as might be necessary or proper. On May 2, 1930, a stipulation was made and filed in said interpleader cause whereby Edith Wake Danziger and Lina Danziger on their part and Ivan R. Bean on his part stipulated that out of the funds deposited with the clerk of said court there should be paid to said Ivan R. Bean the sum of \$3,000 in consideration of his waiving all his claim, right, title, and interest in and to said fund, which by inference was based on an execution lien on a judgment against J. M. Danziger, and of waiving his right of appeal in said action and satisfying his judgment against J. M. Danziger to the extent of \$3,000; and thereupon the presiding judge of said court entered an order for the payment of said sum of money to said Ivan R. Bean, the said sum was paid to him on May 2, 1930, and he thereupon satisfied his judgment against J. M. Danziger to the amount of \$3,000. Later on the same day all the remaining portion of the funds on deposit was withdrawn by Edith Wake Danziger and Lina Danziger and Charles Montgomery.

The court further found that no hearing was held upon any petition for delivery of the moneys in said deposit as provided in said rule of court. Also the court found that it was not true that Ivan R. Bean and respondent bank knew or should have known that said funds were so procured fraudulently and in violation of the rights of the appellant, and that it was not true that the whole transaction of procuring said funds was done for the purpose of cheating and defrauding appellant out of his interest in said funds in the event that said judgment should be reversed on appeal.

On April 30, 1930, notice of entry of the judgment in the interpleader cause was served on appellant, and on May 8, 1930, appellant filed a notice of appeal from said judgment, but he neglected to procure any stay of execution thereon.

The court also found that during the time between judgment entry on April

26, 1930, and the order of withdrawal of May 2, 1930, appellant had full notice and knowledge that said Ivan R. Bean and Edith Wake Danziger and Lina Danziger were negotiating respecting a settlement of the demands of said Ivan R. Bean against said J. M. Danziger and against the funds on deposit, and that said Ivan R. Bean intended to make a settlement with said J. M. Danziger and to procure the payment to him from said deposit and to release his claim to said funds and waive his right of appeal and give partial satisfaction of judgment to said J. M. Danziger. On May 2, 1930, on the stipulation and order above mentioned, the sum of \$3,000 was paid from said funds to Ivan R. Bean, who waived right of appeal and entered partial satisfaction of his judgment against J. M. Danziger, and said Ivan R. Bean, as trustee for respondent bank, received said sum and paid the same over to respondent bank. When said sum was so paid over to Ivan R. Bean, there was in said deposit a sum in excess of \$28,000 in cash and other property of the value of upwards of \$12,000. The court further found that by reason of delay of appellant in procuring a stay of execution on the judgment in the interpleader cause and in permitting Edith Wake Danziger and Lina Danziger to withdraw a portion of said remaining funds, appellant was guilty of such laches as to prejudice respondent bank.

On March 31, 1932, the Supreme Court reversed the judgment in the interpleader cause upon the grounds that as to appellant herein there had been a prior adjudication that the said funds belonged to said J. M. Danziger. *California Bank v. Traeger*, 215 Cal. 346, 10 P.(2d) 51. Thereafter said cause was retried and a judgment was entered therein on June 9, 1933, adjudging this appellant to be entitled to and that he has a first lien in the sum of \$10,000 with certain interest "on the money and securities heretofore deposited with the clerk of this court," describing the same, and that J. M. Danziger is entitled, after the lien of appellant shall have been satisfied, to the balance of said money and securities, and that Edith Wake Danziger and Lina Danziger and other defendants, other than J. M. Danziger and appellant, take nothing by said action. An appeal from this judgment taken by Edith Wake Danziger and Lina Danziger was dismissed.

On these facts the court herein concluded that appellant was not entitled to recover anything from respondent, and judgment was accordingly entered from which this appeal is taken.

[1-3] Appellant claims that he is entitled to recover from respondent bank the amount received by it through its trustee Ivan R. Bean out of the deposit in the hands of the clerk of the court, on the theory that respondent obtained the same under an erroneous judgment afterwards reversed. There is a general rule that a party obtaining through a judgment, before reversal, any advantage or benefit must restore what he got to the other party, after the reversal. *Reynolds v. Harris*, 14 Cal. 667, 681, 76 Am. Dec. 459; *Cowdery v. London, etc., Bank*, 139 Cal. 298, 73 P. 196, 96 Am. St. Rep. 115; *Ward v. Sherman*, 155 Cal. 287, 100 P. 864, 865. Herein appellant claimed an execution lien on the money and property taken into custody by the court in the interpleader cause, to the extent of the amount of his judgment against J. M. Danziger. The court in that cause was called upon to ascertain and determine the nature and order of priority of the claims of defendants therein. It adjudged that neither appellant nor Bean had any lien or valid claim upon the money and property, but that Edith Wake Danziger and Lina Danziger were the owners thereof and entitled thereto. By the judgment appellant's execution lien was voided. In the absence of any stay of execution the successful parties last above named stipulated that Bean should have \$3,000 of the funds on deposit, in consideration of his waiving his claim on the funds and his right to appeal and of his satisfying a judgment against J. M. Danziger to the extent of \$3,000. On this stipulation the presiding judge ordered the payment of that sum to Bean, who received and delivered it over to respondent bank as he was bound to do, and he thereupon gave up his right to appeal and satisfied the judgment against J. M. Danziger pro tanto.

It is clear that in this action the court cannot restore the \$3,000 above mentioned to appellant without placing respondent bank in the position of having waived its claim through its trustee, Bean, to the funds and of having satisfied a judg-

ment against J. M. Danziger to the extent of \$3,000, and then also being deprived of the \$3,000. In *Ward v. Sherman*, supra, it is said: "Where a judgment or decree of an inferior court is reversed by a final judgment on appeal, a party is in general entitled to restitution of all the things lost by reason of the judgment in the lower court; and, accordingly, the courts will, where justice requires it, place him as nearly as may be in the condition in which he stood previously." In the light of the plea of laches by respondent bank and the findings of fact thereunder, it would appear that justice does not require restitution of the \$3,000 so paid out to respondent's trustee under authority of the presiding judge of the court. Those findings are binding on this court and reveal the source of appellant's trouble and loss. It was his omission to secure a stay of execution of the judgment in question, and under which, by authority of the court, respondent through its trustee Bean secured the withdrawal of the \$3,000, at a time when appellant had notice and knowledge of such intended withdrawal. In the absence of such stay the court had power to make the order of withdrawal on the stipulation of the parties adjudged to be entitled to the funds on deposit. See *Wilson v. Coffey*, 116 Cal. App. 635, 3 P.(2d) 62. The money in question was withdrawn by Edith Wake Danziger and Lina Danziger, to whom it was adjudged by the judgment, not by Bean as the beneficiary under such judgment. In our opinion the conclusion and judgment of the trial court is fully sustained by the findings and is in accord with the law.

The judgment is affirmed.

We concur: CRAIL, Acting P. J.; FRICKE, Justice pro tem.

The Presiding Justice deeming himself disqualified, declined to participate in the case and absented himself during its consideration by the court. Mr. Justice CRAIG was not sitting at any time during its consideration. Under the necessity of the above circumstances, the court during the consideration and determination of the case was composed of Justice CRAIL, Justice pro tem. WILLIS, and Justice pro tem. FRICKE.

8 Cal.App.2d 40

ANDREWS v. HORTON et al.

Civ. 10194.

District Court of Appeal, Second District,
Division 2, California.

June 25, 1935.

As Amended on Denial of Rehearing
July 22, 1935.**1. Joint stock companies and business trusts**
⌚19

In attorney's action against syndicate trustees individually on contract, to pay attorney fees, made in compromise of unit holder's action against trustees, contention that trustees as individuals were not parties to contract was without merit, where trustees in individual capacity were named as defendants, and where allegations that defendants entered into contract and that they had already made partial payments thereunder were admitted by answer and supported by evidence.

2. Contracts ⌚246

An agreement to forbear suit upon obligation for limited time after it becomes due does not postpone its maturity or prevent action thereon before expiration of time limited; defendants' only remedy in such case being action for breach of the agreement.

3. Contracts ⌚321(1)

One party cannot compel another party to perform while he is himself in default under contract.

4. Joint stock companies and business trusts
⌚17

In absence of express or implied agreement with creditor to contrary, trustees are personally liable on all contracts with third persons.

5. Judgment ⌚713(3)

In attorney's action on contract whereby oil syndicate trustees were to pay attorney fees, former judgment in declaratory relief suit that contract created no liability against syndicate *held* not to preclude recovery from trustees, where parties were not adverse in former suit.

6. Contracts ⌚113(5)

Judgment construing contract between attorney and trustees of oil syndicate so as to hold trustees personally liable thereunder for attorney fees *held* not void as in contravention of public policy.

7. Contracts ⌚108(1)

Power of courts to declare contract void for being in contravention of sound public policy is delicate and undefined power, and, like power to declare statute unconstitutional-

al, should be exercised only in cases free from doubt.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action by M. S. Andrews against C. C. Horton and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Walter F. Haas, H. C. Johnston, and Haight, Trippet & Syvertson, all of Los Angeles, for appellants.

Derthick, Cusack & Ganahl, Herbert Ganahl, W. R. Law, and August Weymann, all of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal from a money judgment rendered against the defendants in their individual capacity for an indebtedness incurred on a contract entered into with the plaintiff's assignors (hereafter called the plaintiffs) by the said defendants nominally as trustees of the Bell View Oil Syndicate, a common law or so-called Massachusetts trust. The trial court found that the contract was entered into on behalf of the defendants in their individual capacity, and it is the first contention of the defendants on appeal that "the evidence is contrary to and does not justify the judgment."

The trust owned, and through a series of years developed, some oil land at Santa Fé Springs. Mr. Penn, an owner of one or more of the units in the trust, commenced a prior action in the superior court against the said defendants as trustees and as individuals alleging various charges of fraud, mismanagement, misappropriation of trust funds, and refusal to declare dividends. An answer was filed and trial had, Judge Leon R. Yankwich presiding, and thereafter he prepared and filed a written memorandum of opinion in which he held that the defendants as individuals should pay back to the trust \$82,500 each, or a total of \$247,500, being compensation overpaid to themselves as individuals by themselves as trustees, but absolving the defendants from all other charges in the complaint.

In that action the plaintiffs herein were the attorneys for plaintiff Penn. Before judgment was actually entered in the said action numerous conferences were held be-

tween the attorneys on both sides of the litigation, and finally an agreement was entered into which, when boiled down, provides as follows: Said case of Penn et al. v. Horton et al. will be fully compromised, settled, and dismissed, upon the oil syndicate agreeing to declare a dividend of 100 per cent. to all unit holders, and upon payment to the plaintiff's attorneys (plaintiffs herein) the sum of \$24,000 in full of all services by them heretofore rendered or to be rendered up to and including the entry of judgment in an action for declaratory relief hereafter to be commenced. The oil syndicate will immediately commence an action for the following declaratory relief: (1) A judgment decreeing that the said trustees have heretofore fully and faithfully complied with all of the conditions of the trust; that said trustees (as individuals) are entitled to retain the several sums heretofore retained by them for compensation and expenses; (2) that the surplus remaining after payment of office expenses, salaries, and overhead out of 10 per cent. provided for in the declaration of trust shall constitute the compensation that said trustees are entitled to receive in the future without further accounting therefor; (3) confirming all that the said trustees have heretofore done including the settlement of said action of Penn et al. v. Horton et al. The attorneys for the plaintiff Penn (the plaintiffs herein) agree on their part (1) that they will neither directly or indirectly represent any unit holder in contesting the said action so brought for declaratory relief; (2) that they will dismiss the action of Penn et al. v. Horton et al.; (3) that pending the trial and final judgment in said declaratory relief action no action will be filed or prosecuted by them, either directly or indirectly against said syndicate and its trustees, either as such trustees or individually, for any cause or matter whatsoever. The said sum of \$24,000 is to be paid as follows: \$3,000 upon the acceptance of this offer of settlement; \$2,000 upon the filing of said action for declaratory relief; \$19,000 twelve days after entry of judgment in said action for declaratory relief.

After the signing of the above agreement the attorneys for the parties in the Penn Case appeared before Judge Yankwich and after a proper showing obtained from the court a dismissal of said action with prejudice, and the action for declara-

tory relief was begun and prosecuted against all the unit holders.

In this action for declaratory relief certain unit holders, headed by Guy S. Riley, filed a cross-complaint against the oil syndicate, the three trustees, the said Penn, and his attorneys, the plaintiffs herein, as defendants therein, raising an issue by such cross-complaint as to whether or not the settlement of the Penn Case was fraudulent, and challenging the right of the syndicate and its trustees to pay any moneys thereunder out of the syndicate funds. Issue was joined by all the defendants on this cause of action, but in that proceeding no issue was raised as to the liability of the three trustees in their individual capacity to pay said sums for the services of the plaintiffs. In the said action for declaratory relief the court found and decreed that the trustees had authority to prosecute and defend suits on behalf of the trust, and as to the settlement of the Penn Case decreed that the trust and the unit holders thereof suffered no damage and no detriment in the dismissal thereof, and that the dismissal was an act legally done by the parties and their respective attorneys, and that as to the agreement for the payment of said fees to the attorneys for Penn (the plaintiffs herein) said agreement created no liability on the part of said oil syndicate, the trust estate, to pay said attorneys any sums of money whatsoever. The plaintiffs herein were parties to the cause of action set forth in the said cross-complaint along with the defendants herein, but they were not adverse to each other. All were defending against the allegations of Riley.

The defendants herein paid to the plaintiffs herein \$5,000 out of their individual private funds, as distinguished from the funds of the trust, upon the \$24,000 stipulated in the contract, but following the entry of the decree in the declaratory relief suit the defendants refused to pay the remaining \$19,000, and thereupon the instant action was commenced, and judgment was entered in favor of the plaintiffs in the full amount claimed, the court finding that the agreement heretofore set out was for the benefit of and executed by the defendants in their individual capacity and not for the benefit of the oil syndicate.

[1] The defendants first contend that: "The trustees as individuals are not parties to the contract, and there is no allegation

or evidence that any promise was made by them as individuals." There is no merit in this contention. The defendants in their individual capacity were named as defendants in the complaint. The complaint contains an allegation that the defendants entered into said contract, and further that C. C. Horton, Hooper C. Dunbar, and G. B. Morris (the defendants) had made the partial payments provided to be paid by the terms of said agreement. These allegations were admitted by the answer. In addition to the admissions there was substantial evidence to support the findings.

[2,3] It is the defendants' next contention that the plaintiff's action was prematurely brought because of the provision in the contract settling the Penn Case "that pending the trial and final judgment in said declaratory relief action, no action or actions will be filed by us, either directly or indirectly against said Syndicate, and its trustees, either as trustees or individually for any cause of matter whatsoever." In spite of this provision plaintiff's cause of action accrued upon the refusal of the defendants to pay the balance due as provided in the agreement "twelve days after the entry of judgment." "An agreement to forbear suit on an obligation for a limited time after it becomes due does not postpone its maturity or prevent an action thereon before the expiration of the time limited, the only remedy of the defendant in such case, being an action for breach of the agreement." 1 Cor. Jur. 1147. And it is elementary that one party cannot compel another party to perform while he is himself in default under the contract. *Rathbun v. Security Mfg. Co.*, 82 Cal. App. 793, 256 P. 296.

[4] The defendants next contend that under the terms of the contract the trustees are not personally liable as it clearly appears it was the contract of the trust and the parties looked to the trust funds for payment. It does not clearly so appear. The defendants as individuals did more than promise; they paid in part. Furthermore, "The law is clear that, in the absence of an express or implied agreement with the creditor to the contrary, the trustees are personally liable on all contracts with third persons." *Goldwater v. Oltman*, 210 Cal. 408, at page 426, 292 P. 624, 631, 71 A. L. R. 871. In that case the trust was similar to the one herein and the following quotation from Taylor

v. Davis, 110 U. S. 330, 4 S. Ct. 147, 28 L. Ed. 163, is used: "A trustee is not an agent. An agent represents and acts for his principal. * * * When an agent contracts in the name of his principal, the principal contracts, and is bound, but the agent is not. When a trustee contracts as such, unless he is bound, no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee. * * * He is personally bound by the contracts he makes as trustee, even when designating himself as such. * * * If a trustee contracting for the benefit of a trust wants to protect himself from individual liability on the contract he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the trust estate."

[5] It is the next contention of the defendants that the judgment in the declaratory relief suit holding that the contract created no liability on the part of said oil syndicate is conclusive upon the plaintiffs. The judgment in that action was not a judgment between the "same" parties hereto. It was between them both on one side and the cross-complainants on the other. Code Civ. Proc. § 1910. Under the pleadings in the declaratory relief action no judgment could have been entered between the defendants on the one hand and the plaintiffs herein on the other. As already stated, they were not adverse parties. "It is also a general principle in the field of res judicata that parties to a judgment are not bound by it in a subsequent proceeding or controversy between them, unless they were adverse parties in the original action." *Standard Oil Co. v. John P. Mills Organization, Inc.* (Cal. Sup.) 43 P.(2d) 797, 802; *Robson v. Superior Court*, 171 Cal. 588, 154 P. 8.

[6,7] Neither do we agree with the defendants in their final contention, first raised on this appeal, that to so construe the contract as to hold the defendants personally liable thereon makes the contract one against public policy. "Public policy," it has been said, is a term of vague and uncertain meaning, and few cases can arise in which its application may not be disputed. *Spence v. Harvey*, 22 Cal. 336, 83 Am. Dec. 69; *Wells, Fargo & Co. v. Enright*, 127 Cal. 669, 60 P. 439, 49 L. R. A. 647. "The power of the courts to declare a contract void for being in contravention of sound public policy is a very

delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt." *Stephens v. Southern Pacific Co.*, 109 Cal. 86, 41 P. 783, 784, 29 L. R. A. 751, 50 Am. St. Rep. 17. The trial court in this and other proceedings directly or indirectly held that the contract was not contrary to the interests of the oil syndicate and that neither the oil syndicate nor any of the unit holders were caused any detriment by reason thereof. We will not enter into a discussion of such contention at so late a date in this proceeding where the purpose is that of reversing the judgment of the trial court.

Judgment affirmed.

I concur: STEPHENS, P. J.



8 Cal.App.2d 142

MERCER v. FRANK MELINE CO.
Civ. 10248.

District Court of Appeal, Second District,
Division 2, California.
June 27, 1935.

Rehearing Denied July 24, 1935.

Hearing Denied by Supreme Court
Aug. 26, 1935.

1. Vendor and purchaser ⇨116

Obligation of purchaser, suing for rescission of contract to purchase realty and for return of money paid, to surrender her contract was concurrent with obligation of vendor to deliver deed and guaranty of title, and was extinguished by purchaser's offer to surrender contract and vendor's refusal to accept (Civ. Code, § 1496).

2. Vendor and purchaser ⇨159

Whether purchaser acquiesced in vendor's delay in making conveyance of realty and thereby waived her right to demand deed was question of fact for trial court.

3. Appeal and error ⇨895(2)

Action for rescission of contract for purchase of realty and for return of money paid under contract was not triable de novo in District Court of Appeal on evidence offered in trial court, notwithstanding equitable nature of action or presence of sharp conflicts in evidence, since it was province of trial court to determine questions of fact and that of appellate court merely to review errors of law.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by Florence Mercer against the Frank Meline Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Walter H. Hewicker, of Los Angeles, for appellant.

Mott, Vallee & Grant and Paul Vallee, all of Los Angeles, for respondent.

CRAIL, Justice.

After rescinding an agreement to purchase real property for alleged failure of consideration, plaintiff brought this action for rescission and to recover the moneys paid by her under the contract. The appeal is from a judgment decreeing rescission and for the return of the money paid.

From the facts found by the trial court, we summarize the following: In April, 1930, the parties hereto entered into an agreement for the sale by the defendant and the purchase by the plaintiff of a lot in a subdivision in Ventura county. The said agreement contains the following provision: "The seller agrees within a reasonable time after the purchaser's compliance with all the terms and conditions hereof, and the surrender of this agreement, to execute and deliver to the purchaser a good and sufficient deed. * * *" Plaintiff paid to the defendant all sums agreed to be paid by her under said contract and fully complied with all the terms and conditions thereof on her part to be performed. On the 1st day of May, 1933, when the final payment was made, and again on or about the 1st day of July, 1933, and again on or about the 1st day of September, 1933, plaintiff tendered and offered to the defendant to surrender to said defendant her said agreement, and demanded her deed. Defendant did not deliver the deed on any of these occasions and had not done so on the 14th day of November, 1933, when the plaintiff elected to rescind said contract and gave notice of rescission to the defendant. The notice contained a statement that the consideration for the contract had wholly failed, an offer to restore everything of value which she had received under said contract and a demand for return of the moneys paid by her. The defendant did not nor did any one in its behalf at any time tender or deliver to plaintiff any deed.

Approximately six months elapsed after full compliance by plaintiff with all the terms and conditions of said contract before she rescinded the same. And the court held that six months is an unreasonable period of time for plaintiff to wait for performance on the part of defendant. The court also held against defendant's claim that plaintiff had acquiesced in the delays or that she was willing to have the execution and delivery of said deed deferred until the organization of a bondholders' committee, as claimed by defendant.

[1] The alleged failure of consideration was the failure of defendant to deliver the deed and guaranty of title under the terms of the contract. Plaintiff never did deliver her contract to the defendant, and appellant contends that plaintiff was not entitled to receive her deed until she had performed all of the terms and conditions of the contract on her part to be performed, including the surrender of her contract. The obligation on the part of the plaintiff to surrender her contract was concurrent with the obligation of the defendant to deliver the deed and guaranty of title. In any event the trial court found it to be a fact that on three separate occasions plaintiff had tendered to the defendant her said contract. Her obligation to surrender her contract was extinguished by her offer to surrender it and defendant's refusal to accept. "The thing to be delivered, if any, need not in any case be actually produced, upon an offer of performance, unless the offer is accepted." Civ. Code, § 1496. Appellant could not legally and indefinitely avoid its obligation to deliver a deed by its refusal to accept the surrender of plaintiff's contract.

[2] Appellant's second contention is that plaintiff acquiesced in defendant's delay in making a conveyance and thereby waived her right to demand the deed. Whether or not plaintiff acquiesced in the delays was a matter of fact which the trial court decided against the defendant. In its findings of fact the court expressly held that the plaintiff had not acquiesced in the delays and that she was not willing to have the execution and delivery of the deed deferred until the organization of the bondholders' committee, as claimed by the defendant.

[3] Although the sufficiency of the evidence to support the judgment is not attacked, the briefs herein are devoted large-

ly to discussions of the evidence, what inferences can be drawn therefrom, and what the facts are. This action is not triable de novo in this court on the evidence offered in the trial court as equitable actions are triable in appellate courts in some jurisdictions. The evidence conflicted sharply as to some of the facts, but appellate courts in this state do not interfere with the findings on mere conflict of evidence. It is the province of the trial court to determine questions of fact and of the appellate court to review errors of law. "It is thoroughly settled in California that the mode of reviewing the action of a trial court upon an issue of fact is the same in cases formerly denominated cases at law and cases once called cases in equity." 2 Cal. Jur. 800, and cases cited.

The judgment is affirmed.

We concur: STEPHENS, P. J.;
FRICKE, Justice pro tem.



8 Cal.App.2d 119

EGAN v. BISHOP.

Civ. 9206.

District Court of Appeal, Second District,
Division 1, California.

June 27, 1935.

1. Appeal and error ⇨520(4)

Inclusion of affidavits concerning motion for continuance in clerk's transcript does not bring them before appellate court, as constituting record on motion for continuance.

2. Appeal and error ⇨520(4)

Where record upon which motion for continuance was heard was not authenticated by bill of exceptions or reporter's transcript certified by judge, district court of appeals could not pass upon merits of motion for continuance, notwithstanding affidavits concerning continuance were included in clerk's transcript.

3. Continuance ⇨8

Where motion for continuance which had been overruled in calendar department was renewed in trial department on same ground, motion held properly overruled where order in calendar department had been made with prejudice and without condition (Code Civ. Proc. § 182).

4. Account, action on Ⓒ18

Records of account *held* sufficient to support action on account, as against contention that records showed number of wholly unrelated book accounts, since no standard of bookkeeping practice is prescribed, and it is immaterial whether account is kept in one or several books so long as they are permanent records and constitute system of bookkeeping as distinguished from private memoranda.

5. Appeal and error Ⓒ992

Trial court's determination that foundation laid for admitting books of account was sufficient and credit given entries therein *held* binding upon appellate court where such deduction could be reasonably drawn from evidence, as against contention that books were inadmissible because they were not shown to have been correctly kept, and that such foundation was a prerequisite to their admission.

6. Limitation of actions Ⓒ53(3)

Action brought in January, 1932, on account containing charges for legal services in 1923 *held* not barred by four-year statute of limitations where services and entries continued until within four years of action, since in such action all entries are to be regarded as part of one entire account and cause of action (Code Civ. Proc. §§ 337, 360).

7. Account stated Ⓒ20(1)

Where incorrect statement of account was sent to debtor without creditor's knowledge, and creditor later sent corrected statement of account, covering greater period of time and including many charges not included in first account, and debtor contended that first statement fixed rights of parties because of their acquiescence therein, questions relating to alleged mistake, effect thereon upon validity of implied agreement of parties, and discrepancies between two statements *held* for jury.

8. Account stated Ⓒ19(3)

Where incorrect statement of account was sent to debtor without creditor's knowledge, and creditor later sent corrected statement to debtor, evidence that debtor received corrected statement and did not object thereto for six months *held* to warrant finding that debtor, by his acquiescence, agreed to pay balance shown on corrected statement.

9. Account stated Ⓒ20(2)

Instruction that mistake in statement of account could be corrected only within reasonable time after its discovery *held* properly refused, since not a correct or adequate statement of law.

10. Trial Ⓒ207

Admitting evidence in action on account for legal services that debtor was man of

great wealth *held* not error where jury was instructed that evidence was to be considered, not to enhance amount above reasonable compensation, but to enable jury to determine whether debtor was able to pay fair and just compensation for services, especially where jury found that debtor agreed to pay amount of account.

11. Limitation of actions Ⓒ29(1)

Items not contained in book account and which were more than two years old when statement was rendered *held* barred by two-year statute of limitations, and rendering of statement of account did not revive such items (Code Civ. Proc. §§ 337, 360).

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by M. A. Egan against T. W. Bishop. From a judgment for plaintiff, defendant appeals.

Modified and affirmed.

Donald P. Mayhew, of Los Angeles, for appellant.

Mark F. Jones, Walter L. Engelhardt, and Goodwin J. Oppegard, all of Los Angeles, for respondent.

SHINN, Justice pro tem.

Plaintiff, as assignee of an attorney at law, recovered judgment, after verdict of a jury, on account of legal services rendered and for moneys advanced on behalf of the defendant. The complaint contained four causes of action, upon a book account, a mutual open and current account, an account stated, and an account for services rendered and money advanced. Defendant appeals.

[1,2] Extensive argument is made to the point that the trial court erred in denying a continuance. Motion for continuance was made October 10, 1932, in the calendar department of the court. We are told that the motion was based upon affidavits showing the defendant was ill in a hospital and unable to attend the trial. Affidavits to this effect appear in the clerk's transcript. These affidavits bear the clerk's filing mark of date October 11, 1932. The inclusion of affidavits in a clerk's transcript does not bring them before an appellate court as constituting the record on a motion for continuance. *Jeffords v. Young*, 197 Cal. 224, 239 P. 1054; *Gates v. McPherson*, 129 Cal. App. 473, 18 P.(2d) 980.

Affidavits were presented to the court on motion for a new trial which purported to set forth the proceedings on the motion for continuance, but these do not supply the deficiency. The record upon which a motion for continuance is heard must be authenticated either by bill of exceptions or reporter's transcript certified by the judge. We are therefore unable to pass upon the merits of the motion for continuance made on October 10th.

[3] On October 10th the case was continued to October 11th for trial. When it was called for trial in a trial department on the latter date the motion for continuance was renewed upon the same ground, namely, the absence of the defendant on account of illness. This motion was properly denied, as the former order had been made with prejudice and unconditionally in the calendar department and could not be renewed upon the same ground in another department. Section 182, Code Civ. Proc., then in effect.

The book account sued on was composed of entries of debits and credits entered in books kept by the attorney. The entries were made by the attorney, or under his direction and supervision, and at about the dates when the items became chargeable. These books consisted of an attorney's docket of court cases and a journal in which charges for office services were recorded. There was no single ledger account combining the entries made in the docket and the journal. There were many separate matters of legal business in the services charged for.

[4] It is claimed by appellant that these records were insufficient to constitute a single book account and that they in reality show a great number of book accounts, wholly unrelated to each other. We do not accede to this view. The law does not prescribe any standard of bookkeeping practice which all must follow, regardless of the nature of the business of which the record is kept. We think it makes no difference whether the account is kept in one book or several so long as they are permanent records, and constitute a system of bookkeeping as distinguished from mere private memoranda. The records were sufficient to support a cause of action on a book account.

[5] It is claimed that the books were inadmissible in evidence because they were

not shown to have been correctly kept, and that such foundation was a prerequisite to their admission. *Colburn v. Parrett*, 27 Cal. App. 541, 150 P. 786. The charges for services were all explained by the attorney who was a witness in the case, and the expenditures were generally such as become necessary in connection with litigation. There was evidence that the services were reasonably worth the amounts charged and that the costs were actually expended. The several amounts testified to were the amounts shown in the account. Evidence relating to the character of the books—whether or not they were books of original entry and permanent records, made at the approximate time of the accrual of the items shown therein—as well as the sufficiency of the preliminary evidence of verity required to justify their admission in evidence all related to questions of fact. The determination of the trial court that the foundation laid was sufficient, being a deduction reasonably drawn from the evidence, is binding upon an appellate court. *Cogswell v. Dolliver*, 2 Mass. (Tyng) 217, 223, 3 Am. Dec. 45. The same is true as to the credit to be given to the entries in the books. *Yick Wo v. Underhill*, 5 Cal. App. 519, 90 P. 967.

[6] The account contained charges for services in 1923; the action was brought in January, 1932. Because many of the charges were more than four years old, appellant claims they were barred by the provisions of section 337 of the Code of Civil Procedure. His argument is to the effect that as each service was completed a cause of action arose for the recovery of compensation therefor and was barred four years thereafter if the charges were contained in a book account, otherwise in two years. This, we think, presents a theory in conflict with the decided cases. A book account was placed upon the same basis as a mutual open and current account by the 1917 amendment of section 337 of the Code of Civil Procedure. *Furlow Pressed Brick Co. v. Balboa, etc., Co.*, 186 Cal. 754, 763, 200 P. 625; *Bailey v. Hoffman*, 99 Cal. App. 347, 278 P. 498. The statute commences to run from the date of the last entry in the account. Such is the settled law in this state. The cause of action is upon the account, not upon the separate charges which enter into it. When, therefore, four years have run from the date of the last entry in the ac-

count, action on the entire account is barred, but the action is not barred piecemeal as to the several items, because in an action on the book account they are all to be regarded as a part of one entire account and cause of action.

A similar argument is addressed to plea of the statute against the cause of action upon the account stated. It is said by appellant that an account stated cannot have the effect of reviving items already barred. At the time the account was stated the statute had not run against the book account, and therefore, as to all items of the book account, no question of revival is involved.

[7,8] Two accounts were sent to defendant by plaintiff's assignor or his employees. The first, sent by his secretary and an office assistant, was for \$1,857.47. This, it appears, was sent without the employer's knowledge. Later a corrected one was sent for \$6,744.31, covering a much greater period of time, and including many charges not contained in the first one. Error in sending the first one cannot reasonably be questioned. Appellant insists that plaintiff is bound by the first statement, which, it is said, fixed the rights of the parties because of their acquiescence therein. The questions relating to the alleged mistake, and the effect thereof upon the validity of the implied agreement of the parties, and as to numerous discrepancies between the two statements, were for the jury. The testimony disclosed the receipt of the corrected statement by the defendant and that he made no objection thereto for a period of some six months. This showing was sufficient to warrant a finding that defendant, by his acquiescence, agreed to pay the balance shown on the statement.

[9] Instructions were requested by appellant, and refused, which followed his theories, which we do not adopt, as to the adequacy of the showing of the existence of a book account and as to the application of the statute of limitations. These instructions did not correctly state the law and were properly refused. We have examined the other instructions requested by appellant. The one which stated that the attorney could ratify and adopt the act of his employee in sending out the erroneous statement declared a mere truism upon which no instruction was required. Another instruction to the effect that the mistake could only be corrected

within a reasonable time after its discovery was not, we think, a correct or adequate statement of the law. There was no error in refusing these instructions.

[10] Evidence was introduced by plaintiff that defendant was a man of great wealth, not only at the time the services on his behalf were commenced, but also at the time of trial. The jury was instructed that this evidence was to be considered, not to enhance the amount above a reasonable compensation, but to determine whether or not defendant was able to pay a fair and just compensation for the services rendered. This instruction is complained of by appellant and cases are cited from other jurisdictions holding that in such actions as this, evidence of the wealth or poverty of the defendant is inadmissible. Respondent justifies the instruction upon the ground that there was a cause of action for the reasonable value of certain of the services which had been rendered within two years immediately preceding the commencement of the action, and that therefore the financial worth of the defendant was a factor to be considered in determining the reasonable value of the services. Cases are cited so holding. See 6 C. J. 752. No California cases are cited by either side, and we are not able to find that the point has been decided in this state. If we should assume that appellant's view is the correct one, and that error was committed in allowing the evidence to go in over the objection made, we would not regard the error as one justifying a reversal of the judgment. The charges made for services rendered within the preceding two years were included in the book account and in the statement of account rendered. There was testimony that the charges were reasonable and that the disbursements charged to the defendant were actually made. There was no evidence to the contrary. The verdict was in plaintiff's favor in the amount of the total sum shown on the account stated. We have already pointed out that the evidence was sufficient to support a finding that the account became stated and that defendant thereby agreed to pay the amount shown thereon to be unpaid. Under these circumstances, it seems clear to us that the testimony objected to could not have influenced the jury in fixing the amount of the verdict. That amount would naturally have followed the uncontradicted

evidence offered by plaintiff as to the value of the services, and, as we have stated, the question was not presented by the evidence as one of controverted fact. And if defendant agreed to pay the amount, as the jury has found, the question of value becomes immaterial.

[11] Included in the total amount of the verdict were items amounting to \$499.-86 which were included in the statement rendered, but were not contained in the book account. They were more than two years old, and action for their recovery was barred before the statement was rendered. The statement of the account did not revive them. Code Civ. Proc. § 360. The recovery was excessive in this amount. The judgment is ordered reduced in the amount of \$499.86 and as thus modified is affirmed, appellant to recover costs of appeal.

We concur: CONREY, P. J.; YORK, J.



8 Cal.App.2d 244

**CUMMINGS v. COLUMBIA PICTURES
CORPORATION OF CALIFORNIA.**
Civ. 5356.

District Court of Appeal, Third District,
California.
July 1, 1935.

Hearing Denied by Supreme Court
Aug. 29, 1935.

1. Appeal and error ⇨891

Appellate court is not authorized to take additional testimony unless it can be taken and considered with testimony taken before trial court (Code Civ. Proc. § 956a; Const. art. 6, § 4¾).

2. Appeal and error ⇨891

On appeal which was based upon judgment roll alone, plaintiff held not entitled to introduce additional testimony to correct an alleged clerical error in one finding of trial court, since no evidence had been brought up for consideration of appellate court (Code Civ. Proc. § 956a; Const. art. 6, § 4¾).

3. Trial ⇨396(6)

In proceeding for declaratory relief, construing contract of employment whereby employer had right of exercising options of six months each for services of employee, upon giving 30-day notice, where one finding of

trial court indicated that contract, under options which were exercised, ended on May 30, 1933, although its judgment was that contract ended November 30, 1932, finding might be disregarded as immaterial, where employer's pleadings admitted that no notice was given of exercise of option commencing December 1, 1932, and set up affirmative defense that employee waived notice of exercise of such option.

4. Pleading ⇨36(2)

In proceeding to construe option contract of employment providing that 30-day notice must be given by employer of intention to exercise option, employer's pleadings that no notice was given, and that requirement of notice had been waived, held admission that employer was not entitled to contest claim that contract was ended, where court found that notice had not been waived.

5. Appeal and error ⇨1071(4)

Where one finding of trial court in proceeding to construe option contract giving employer right to exercise several options referred to exercise of option "A" where option "B" was meant, judgment should not be reversed or a new trial granted, since mistake was mere clerical error.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Bill by Constance Cummings against the Columbia Pictures Corporation of California. Judgment for plaintiff, and defendant appeals.

Affirmed.

Mitchell, Silberberg & Knupp and Ross R. Hastings, all of Los Angeles, for appellant.

Ralph H. Blum, of Hollywood, Alan J. Miller, of Los Angeles, and Henry F. Walker, of Long Beach, for respondent.

PLUMMER, Justice.

This is an appeal by the defendant from the judgment of the superior court, based upon a complaint for declaratory relief construing a contract of employment entered into between the plaintiff and the defendant, dated October 4, 1930, whereby the defendant employed the plaintiff to act as a moving picture actress in a production entitled, "The Criminal Code"; terms of employment to commence on or about the 30th day of September, 1930. The contract further provided, in paragraph 14 thereof, that the defendant might exercise options of six months each for the

services of the plaintiff as such actress, designated as "A," "B," "C," "D," "E," "F," "G," "H," and "I." Notice of the exercise of the respective options other than as to option "A," to be given at least 30 days prior to the expiration of the previous option.

Upon notice previously given, the plaintiff asked to be allowed to submit additional testimony consisting of a notice of the exercise of the first option mentioned in the contract, to wit:

"Columbia Pictures Corporation, 1438 Gower Street, Hollywood, California.

"December 1, 1930.

"Miss Constance Cummings, c/o Joyce & Selznick, Ltd., Bank of Hollywood Bldg., Hollywood, Cal.

"Dear Madam: In accordance with the terms of a certain contract entered into between us for your services, dated the 4th day of October, please be advised that we desire to exercise the first option granted us in the said contract, and we do hereby exercise the said option to become effective as of this date. All terms and conditions outlined in the above mentioned contract immediately become in full force and effect.

"If this is in accordance with your understanding will you please sign in the lower left-hand corner of this notice under the word 'accepted.'

"Yours very truly,

"Columbia Pictures Corporation of California, Ltd.,

"By Samuel Bischoff,

"Business Manager."

For the purpose of correcting what is claimed to be a clerical error in designating, in finding No. 10, the notice attached to the complaint as Exhibit B as evidencing the exercise of option "A" instead of a notice evidencing the exercise of option "B," this application is further based upon the fact that other findings of the court are to the effect that options covering a 2-year period, and ending on November 30, 1932, point conclusively to the fact that the naming, in finding No. 10, of the exercise of option "A" as dating from June 1, 1931, should have referred to option "B."

The complaint, in paragraph IX, contains the same alleged error as is found in finding No. 10. Following paragraph IX alleging the exercise of option "A" as dating the 18th day of April, 1931, the com-

plaint alleges that thereafter the plaintiff rendered her services to the corporation as a motion picture actress under said option agreement, and then, in paragraph XI, alleges that thereafter the defendant corporation, by notice in writing, at the proper times, availed itself of options "B," "C," and "D," and that the plaintiff so rendered her services to the defendant corporation, to and under the options mentioned in said contract, up to and including the 30th day of November, 1932.

It is then further alleged that the defendant failed to exercise option "E," in that it failed to give notice to the plaintiff, in writing or otherwise, of its exercise of option "E," as provided in the contract. That the defendant did not exercise its option according to the terms of subdivision "E" of paragraph 14 of the contract is admitted in the answer. The defendant in its answer admits that it did not exercise the option mentioned in subdivision "E" of paragraph 14, in writing, but sets up the defense that the plaintiff waived such a notice.

The court found in accordance with the admission that no notice in writing was given, and also further found that the plaintiff did not waive notice, and entered judgment to the effect that the contract providing for the services of the plaintiff ended November 30, 1932.

Upon this appeal it is urged as a ground for reversal that the findings are conflicting, in that the court found that notice of the exercise of option "A" was given on the 18th day of April, 1931, and that thereafter notice of the exercise of options "B," "C," and "D" was also given, which would carry the expiration of the contract over to, and include six months following the 30th day of November, 1932, or until the 30th day of May, 1933.

The motion to be allowed to present in evidence the first notice so as to clear up the inaccuracy appearing in the complaint, and also in finding No. 10, is contested by the appellant on the ground that section 4¾ of article 6 of the Constitution, and section 956a of the Code of Civil Procedure do not permit of an order in this case allowing the admission or taking of additional testimony.

Notwithstanding the fact that the evidence sought to be adduced shows beyond any reasonable doubt or controversy that the respondent's contention is correct,

and that the recital in finding No. 10 that the period for the exercise of option "A" began with June 1, 1931, pursuant to the notice dated the 18th day of April, 1931, is an apparent error or mistake either of a scrivener, typewriter, or of one of plaintiff's attorneys in drafting the complaint and framing findings for the signature of the trial judge, the appellant's contention appears to be well taken.

[1] The appeal in this case is based upon the judgment roll alone, and thus no evidence taken in the case is brought up for our consideration. A reading of section 4¾ of article 6, supra, and section 956a, supra, leads us to the conclusion that an appeal court is not authorized to take additional testimony, unless the record shows the testimony taken before the trial court. The language of the Constitution is as follows: "Such findings may be based on the evidence adduced before the trial court, either with or without the taking of evidence by the court of appellate jurisdiction." In other words, additional testimony can only be taken and considered in connection with the testimony taken before the trial court. This appears to be the holding of the Supreme Court in the case of *Geneusz v. Harrington*, 218 Cal. 760, 25 P.(2d) 4; *Estate of Dreer*, 122 Cal. App. 763, 10 P.(2d) 803.

We do not think it necessary to cite any of the authorities as to what an appellate court may consider where the appeal is presented upon the judgment roll alone.

[2] The motion for leave to introduce the notice which we have set forth herein must be denied on the ground that the court has no authority to permit its admission as testimony, although satisfied that it exhibits the true state of affairs. We may add that the circumstances here considered also show how technical objections stand in the way of the truth, and constitute a basis for many of the criticisms of our legal procedure.

Notwithstanding the fact that the record before us shows that the whole controversy revolves around the question as to whether the plaintiff had waived notice in writing, or otherwise, of the exercise of option "E" mentioned in the contract, it is here urged by the appellant, following the error which we have mentioned as occurring in finding No. 10, that the options began as follows: Option "A," on June 1, 1931; option "B," on December 1, 1931; option "C," on June 1, 1932;

and option "D," on December 1, 1932; which would terminate on May 31, 1933. The court found that four options had been exercised, and that the two-year period during which the options had been exercised ended November 30, 1932. This shows that option "A" was exercised as beginning on December 1, 1930. Four options of six months each could not have been exercised within the two-year period, unless that two-year period began on the date which we have stated, and ended on the 30th day of November, 1932, just as found by the court.

[3] The answer to the appellant's complaint in paragraph II is worded as follows: "Answering paragraph XIII, admits that the defendant did not give to the plaintiff a notice in writing of its intention to exercise the option for the additional six months commencing on December 1, 1932." And, further, the answer in its affirmative defense sets up that the plaintiff waived notice in writing of the exercise of the option beginning on December 1, 1932. In the face of the admission in the answer which we have just quoted, and the affirmative defense set up, we conclude that finding No. 10 is wholly unnecessary to support the judgment in this case, and that it may be disregarded as wholly immaterial.

The complaint, as we have stated, further alleged that options "B," "C," and "D" had been exercised. This allegation is not denied in the defendant's answer.

Finding No. 12 sets forth that the defendant had given notice to the plaintiff of the exercise by it of options granted in subdivisions "A," "B," "C," and "D" of article 14 of the agreement, and that the period covered by the exercise of said options ended with the 30th day of November, 1932. Finding No. 13 of the court is to the same effect, that the employment of the plaintiff by the defendant ended on that date.

It is further found in finding No. 14 that the plaintiff rendered services in accordance with the terms of the contract and the options exercised by the defendant, up to and including the 30th day of November, 1932.

It is further found that the exercise of the option mentioned in subdivision "E" terminated on the 31st day of October, 1932. It is also found that the defendant did not exercise such option in writing, or otherwise, and that the plaintiff did not

waive notice of the exercise of option "E," as required by the contract.

In addition to what we have said, the contract itself evidences that the period of service under option "A" began in December, 1930. The contract provided that option "A" should begin immediately, and when the option was exercised, and was to be exercised, it specified time before the completion of the picture in the production of which the plaintiff was engaged as a moving picture actress. All the other options provided for a 30-day notice being given previous to the exercise of the option under which the plaintiff was rendering services. The contract provided, we may specifically state, the giving of notice sixty days after the completion of the picture designated as "The Criminal Code," for the beginning of work by the plaintiff under option "A," and that upon giving the notice work should begin immediately.

The option set forth as Exhibit B in the complaint shows that the notice was given in compliance with the requirements of option "B," and not with the requirements of option "A," as set forth in the contract. The option set forth in the complaint does not, in and of itself, specify the letter designating the option to be exercised, which leads further to the conclusion that the naming of option "A" instead of option "B" in finding No. 10 was simply the culmination of a clerical error or oversight carried through the proceedings in this cause, and that such error or oversight did not mislead the defendant; was not taken advantage of by the defendant upon the trial of the action by demurrer or otherwise; but, so far as we can ascertain from the record, is sought to be taken advantage of for the first time upon this appeal in order to secure a reversal upon a technicality in direct opposition to the actual facts.

[4] Again, the appellant having admitted that it did not give notice in writing of the exercise of the option for the term commencing on December 1, 1932, it seems to us wholly immaterial whether that option is lettered "D," "E," or "F," or is known by any designation whatsoever. If notice in writing was not given of the option beginning on that date, the appellant virtually admits that it has no standing in court in view of the find-

ings of the court, which we must accept as true and conclusive in the absence of testimony that the giving of such notice in writing was not waived by the plaintiff.

The language found in the opinion of the court in the case of *Asnon v. Foley*, 105 Cal. App. 624, 288 P. 792, 794, we think applicable, to wit: "It is unfair for a party to withhold an objection founded upon a defect which, if pointed out in time, might be remedied, until it is too late to correct the defect, thereby inducing an opponent to rely upon his pleading as sufficient, in order that he may have a fatal objection. Such course is a fraud upon justice, and prevents a fair trial. It is therefore not tolerated."

[5] Having set forth sufficient to show beyond controversy that the reference to the exercise of option "A" in finding No. 10, instead of mentioning the exercise of option "B," was an error either clerical or an oversight, we hold with the following cases that: "A judgment should not be reversed or a new trial ordered for what so clearly appears to be a mere clerical error." *Stone v. San Francisco Brick Co.*, 13 Cal. App. 203, 109 P. 103, 104; *Del Monte Ranch Dairy v. Bernardo*, 174 Cal. 757, 164 P. 628; *Field v. Burr*, 129 Cal. 44, 61 P. 665; *Francis v. Western Screen Co.*, 22 Cal. App. 32, 133 P. 327; *Cox v. O'Dell*, 1 Cal. App. 682, 82 P. 1086.

As no controversy is made by the appellant as to the correctness of the findings other than as to finding No. 10, and as no testimony is brought up to show that the court erred in finding that the appellant had not given notice to the plaintiff, as required by the contract for the option beginning December 1, 1932, and that the plaintiff had not waived the giving of notice, it follows that there is absolutely no merit whatever in the appellant's appeal.

We do not deem it necessary to consider further appellant's contention, or analyze any of the authorities cited to support its contention having to do with conflicting findings, as what we have set forth we think determinative of this cause.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

In re GRANT'S ESTATE.

GRAHAM et al. v. THORNEWILL.
Civ. 9552.

District Court of Appeal, First District,
Division 1, California.
July 1, 1935.

Hearing Denied by Supreme Court
Aug. 29, 1935.

1. Wills Ⓒ55(1)

Evidence held insufficient to show testamentary incapacity.

2. Wills Ⓒ31

Mental derangement invalidating will must be insanity which establishes mental incompetency generally, or some hallucination or delusion.

3. Wills Ⓒ50

Testator is of "sound and disposing mind and memory" if able to understand nature of act and to understand and remember nature and situation of property and his relation to persons having claims on his bounty.

[Ed. Note.—For other definitions of "Sound and Disposing Mind," see Words & Phrases.]

4. Wills Ⓒ166(2)

Evidence held insufficient to show fraud or undue influence by youngest of testatrix' four daughters in procuring execution of will making such daughter sole beneficiary.

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

In the matter of the estate of May Louise Grant, deceased. From a judgment in favor of Alda Rose Graham and another, contestants, denying admission to probate of the deceased's will, and from an order denying proponent's motion for judgment notwithstanding the verdict and from an order granting a new trial on certain issues, Helene Grant Thornewill, the proponent, appeals.

Judgment and order granting new trial reversed, with directions.

Edward A. Cunha and Harry I. Stafford, both of San Francisco, and Harry J. Bias and Stanford G. Smith, both of Santa Cruz, for appellant.

J. Frank Murphy, of Santa Cruz, and Daniel A. Ryan and Thomas C. Ryan, both of San Francisco (James W. Harvey, of San Francisco, of counsel), for respondents.

OGDEN, Justice pro tem.

This is an appeal from a judgment denying admission to probate of the will of May Louise Grant in accordance with the verdict of a jury finding her to have been of unsound mind at the time of its execution, from an order denying proponent's motion for judgment notwithstanding the verdict and from an order granting a new trial upon the issues of fraud and undue influence, verdicts upon the latter issues having been at the trial directed by the court in favor of proponent.

The testatrix died on November 23, 1930, at the age of 69 years, leaving an estate of the estimated value of between three and five hundred thousand dollars consisting, in the main, of the family home in Santa Cruz county and an interest in the Florists Review Publishing Company which produced an income of over \$20,000 annually. She left surviving her four daughters, all adults, Mrs. Maude E. Jaeger, the two contestants, Mrs. Alda Rose Graham and Mrs. Bessie May Olive, and the proponent and appellant Mrs. Helene Grant Thornewill.

By the terms of the will, which was executed on the 18th day of February, 1927, the proponent, who is the youngest of the daughters, is made the sole beneficiary. Mrs. Graham and Mrs. Olive contest the probate of the will upon the grounds of unsoundness of mind, fraud, and undue influence. The eldest daughter, Mrs. Jaeger, refused to join in the contest and at the trial testified in favor of proponent. The single question presented upon this appeal is the sufficiency of the evidence to justify the verdict of the jury finding the testatrix to have been of unsound mind, and the order of the trial court granting a new trial upon the issues of fraud and undue influence.

In the year 1902, the decedent, with her husband and children, moved to the county of Santa Cruz from the city of Chicago, Ill., where Mr. Grant had founded the publishing company which continued to so bountifully provide for his family. Mr. Grant died testate in the year 1913 leaving one-half of his estate to his widow and the remainder in equal shares to his four daughters and a son who later died. Decedent continued to live at the family home near Santa Cruz until her death, except for brief intervals living alone with the proponent, who was her constant companion.

Although the evidence discloses the natural relationship of mother and daughter existing as to the eldest and youngest daughters, the two contestants were apparently neither close to nor at times upon friendly terms with decedent. Although the contestant Mrs. Olive resided in the city of Santa Cruz, she saw her mother but seldom and could not say definitely whether she had seen her within a year prior to the execution of the will. The contestant Mrs. Graham saw her mother on but three occasions in the last fifteen years of her life.

It is the contention of contestants that this strained relationship was due to a complete change in the personality of decedent commencing at about the time of her husband's death in 1913, due to a mental disturbance occasioned by her period of menopause, as a result of which she changed from a sedate and conventional matron and devoted mother to a giddy, pleasure-loving, man-struck woman and a cold and indifferent mother incapable of appreciating her relationship to her children and the nature of their claims upon her bounty.

[1] Although the two contestants, one other lay witness and a medical expert, Dr. Joseph Catton, expressed the opinion that decedent was of unsound mind, no substantial reason in support thereof was given. In the hypothetical question asked of Dr. Catton, and upon which his testimony was alone based, is summarized all of the testimony offered in support of the claim of decedent's unsoundness of mind. In order that the character of evidence relied upon may be illustrated, we therefore quote it in full:

"Q. Doctor, assuming, if you please, a woman who died at the age of sixty-seven years from Bright's disease and cancer of the liver and spleen on November 24th, 1930, leaving a will dated February 18th, 1927; that she left surviving her four daughters, the oldest then of the age of about fifty years, the second then of the age of about forty-eight years, the third then of the age of about forty-four years, and her youngest then of the age of about thirty-two years; that in this will she left all of her property to her said youngest daughter; that she was unable to understand business transactions and that her husband had attended to everything of that nature during his lifetime; that whenever he would discuss business in her presence she would have a vacant, puzzled expression, and very often when

the family would be sitting in the living room and the husband went into details of business in the presence of the daughters she would get up and leave the room; that when she was about thirty years of age she was taken severely ill with Bright's disease and was in bed for many months under the care of a trained nurse; that sometimes she knew her two older daughters and sometimes she did not; that she was out of her head a great deal of the time during that illness; that while she was convalescing she was hysterical and would laugh and cry, and changed so much that the three younger children, who had been sent away, did not know their own mother when they were brought home; that from that time on during the balance of her lifetime she was off and on under the care of a doctor for this Bright's disease; that when about fifty years old, shortly before her husband's death, which occurred in May, 1913, she showed a liking for the family chauffeur, and on one occasion she told a daughter that she was tired of giving her time to her husband, that she had been giving too much of her time to him and that she wanted some gay life, and spent certain evenings with the chauffeur on the porch of the family dwelling; that while her husband was dying she allowed him to sit in her husband's chair in the living room and smoke her husband's cigars, taking the posture which had previously been assumed by her husband; that two or three days before her husband's death, when one of her daughters protested at this attitude on her part, she told her daughter to mind her own business as it was all right, and upon the arrival of another daughter from the south the mother stated that she thought it best that both of these daughters leave for the night; that on the next morning, while her husband was dying and the children had gathered around his bed, she permitted this chauffeur to put his arms around her and she laid her head upon his shoulder and went outside into the corridor with him, but she refused to permit a daughter to put her arms around her; and later, just before the funeral when she was asked what she was doing with regard to the body, she stated that this chauffeur had seen to everything; and upon the same day upon which her husband passed away this chauffeur assumed the head of the table in the father's place—the husband's place; that within a month or two after her husband had passed away she, the decedent, per-

mitted the chauffeur to spoon with her and permitted him to use the family car when he was under the influence of liquor, for his own use and pleasure; that she bragged about her allurements and said to one of her daughters that once when she had on a thin summer dress she was standing in the doorway and the sun was in such a position that one could see right through the dress, and that this chauffeur stood off on the front porch and admired the outlines of her form through this dress, saying to her that it was all and more than he had expected, and that she seemed very much pleased; that at or about the time of her husband's death she stated to one of her daughters that she preferred strangers to her own; that previous to her husband's death she had led a quiet and sedate life, being devoted to her husband; that after the death of her husband there was a change in her life and she conducted herself contrary to her former habits; that on a visit south to see one of her daughters in October, 1914, less than a year and a half after her husband passed away, she became frivolous and insisted in taking this daughter around to cabarets and she encouraged the approach of strange men in cabarets; and in the hotel where she was stopping there was a man whom the daughter knew slightly, but she, the mother, did not know at all, but she made up with the stranger and insisted that the daughter invite him to travel with her, the daughter, to Overlook, the mother's residence in Soquel, and said that she would entertain him there; that to travel there would cause them to be on the train overnight, and that was all foreign and contrary to her habits, and the children were not brought up to conduct themselves in such a manner; that on one occasion in the year 1914, when she was cabaretting she called a taxi, but instead of getting in immediately she put her foot on the step and talked to the taxi driver for fifteen minutes about the condition of her ankle which she had just sprained, and went on and told him in detail about the condition of her leg; that one daughter told her that the management of the Alexandria Hotel in Los Angeles had offered her, the daughter, a position as a cabaret singer, and the mother thought it would be wonderful, although the daughter had not been a cabaret singer at any time; that in 1924, when asked by one of her daughters if she left all of her property to Helene, the youngest daughter she said 'yes' in a broken and

sobbing voice; and when the daughter said 'It is not enough that Helene has robbed us of your love and companionship all these years, but you must leave her everything,' she trembled and said in a sobbing voice 'I had to do it, I had to do it, I had to do it'; that she overdressed and spent little time at home, entertained a different set of people from those whom she had entertained during the lifetime of her husband, and that these people were of frivolous tendencies, and she spent more of her time in San Francisco at hotels, and she spoke of her wine cellar, of its being well stocked, and stated that the youngest daughter was good at cocktail mixing; and once when she showed a friend some boxes, bottles and kegs of liquor that a man gave to her youngest daughter, when the friend asked her, 'You certainly wouldn't allow a man to give you daughter liquor?' she laughed and said 'Yes, isn't that a nice kind of beau to have?'; that in 1916 she took up new dance steps and remarked how good she was at it, and how good she was becoming, and stated that the young man that was teaching her and with whom she loved to dance was 'Peach Blossom,' who was nicknamed after the special cocktail for which he had shown a preference; that she stated that she visited a man known as 'Bright Eyes,' stating that his nickname had also been derived from his favorite cocktail; that she stated that 'Bright Eyes' admired her charms, and she told about visiting cafes in San Francisco; that at a Christmas party given at a Santa Cruz hotel in 1922 one woman became very ill from drinking in the rooms occupied by her together with her youngest daughter while she, the mother, was present, and when spoken to by another daughter who had just arrived she said 'It is all right'; that in 1921 she was one of the spectators in a theater where her youngest daughter appeared on the stage in nothing but her underwear, to be draped by a male employee of a certain store, and that later, to a close woman acquaintance and to another daughter she expressed approval of this conduct on the part of the youngest daughter, and also told to the daughter of an occasion when she was draped herself; that she related to a close woman friend that a man who visited Overlook, her place of residence, told her it would be very much easier on her if she would allow him to keep her instead of having all those young boys there, and that,

when asked what she did, she replied, 'Nothing, as he was going to leave the next day,' and she seemed pleased; and that when this same woman friend asked her why she did not arrange for her only living son to stay at Overlook during his illness, as it would be high and there would be no danger, she said, 'Oh, yes, there would be danger to Grant,' who was her young grandson—the son spoken of being suffering from tuberculosis; that previous to her husband's death she had been solicitous and affectionate in her attitude toward all the children in the family; that after her husband's death she appeared to lack love and feeling for her children with the exception of her youngest daughter; that when she knew the husband of one of her daughters had mistreated her daughter and that the daughter divorced him, and also knew that this daughter was suffering from a serious health condition, she nevertheless neglected the daughter but was seen often in the company of the daughter's divorced husband thereafter; that when her only living son joined the army in 1918 she did not worry about him, and later when he caught double pneumonia she laughed and said that 'Edwin is always catching something,' and was unconcerned in regard to his health; and when he was discharged from the army one daughter told her in 1922 that this son had symptoms of tuberculosis and she stated that she, his mother, should look out for him as he was the last of ten generations of Grants, the family name, and that if he should die there would be no one to carry on the name, and she stated, 'Well, I don't see what you tell me that for, there is nothing I can do'; and when asked why she did not take him to her home at Overlook, her large estate consisting of ninety acres, at an elevation of 800 feet, and upon which there was a large house and buildings for the help and cattle and chickens, and cows for milk, she became very impatient and said, 'I could not take him up there because I could not have him'; and on another occasion she stated the Government ought to take care of him, and she never visited him while he was confined in the government hospitals in Arizona and Texas; that during all of these years she enjoyed a large income; that when her son was confined in the government hospital at Palo Alto and asked that his mother come to visit him she said 'I will later—Helene thinks it would be too hard on me', Helene being her youngest daughter, and she sent

a man to see her son, a man whom he did not know; and that when discussing her son stated on some occasions he would be better off dead; that in the year 1926 when her son was residing in Calexico for his health, she called upon him and remained with him only an hour, did not leave her machine, and manifested very little interest and no sorrow and did not embrace him,—Doctor, in your opinion, was that woman of sound or unsound mind?"

Without here discussing the evidence offered by proponent, most of which was uncontradicted and unimpeached in explanation of the various incidents referred to, it is sufficient to say that the foregoing facts, even if all are considered to be proven, fall far short of evidencing a lack of testamentary capacity. Although they might indicate from a purely medical standpoint some, as expressed by the medical expert, "involuntional psychosis," it is not every mental departure from the normal that will destroy testamentary disposition. In re Estate of Chevallier, 159 Cal. 161, 113 P. 130.

[2, 3] Mental derangement sufficient to invalidate a will must be insanity in one of two forms: (1) Insanity of such broad character as to establish mental incompetency generally; or (2) some specific and narrower form of insanity under which the testator is the victim of some hallucination or delusion. In re Estate of Chevallier, supra; In re Estate of Collins, 174 Cal. 663, 164 P. 1110; In re Estate of Redfield, 116 Cal. 637, 48 P. 794; In re Estate of Casarotti, 184 Cal. 73, 192 P. 1085; In re Estate of Finkler (Cal. Sup.) 46 P.(2d) 149. A testator is of sound and disposing mind and memory, if, at the time of making his will, he has sufficient mental capacity to be able to understand the nature of the act he is doing, and to understand and recollect the nature and situation of his property and to remember, and understand his relations to, the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument. In re Estate of Smith, 200 Cal. 152, 252 P. 325; In re Estate of Sexton, 199 Cal. 759, 251 P. 778. We think it apparent that the character of evidence relied upon by contestants does not meet the above tests of testamentary capacity. Fifty witnesses, both those who knew deceased socially and had transacted business with her, testified as to her sanity

and as to the normalcy of her conduct and habits and ability to understand and transact affairs of business. That decedent possessed sufficient mental capacity to make testamentary disposition of her property is affirmatively shown by the evidence not only of proponent but also of contestants. Even from the testimony of the latter can be drawn no inference but that decedent understood the nature and extent of her property and her relationship to all of her children.

[4] Nor is there any evidence tending to show the perpetration of fraud or the exercise of undue influence on the part of proponent in procuring the execution of the will. Although a close and confidential relationship existed between decedent and proponent and the latter advised and counseled her mother in business affairs and wrote checks for her signature, there is no indication of any undue advantage having been taken of this natural relationship of mother and daughter. Nor is there any substantial evidence of the testamentary act of decedent having been affected by any attempt upon the part of proponent to prejudice her mother against the contestants. Although apparently the lack of sisterly devotion existing between proponent and the two contestants was at times made known to decedent by the former there is no showing that her testamentary act was in any way affected thereby. The isolated statements of proponent to decedent in the presence of and referring to one or the other of contestants such as "She isn't any good to herself or anyone else—she doesn't care anything about you nor any one—she is just after your money—just what she can get out of you," fall far short of showing such a continued and successful effort on the part of proponent to prejudice and influence her mother against contestants as is referred to in the case of *In re Estate of Newhall*, 190 Cal. 709, 214 P. 231, 28 A. L. R. 778.

In the year 1923, a similar will in which proponent was made the sole beneficiary was executed by decedent. Shortly thereafter decedent discussed the execution and terms of this will with one of the contestants saying, "I had to do it." No indication was given, however, that she was influenced or required to make such will by any act or conduct of proponent. Although at the time of the execution of the present will proponent accompanied de-

cedent to the office of the attorney who drafted it and who had previously acted as attorney for both decedent and proponent, and upon the next day proponent drove decedent to the office but did not accompany her out of the automobile while she executed the will in the office and in the presence of the president of the Santa Cruz Land Title Company, no inference can be found therefrom that proponent influenced its execution or the terms thereof. About six months after the execution of the will decedent called at the office of her attorney and left with him a letter in her own handwriting in which she stated in substance that she omitted to make provision for either of the contestants because of the heartaches that they had caused her and stating that "unnatural deeds create unnatural feelings." She also left inclosed in the letter complaining and fault-finding letters written to her by each of the contestants.

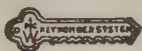
The rule is, as recently stated in the *In re Estate of Finkler*, supra, quoting from the *In re Estate of Hamburger*, 126 Cal. App. 455, 14 P.(2d) 802, "Proof, to establish undue influence, must be had of a pressure which overpowers the mind and bears down the volition of the testator at the time the will is made. It consists in the exercise of acts or conduct by which the mind of the testator is subjugated to the will of the person operating upon it (*In re Estate of Holloway*, 195 Cal. 711 [235 P. 1012]; *In re Estate of Anderson*, 185 Cal. 700 [198 P. 407]). Mere proof of opportunity to influence a testator's mind, even when coupled with an interest or motive to do so, will not sustain a finding of undue influence in the absence of testimony showing that there was a pressure operating directly on the testamentary act and to such an extent as to affect the terms of the testament (*In re Estate of Fleming*, 199 Cal. 750 [251 P. 637]; *In re Estate of Bryson*, 191 Cal. 521 [217 P. 525]). It is not sufficient for a contestant merely to prove circumstances consistent with the exercise of undue influence, but, before a will can be overthrown, the circumstances proved must be inconsistent with voluntary action on the part of the testator. (*In re Estate of Morcel*, 162 Cal. 188 [121 P. 733].)" Although the testimony in the present case might be said to show circumstances consistent with the exercise of undue influence, it utterly fails

to show the exercise of such influence or the lack of voluntary action on the part of the testatrix.

We conclude, therefore, that there being an insufficiency of evidence to justify the verdict of the jury upon the issue of soundness of mind, the motion of proponent for judgment notwithstanding the verdict should have been granted. Likewise, there being a failure of proof upon the issues of fraud and undue influence, the trial court properly directed verdicts in favor of proponent upon those issues, and erred in subsequently granting a new trial thereon.

We see no gainful purpose in ordering a new trial upon any of the issues here involved. Contestants have apparently already presented their complete case, which falls far short of being sufficient to justify the exclusion from probate of decedent's will. The judgment and the order granting a new trial are reversed, with directions to the trial court to enter judgment admitting the will to probate.

We concur: TYLER, P. J.; CASHIN, J.



8 Cal.App.2d 306

MUTUAL LIFE INS. CO. OF NEW YORK
v. HENES et al.
Civ. 9810.

District Court of Appeal, First District,
Division 2, California.
July 3, 1935.

Hearing Denied by Supreme Court
Aug. 29, 1935.

1. Interpleader ☞11

Where insured intending to comply with requirements of property settlement agreement executed between wife and himself had executed assignments of life policies to his two children but had thereafter canceled assignments for purpose of obtaining disability benefits under policies, insurer held entitled to invoke remedy of interpleader to determine persons having right to proceeds of policies upon death of insured (Code Civ. Proc. § 386; Civ. Code, § 2769).

2. Insurance ☞593(1)

Property settlement agreement executed between wife and insured whereby insured agreed to name children as beneficiaries of

policies held to operate as equitable assignment of proceeds of policies to become due upon death of insured entitling children, as against executors of insured's estate, to such proceeds upon insured's death, notwithstanding insured, instead of naming children as beneficiaries, had merely executed assignments of policies to children and had subsequently canceled assignments for purpose of obtaining disability benefits (Civ. Code, § 1559).

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Interpleader suit by the Mutual Life Insurance Company of New York against Ellis Hugh Henes and another, minors, by Evelyn E. Henes, as guardian of the persons and estates of said minors, and against the Wells Fargo Bank & Union Trust Company and others, as executors of the will of Louis G. Henes, deceased. From an interlocutory decree of interpleader and a judgment for Evelyn E. Henes as guardian, the executors appeal.

Decree and judgment affirmed.

William S. Downing and Frank J. Baumgarten, both of San Francisco (James F. Brennan, of San Francisco, of counsel), for appellants.

Knight, Boland & Riordan, of San Francisco, for plaintiff.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondents.

SPENCE, Justice.

Plaintiff filed its complaint in interpleader after conflicting claims had been made upon it by the children of the assured and executors of the assured for the proceeds of two life insurance policies. The trial court entered an interlocutory decree of interpleader, and thereafter entered judgment determining the conflicting claims of the defendants in favor of the children of the assured. The executors have appealed from said interlocutory decree of interpleader and from said judgment.

There is no dispute concerning the facts, as the cause was tried upon a stipulation of facts submitted by the parties. In the discussion herein, we refer to the plaintiff as the company, to the defendants Ellis Hugh Henes and Ellis Hope Henes as the children, and to the remaining defendants as the executors.

In 1914, Louis G. Henes, the assured and father of said children, married Evelyn E. Henes, the mother and present guardian of said children. He took out two policies of life insurance with the company in 1923, naming his wife as beneficiary in both policies. Policy numbered 3241561 was in the sum of \$10,000, and the right to change the named beneficiary therein was reserved to the assured. Policy numbered 3235481 was also in the sum of \$10,000, but the right to change the named beneficiary therein was not reserved to the assured. Matrimonial difficulties thereafter developed, and said Louis G. Henes and Evelyn E. Henes separated. An agreement was entered into by the parties for the purpose of settling their property rights and making provision for the support of the minor children. Said agreement provided with reference to said policy numbered 3241561, that the beneficiary should be changed from the wife to Ellis Hugh Henes, the son; and with reference to said policy numbered 3235481, that the beneficiary should be changed from the wife to Ellis Hope Henes, the daughter. It was agreed that when the beneficiaries were so changed, the policies would be deposited with the Wells Fargo Bank & Union Trust Company; that the assured would pay the premiums thereon for at least 10 years from the date of each of said policies; that if the assured was unable to pay the premiums when due, the wife might pay and would be entitled to reimbursement from the assured; and that at the expiration of ten years from the date of each of said policies, the assured would have the "privilege of converting each of said policies into fully paid up policies without change of beneficiaries." Said agreement was thereafter approved in the interlocutory and final decrees of divorce. In 1929 and shortly after the entry of the interlocutory decree of divorce, the wife assigned all of her interest in said policies to the assured for the purpose of enabling the assured to carry out the terms of the above-mentioned agreement.

The assured then executed an assignment of one of said policies to his son and an assignment of the other to his daughter. Said assignments were sent to the company, were attached to the policies, and then said policies were deposited with the bank. It will be noted that said policies were assigned to the children while

the agreement had provided that said children should be named as beneficiaries. The assignment forms which were used expressly reserved the right of cancellation of the assignments.

In 1931, the assured became disabled and disability benefits became due under the policies. The assured was apparently advised that he could not collect the disability benefits unless said assignments to the children were canceled. He therefore executed cancellations of said assignments, which were forwarded to the company. They were filed by the company and the assured was informed that the company assumed no responsibility as to the validity or effect of the instruments. The company thereafter paid the disability benefits to the assured until November, 1931, when the assured died without having named any beneficiaries under said policies other than as above set forth.

The making of the foregoing assignments and the cancellation thereof by the assured was done without the knowledge or consent of the wife. It appears, however, that the assured thought he was complying with the agreement in executing said assignments to the children and that he had no intention of divesting them of the right to the proceeds of the policies upon his death when he executed the cancellations of said assignments. In his will executed in 1931, he created a trust in favor of the children. He recited therein that he was maintaining insurance on his life for the benefit of his children, "which on my death will be available to them as beneficiaries of the policies therefor," and further recited that the trust was created for the purpose of providing for said children "after the insurance proceeds are exhausted." Shortly after the cancellation of the assignments, he wrote his attorney telling him what he had done and stating, "Now, I don't know if I did anything contrary to the divorce agreement. In any event, it was never my intention to have the disability benefits made payable to the children." He also wrote in another letter to his attorney, "I am afraid that in signing the papers, that my children are no longer beneficiaries in my will. (It was stipulated that the assured was referring to the policies rather than the will.) If that is so, that's not what I wanted to happen. I want them to be the beneficiaries except that I want personally to get the disability money."

After the death of the assured, both the executors and the children filed claims with the company for the proceeds of the policies. The company thereupon commenced this suit. The executors interposed a demurrer to the amended complaint, which demurrer was overruled. The parties then filed their answers and cross-complaints and the cause proceeded to trial with the result above set forth.

[1] The executors contend that under the facts above set forth, the company was not entitled to invoke the remedy of interpleader, and that the allegations set forth in the amended complaint were insufficient. We find no merit in this contention. The executors cite authorities from other jurisdictions in support of their position, but even under the rules set forth in said authorities, we believe that the allegations and proof were sufficient. At all events, the conditions under which the remedy may be invoked in this state are prescribed by statute and scope of the remedy has been broadened and enlarged. 14 Cal. Jur. 702; *Fidelity Savings & Loan Ass'n v. Rodgers*, 180 Cal. 683, 182 P. 426. Section 386 of the Code of Civil Procedure provides in part: "And whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves." In view of the terms of said section, we believe there is but one question regarding the above-mentioned contention of the executors which requires serious consideration. They cite section 2769 of the Civil Code, which reads as follows: "The proceeds of every policy of insurance due on the death of insured shall by the insurer be paid either to the beneficiary designated therein, or, if no beneficiary is designated therein, to the estate of insured; or, if the policy has been assigned, to the assignee thereof; and such payment shall satisfy all obligations of the insurer with respect to said policy." They then argue that under the terms of said section, payment to the executors would have relieved the company of liability, and therefore the company could not maintain this action in interpleader. *Calloway v. Miles* (C. C. A.) 30 F.(2d) 14, is cited in support of their position. The fallacy in the executor's argument is

found in the fact that it assumes that the policies had not been assigned. We are of the opinion that the company was not bound at its peril to determine whether the facts above set forth operated as an assignment to the children within the meaning of the section, and that the company could properly invoke the remedy of interpleader for the purpose of determining the persons entitled to the proceeds of the policies. The case cited by the executors is not in point as the policy there contained a "facility of payment" clause, and, under the terms of the policy itself, payment to either claimant would have relieved the company from all liability. It follows from what has been said that the interlocutory decree of interpleader should be affirmed.

[2] Coming to the consideration of the appeal from the judgment in favor of the children, we find some difficulty in ascertaining the exact contentions of the executors. Said judgment was based upon findings of fact and no direct attack is made upon the sufficiency of the evidence to support the findings nor upon the sufficiency of the findings to support the judgment. As we view the situation, the children's right to the proceeds of the policies was derived from the property settlement agreement between the assured and his wife. It is apparently conceded that said agreement was valid and based upon a sufficient consideration, and, in the absence of rescission by the parties, the children could enforce the provisions thereof made expressly for their benefit in the same manner as could a party to the agreement. Civ. Code, § 1559. Said agreement required the assured to name the children as the beneficiaries of said policies and clearly implied that the assured should not at any time thereafter have the right to change the beneficiaries. The assured failed to comply with the exact terms of the agreement, but we believe said agreement operated as an equitable assignment of the proceeds of the policy which were to become, due upon the death of the assured. See *Fidelity Savings & Loan Ass'n v. Rodgers*, 180 Cal. 683, 182 P. 426; *Simas v. Conselho Supremo*, 184 Cal. 511, 194 P. 1001; *Shoudy v. Shoudy*, 55 Cal. App. 344, 203 P. 433; 3 Cal. Jur. 259 et seq. We are therefore of the opinion that the showing of the existence of said agreement was sufficient to support the judgment in favor of the children and against

the executors. Said executors complain of the rulings admitting certain evidence over their objection. While the cause was tried upon stipulated facts, the right to object was reserved and the objections were interposed upon the trial. The evidence in question consisted of various letters and the will of the assured. From all of these it appeared that the assured desired at all times to carry out the terms of the agreement and intended that the children should receive the proceeds of the policies upon his death. We need not discuss the propriety of the rulings admitting this evidence, as said evidence could not affect the result in view of the conclusions above set forth.

The decree and the judgment appealed from are affirmed.

We concur: NOURSE, P. J.;
STURTEVANT, J.



8 Cal.App.2d 270

**ABELSETH v. INDUSTRIAL ACCIDENT
COMMISSION et al.**
Civ. 9768.

District Court of Appeal, First District,
Division 1, California.

July 2, 1935.

Rehearing Denied Aug. 1, 1935.

Hearing Denied by Supreme Court
Aug. 29, 1935.

1. Master and servant ☞376(2)

Acceleration or aggravation of pre-existing disease is "injury" attributable to occupation causing such acceleration or aggravation.

[Ed. Note.—For other definitions of "Injury," see Words & Phrases.]

2. Master and servant ☞417(7)

Finding of Industrial Accident Commission that perforation of duodenal ulcer was not result of muscular exertion in course of employment but was natural result of growing process of ulcer itself held conclusive, in view of very definite difference of opinion which existed between expert witnesses on question.

Industrial Accident Commission denied compensation, and the employee applies for writ of review.

Award affirmed.

Clarence A. Henning, of San Francisco, for petitioner.

Everett A. Corten, of San Francisco (Arthur I. Townsend, of San Francisco, of counsel), for respondents.

PER CURIAM.

This is a proceeding to review a decision of the Industrial Accident Commission denying petitioner's application for compensation upon the ground that the disability from which he was suffering was not caused by an industrial injury.

The evidence discloses that the alleged injury occurred on October 18, 1932, at which time petitioner was of the age of 44 years, a carpenter by trade, and at the time engaged as such upon a dwelling house in San Francisco. About 2:30 in the afternoon of said day petitioner was engaged in assisting a truck driver remove a cabinet from the truck to the garage upon the premises. The cabinet weighed about 200 pounds, was 8 feet long, 4 feet wide and 12 inches deep. Petitioner assisted in moving the cabinet off the truck at about shoulder height, or 5 feet, then walking backwards carried one end a distance of about 30 feet, where the cabinet was deposited upon a stack of building material slightly elevated above the floor level. Upon lowering the cabinet petitioner was forced to assume a slightly twisting position. Just as petitioner set the cabinet down he experienced a very severe pain in the pit of his stomach, which was accompanied by a feeling of nausea. Efforts to induce vomiting were unavailing, and the pain increased in intensity to such an extent petitioner was forced to lie down. About half an hour later petitioner gathered up his tools and went home. About 5 p. m. he was visited by his family physician, who diagnosed his ailment as duodenal ulcer and ordered his immediate removal to a hospital. Petitioner was removed to the City and County Hospital, where he was operated upon the same day. The operation disclosed that petitioner was suffering from a perforation of a gastric or duodenal ulcer. He was required to remain in the hospital for a period of 13 days, and his disability continued until December 29, 1932.

Proceeding under the Workmen's Compensation Act by Knute B. Abelseth, employee, opposed by H. Meinberger. The

The uncontradicted evidence further discloses a very definite history of gastric ulcer prior to October 18, 1932. In 1916, petitioner suffered from indigestion, which continued until 1927 without much variation. The symptoms during this period consisted of a slightly distressed feeling about two hours after meals, which was somewhat relieved by taking food. In 1918 petitioner visited a doctor who prescribed medicine and diet. In 1927 he suffered a hemorrhage one morning while on his way to work, and was removed to the Harbor Emergency Hospital and then removed to Franklin Hospital, where he remained nine days. His ailment was then diagnosed as gastric ulcer and his treatment while at the hospital and for a month thereafter consisted primarily of dieting. Petitioner at this time was required to cease work for a period of about three months. For about a year following this period no further symptoms appeared, but thereafter occasional pains in the stomach accompanied with slight indigestion occurred. In 1932, no symptoms appeared until about two weeks prior to October 18th, when petitioner experienced similar feelings upon two occasions.

[1] The rule is well established that acceleration or aggravation of a pre-existing disease is an injury attributable to the occupation causing such acceleration or aggravation. *Thoreau v. Industrial Acc. Com.*, 120 Cal. App. 67, 70, 7 P.(2d) 767.

The question to be determined herein is whether the perforation of the duodenal ulcer was the result of the muscular exertion arising in the course of petitioner's employment, or whether, as respondents contend, the same resulted from the natural progressive nature of the ulcer itself. The evidence is in substantial conflict. The petitioner's family physician diagnosed the ailment prior to his removal to the hospital as duodenal ulcer, and advised hospitalization without operation. He did not perform the operation nor witness the same. He testified, upon direct examination in response to a hypothetical question, that: "The strain of lifting could be and probably was the precipitating cause of the rupture at that particular moment. The description that the gentleman gives of immediately thereafter trying to vomit and of the cold sweat is rather characteristic of those perforating things in the abdomen." A letter from

Dr. Thomas B. Wiper, associate resident physician, who assisted in the operation upon petitioner, was submitted to the commission wherein the doctor stated: "It is in my opinion *conceivable* that a penetrating ulcer might be caused to rupture by unusual exertion or a strenuous lifting effort whereby a marked increase in intra-abdominal tension would be brought about, this increased pressure exerted sufficient force upon the distended viscus to cause rupture. *It is however not at all unusual for penetrating peptic ulcers to rupture spontaneously while the patient is at rest.*" (Italics ours.) Dr. W. W. Washburn examined the petitioner at the request of respondent commission in December 1932, and thereafter on December 16, 1932, advised the commission in part as follows: "That there was an active process in the pre-existing ulcer is indicated by the history of recent discomfort. The patient gives a history of lifting heavy case from high up in an awkward position, then lowering the case. He claims to have twisted the abdomen somewhat in this maneuver. Certainly the ulcer was penetrating and near to perforation before lifting. The patient says the abdomen was not directly contused. However, perforation occurred almost immediately after somewhat unusual muscular effort which in my opinion may well have been a contributing factor in aggravating pre-existing disease (ulcer). Without having lifted it might be argued that perforation might not have occurred and the patient might have 'cured' his ulcer by diet, etc. * * * While there is considerable doubt in my mind as to the trauma of lifting being a contributing cause of the actual perforation in this case, it may well have been an aggravating cause. It is to be noted that we advise our ulcer cases to abstain from work and vigorous exercise while under treatment for peptic ulcer. So physical exercise is admittedly undesirable and retards healing of peptic ulcer, etc. So it may be argued that heavy lifting might by aggravation bring about acute perforation in an ulcer which might not otherwise have perforated. I assume that the history as given by the patient to me is correct. I would then consider that actual perforation came about due in a small measure to over exertion and that the patient is entitled to compensation, upon the basis of time lost, but not for any permanent disability."

Subsequent to the rendering of this report, Dr. Washburn was called as a witness for respondents at hearings held on January 19 and April 11, 1933. At these hearings the doctor testified that in his opinion it was very improbable that the perforation was the result of lifting. The doctor thereupon explained the discrepancy, if any, in his testimony before the commission and his report. It appears that subsequent to filing the written report, which was based upon a rather brief examination of petitioner and the hospital record, further investigation was made by the witness. This investigation included a discussion with Dr. Butler, who performed the operation upon petitioner, as to what conditions the operation disclosed, as well as an examination of the microscopic report upon the ulcer. The witness thereupon stated that his written report had been based upon the assumption that adhesions were present which had ruptured, but that the operating surgeon stated and the microscopic report showed no adhesions were present. The witness then testified that the microscopic examination revealed "that the base of the ulcer was thin and that the muscular coat was replaced by granular tissue; in other words, instead of having muscle there, it was replaced by simply granular tissue which is merely a type of tissue with a few blood vessels in it and not a solid tissue at all. * * * It is a soft tissue * * * extremely weak. * * * It is merely further confirmation of my view. * * * So, it was my view the lifting of the weight was not related to the perforation, * * * and that the principal factor also is the natural process of the ulcer itself, which is a gnawing type of thing. * * *" The witness likewise clearly distinguished the difference in effect upon a gastric ulcer of a sudden or violent blow and a muscular strain.

[2] It will be observed that a very definite difference of opinion exists between the expert witnesses as to whether the perforation of the gastric ulcer was accelerated by petitioner's lifting the cabinet, or was the natural result of the growing process of the ulcer itself. It is obvious that the question is one which, under the facts of this case at least, can only be determined by experts. The experts have disagreed upon the question, and upon the testimony presented respondent

commission has decided the question adversely to petitioner. Nor can the conflict of opinion upon the question be said to be fanciful or fictitious. The record herein is such that under the law the finding of respondent commission must be deemed conclusive. *Brandon v. Industrial Accident Com.*, 211 Cal. 341, 294 P. 1064.

The award is affirmed.



8 Cal.App.2d 265

BERNSTEIN et al. v. EQUITABLE DISCOUNT CORPORATION.

Civ. 1714.

District Court of Appeal, Fourth District,
California.

July 1, 1935.

1. Assignments for benefit of creditors ☞278

In action by trustee for creditors who had assignment from debtor against defendant creditor to compel it to present its claims against debtor, wherein defendant filed cross-complaint, evidence held sufficient to justify finding that defendant owed debtor nothing for collections made by debtor under a contract between defendant and debtor.

2. Assignments for benefit of creditors ☞31

Where assignment of stock in trade, accounts receivable, etc., to committee of creditors was not assignment for benefit of creditors because failing to give notice required by statute but was conveyance in trust for payment of certain debtor's creditors and was not binding on nonconsenting creditors, creditor that presented claim when sued by consenting creditors consented to the assignment and was entitled to share in the trust funds (Civ. Code, § 3449 et seq.).

3. Assignments for benefit of creditors ☞280

Judgment by creditors against trustees for creditors which was based on finding that dividend had been declared and paid by trustees to the other creditors held proper, where it imposed no personal obligation on trustees, but only required payment of proceeds of collections made as trustees.

4. Parties ☞7(2)

Generally, trustee of an express trust is competent to sue and defend in behalf of the beneficiaries in an action with a third party.

5. Appeal and error ⇨187(3)**Trusts** ⇨366(1)

Where controversy arises between parties to a trust, for protection of trustee against suit by omitted beneficiaries all interested parties should be before the court, but by not raising the point at the trial, trustee may waive the failure to join interested beneficiaries.

6. Assignments for benefit of creditors ⇨275

In suit by creditors who had assignment from debtor, which was valid only as to consenting creditors, against another creditor to force it to present its claims against debtor, wherein such creditor filed cross-complaint against debtor and members of committee to whom assignment was made, though not against all consenting creditors, failure to make all interested creditors parties was waived, where no objection was taken in trial court to cross-complaint on such ground.

Appeal from Superior Court, Los Angeles County; Birger Tinglof, Judge.

Action by Sol R. Bernstein and others, trustees for creditors of Robert Wolf, doing business under the firm name and style of Wolf Cabinet & Furniture Manufacturing Company, against the Equitable Discount Corporation, wherein defendant filed a cross-complaint. From a judgment for defendant and cross-complainant, plaintiffs Sol R. Bernstein, R. L. Smith, and J. G. Bonanomi appeal.

Affirmed.

Euler & Subith, of Los Angeles, for appellants.

Merrill L. Granger, of Los Angeles, for respondent.

HARDEN, Justice pro tem.

Robert Wolf was engaged in business as a retail merchant in Los Angeles under the name of Wolf Cabinet & Furniture Manufacturing Company. He sold furniture under conditional sales contracts to purchasers. Such contracts provided for payments in installments by the purchasers, and gave the seller the right to repossess the furniture upon default in payments. Many such contracts were assigned by Wolf to defendant Equitable Discount Corporation. There was a general blanket agreement between said corporation and Wolf providing for a cash payment to Wolf of an amount to be fixed as the purchase price of each contract assigned. Said agreement provided further, in effect,

that the corporation might appoint Wolf as agent to collect for it installments due under assigned contracts, and that Wolf should be paid 10 per cent. of the sale price of the furniture for making the collections on each contract, payable by the corporation to him when and if the collection had been made in full and remitted to the corporation, provided the aggregate of delinquencies for nonpayment of installments upon the remaining contracts so assigned did not exceed 10 per cent. of the aggregate of all balances then remaining unpaid on such contracts.

On December 31, 1931, Wolf made what purported to be an assignment of his assets for the benefit of creditors to a creditors' committee composed of R. L. Smith, Sol R. Bernstein, E. W. Kohn, V. E. Freeman, and J. G. Bonanomi. No notice as required by section 3440, Civil Code, was given. Thereafter, Freeman and Kohn resigned and withdrew as members of said committee, and G. D. Cobb, subsequent to December 31, 1931, and prior to the commencement of this action, associated himself therewith and assumed to act as a member of such committee. Smith, Bernstein and Bonanomi, as members of said creditors' committee, are plaintiffs in this action, brought against the defendant for the purpose of compelling it to present any claim it had against Wolf to said committee, in order that the same might be taken into account and paid together with other valid claims against Wolf. Defendant filed a cross-complaint against Wolf, all the original members of said creditors' committee, and Cobb, wherein its claim is set forth.

Said claim arose by virtue of the fact that, without notice to or knowledge of said corporation, Wolf repossessed himself of the furniture sold under 33 of the contracts of sale assigned to the corporation, and thereafter sold the same at auction. At that time the aggregate balance due on said 33 contracts was \$4,096.10. From the auction sale there came into Wolf's hands, as proceeds thereof, the sum of \$435.78, which he remitted to the corporation. Defendant's claim was for \$3,660.32, being the difference between the aggregate balances due on said 33 contracts and the payment of \$435.78.

Judgment went for the defendant and cross-complainant and against Wolf for \$3,660.32 and interest, and against all of

the members of the committee, including Cobb, ordering that they pay cross-complainant forthwith out of the funds received by them from the sale of property to which they succeeded under the terms of said trust \$1,098.10 (to equal a 30 per cent. dividend previously paid by the committee to the other creditors), and that they pay to cross-complainant additional dividends on its judgment against Wolf, at the same time and in the same percentages as such dividends may be declared and paid generally to other creditors under said assignment. From said judgment Smith, Bernstein, and Bonanomi have appealed.

[1] The principal point urged on the appeal is that there was an accumulation of several thousand dollars (called the reserve fund) in the hands of the corporation at the time of the presentation of its claim to said committee, which fund arose by reason of the retention by the corporation of the 10 per cent. in collection fees provided for in the agreement. The aggregate of said collection fees appears to be \$7,315. Respondent justifies its action upon the contention that said sum did not become payable to Wolf under the provisions of the agreement because the aggregate of delinquencies under the remaining contracts assigned by Wolf to the corporation was at all times in excess of 10 per cent. of the balance due on said contracts. The record is not clear as to the exact amount of the delinquencies under said contracts. The only evidence on the subject is that the delinquencies were never at any time reduced to 10 per cent. of the aggregate balance due on the contracts. It therefore appears that the condition imposed upon the payment to Wolf of anything for services rendered by him in making the collections was not met, and that there was no obligation on the part of the corporation to pay or allow Wolf anything as an offset against its claim for conversion of the property. Furthermore, it was established that, by reason of Wolf's failure to make collections, the corporation was required to and did take over the business of making the collections, and that for a period of time Wolf performed no service for the corporation in that connection. The evidence was sufficient to justify a finding that nothing was due Wolf on account of collections made.

[2] The instrument by which the assignment of Wolf's stock in trade, accounts receivable, etc., to the committee was ac-

complished is made an exhibit to the amended complaint. It is evident from its form and from the parties to it that it is not such an instrument as constitutes an assignment for the general benefit of creditors under section 3449 et seq., Civil Code. It is rather of that class of instrument having some of the characteristics of an assignment for the general benefit of creditors, but in fact a conveyance in trust in payment or by way of security for some or all of a debtor's creditors. *Jarvis v. Weber*, 196 Cal. 86, 236 P. 138. While this assignment would be void as to nonconsenting creditors, by reason of the failure to give the seven days' notice required by section 3440, Civil Code, the defendant consented to it by presenting its claim and has not appealed from the judgment; and the appellants are in no position to claim that they had no authority to bring defendant in.

[3] The judgment imposes no personal obligation against the plaintiffs, nor against any of the members of the committee, to pay the judgment; the only payments required of them being payments of proceeds of their collections as trustees. The part of the judgment which required an immediate payment to cross-complainant of \$1,098.10 was based upon a finding, supported by the evidence, that a dividend of 30 per cent. had been declared and paid by the trustees to the other creditors entitled to share, and that defendant was entitled to a like amount. It was proper.

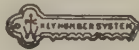
[4-6] Notwithstanding that plaintiffs brought the defendant into court to disclose the nature of his claim against Wolf, pursuant to which he set up his cross-complaint, plaintiffs now contend that the judgment thereon is without legal support by reason of the fact that cross-complainant did not bring in as cross-defendants all of the creditors. The general rule is that the trustee of an express trust is competent to sue and defend in behalf of the beneficiaries in an action with a third party. *Sterrett v. Barker*, 119 Cal. 492, 21 P. 695; *Lasar v. Johnson*, 125 Cal. 549, 58 P. 161. Where the controversy is between parties to the trust, for the protection of the trustee against suits by omitted beneficiaries, all of the interested parties should be before the court. *McPherson v. Parker*, 20 Cal. 455, 89 Am. Dec. 129; *Alison v. Goldtree*, 117 Cal. 545, 49 P. 571; *Lake v. Dowd*, 207 Cal. 290, 277 P. 1047. The trustee, however, by not raising the point

in the trial court, may waive the failure to join interested beneficiaries. *Alison v. Goldtree*, supra. No objection to the cross-complaint was taken in the trial court upon that ground. Therefore, the point has been waived.

The findings and judgment are supported by the evidence. We find no merit in any other point raised.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.



7 Cal.App.2d 385

**ELLERMAN v. PACIFIC ELECTRIC
RY. CO. et al.**
Civ. 9969.

District Court of Appeal, Second District,
Division 2, California.
July 3, 1935.

Hearing Denied by Supreme Court
Aug. 2, 1935.

1. Negligence ⇨83

Negligence is a necessary element in doctrine of last clear chance.

2. Railroads ⇨350(12)

Evidence of negligence of interurban motorman who blew whistle continuously from time interurban car was block away until it struck automobile at crossing, whose driver had had clear view of interurban track for several hundred feet, although brakes were not applied to interurban car until within 15 or 20 feet of crossing, *held* insufficient for jury, since motorman was under no duty to slacken speed of car while he was uncertain whether motorist would stop.

3. Railroads ⇨350(33)

Where motorist approaching grade crossing had clear view of interurban railroad track for several hundred feet, evidence that interurban motorman had last clear chance to prevent collision between car and automobile after it appeared that motorist was in dangerous position and likely would not extricate himself *held* insufficient for jury.

Action by A. D. F. Ellerman against the Pacific Electric Railway Company and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Clyde C. Shoemaker and William W. Shaw, both of Los Angeles, for appellant.

Frank Karr, E. E. Morris, and C. W. Cornell, all of Los Angeles, for respondents.

STEPHENS, Justice.

Upon petition for rehearing our attention has been called to some inaccuracies in the statement of facts, and in correcting them we have concluded to enlarge somewhat upon our reasons for affirming the judgment. The former opinion is therefore stricken and the following substituted in its stead:

Plaintiff brought suit for damages against defendants. When all of the evidence at the trial was in, defendants made and the court granted a motion for a directed verdict. The jury accordingly rendered its verdict in favor of defendants, and this appeal is from the judgment entered thereon.

[1] There is but one ultimate question in the case: Was there evidence sufficient to raise an issue as to the last clear chance of defendants to avoid the collision causing the injuries? Negligence is a necessary element in the doctrine of the last clear chance. *Young v. Southern Pacific Co.*, 189 Cal. 746, 210 P. 259.

The accident happened in open country, although within the city limits of Santa Monica. An interurban electric railroad motor passenger car was traveling 30 to 45 miles per hour on its own right of way. Most of the witnesses estimate its speed at 35 miles per hour. An expert for plaintiff testified that the car could stop within 115 or 120 feet at a speed of 25 miles per hour, within 200 or 210 feet going 35 miles per hour and within 250 or 260 feet at 40 miles per hour. When the electric car was about 350 feet from a well-traveled boulevard crossing at grade, appellant's sedan-type automobile was something like 400 feet from and approaching the crossing at a rate of 30 to 50 miles per hour. Plaintiff himself says he was traveling about 30 miles per hour. All of these speeds and distances are estimates of witnesses who saw the events from different places. The automobile driver, appellant, was driving with all windows completely closed, but his vision was

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

clear and no obstruction shut off the view of the track for several hundred feet. He knew of the railroad but had never observed a passenger car being operated over it, and did not on this occasion observe the car at all. He had seen freight cars operated thereon. Nothing was the matter with his automobile. As the two vehicles approached the crossing with little if any change of speed (some witnesses say the automobile slackened and then accelerated speed shortly before attempting to cross), the motorman observed the automobile and blew his whistle a block away, blowing one long blast that continued up to the time of the collision which resulted. When within 15 or 20 feet of the crossing the motorman applied his emergency brakes, but the left front of his car hit the left rear of the automobile, badly wrecking it and throwing it about 60 feet. There is no doubt as to the serious injury to appellant.

[2] Was the motorman negligent? The following is quoted with our approval from respondents' brief: "It is held * * * in this state that a motorman or engineer approaching a crossing such as the one in this case has the right to assume and act upon the assumption that any person approaching such crossing is in possession of his faculties of sight and hearing, and that he will use these faculties and will look and listen and see and hear the car if it can be seen or heard, and will stop before reaching the track, and that no duty devolves upon the motorman or engineer, under such circumstances, to slow down or stop his car or train until he concludes, in the exercise of ordinary care, that such person so approaching the crossing will not perform his duty to stop and let the car go by." See *Billig v. Southern Pacific Co.*, 192 Cal. 357, 363, 219 P. 992; *Young v. Southern Pacific Co.*, *supra*. If there is any negligence in this case attributable to the motorman, then every interurban train approaching a grade crossing has to be kept under the same control as an automobile; and if an automobile happens to be approaching at a good clip, the motorman must not proceed to cross until he is satisfied the driver of the automobile will not attempt to "beat him to it." We do not think this is the law.

[3] As to last clear chance, we find no evidence, and we have read the transcript in full, that the motorman could see, in time to prevent a collision; that the circumstances were such that the auto driver was in a dangerous position and likely would not

extricate himself. We agree with the trial judge that the evidence could not support a verdict for plaintiff and that he did the proper thing when he instructed the jury to find for defendants. We think both *Girdner v. Union Oil Company of California*, 216 Cal. 197, 13 P.(2d) 915, and *Center v. Yellow Cab Company of Los Angeles*, 216 Cal. 205, 13 P.(2d) 918, relied upon by appellant, are in accord herewith.

The judgment is affirmed.

I concur: CRAIN, J.



8 Cal.App.2d 226

MARTIN v. WESTERN STATES GAS & ELECTRIC CO. et al.

Civ. 5399.

District Court of Appeal, Third District,
California.

June 29, 1935.

Rehearing Denied July 29, 1935.

Hearing Denied by Supreme Court
Aug. 26, 1935.

1. Estoppel ⇨93(7)

Riparian owner, who, for more than four years after he had knowledge of expenditure of several million dollars in construction of dam, reservoir, and power plant to be used for diverting, storing, and using increased quantity of water for hydroelectric power and other public purposes, failed to object thereto, *held* to have waived his right to restrain diversion and appropriation of increased quantity of water by public utility corporations.

2. Waters and water courses ⇨78

Riparian right of an owner of real property to the use and benefit thereof is an inherent part of the land, and the appropriation of such water is a detriment to the real property as distinguished from a mere trespass.

3. Limitation of actions ⇨32(2)

Appropriation of riparian right to water constituted a "taking and damaging of real property" contrary to constitution and not a mere "trespass on interest in land," and hence action for damages was not barred before expiration of five years necessary for appropriators to have acquired title to water by adverse possession (Code Civ. Proc. § 338, subd. 2; Const. art. 1, § 14).

[Ed. Note.—For other definitions of "Taking (In Eminent Domain)" and "Trespass," see Words & Phrases.]

4. Appeal and error ☞1176(1)

Where trial court's finding that plaintiff had been damaged in the amount of \$5,000 by reason of increased appropriation of his riparian rights was adequately supported by the evidence, but trial court erroneously found that action for damages was barred, judgment should be reversed, with directions to enter judgment for plaintiff in the sum of \$5,000 (Code Civ. Proc. § 338, subd. 2; Const. art. 1, § 14).

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by Albert M. Martin against the Western States Gas and Electric Company and others, wherein El Dorado Irrigation District intervened. From a judgment for defendants, plaintiff appeals.

Reversed in part and remanded, with directions.

Peter tum Suden and Richard tum Suden, both of San Francisco, for appellants.

Thomas J. Straub, W. R. Dunn, and Chickering & Gregory, all of San Francisco, and Thomas Maul, of Placerville, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is an appeal from the judgment which was rendered in favor of the defendants in a suit for damages and for injunctive relief for the continued taking of water from the American river by the defendants for public commercial purposes, to the detriment of the riparian rights of the plaintiff. The court denied the application for injunctive relief on the ground that the water was appropriated by the defendants for public use, and that the plaintiff had waived his right to equitable relief by his laches. The court further found that the plaintiff's property was damaged to the amount of \$5,000 by virtue of the increased appropriation of water by the defendants, but held that this damage was barred by the provisions of section 338, subd. 2, of the Code of Civil Procedure.

The plaintiff owns Riverton Resort, which is situated on the south fork of the American river 25 miles east of Placerville. He acquired this property in 1918.

In 1876 the El Dorado canal was constructed from a point on the American river nine miles above the plaintiff's property to a point in the same river some distance below his resort. Through this canal system the owners thereof continued to divert a portion of the surface flow of water from the American river until January 27, 1924. It is not contended this original diversion of water damaged the plaintiff's property. The El Dorado canal system was subsequently acquired, and is now owned and operated by the defendant, Pacific Gas & Electric Company, for public utility purposes. This canal system was enlarged so that it diverted, from and after January 27, 1924, a continuous flow of 155 cubic feet of water per second. This is an excess of 85 cubic feet per second over the former capacity of the canal. The defendants also constructed at an expense of \$9,000,000 a dam, reservoir, and power plant, to be used in connection with the canal system for the purpose of storing water and generating hydroelectric power for public use. The plaintiff had notice of these improvements and of the defendants' purpose to divert from the American river an increased quantity of water, but failed to institute proceedings to prevent this increased appropriation of water until this suit was commenced, November 8, 1928.

The cause was tried by the court sitting without a jury. The court adopted findings in accordance with the preceding statement of facts. Among the findings which were adopted by the court it was determined that: "By reason of the increased or enlarged diversion consummated January 27, 1924, by defendants as alleged in said first amended complaint on file herein, including as it did the complete exhaustion of the subflow and underflow theretofore existing at the point of diversion and not withdrawn under prior appropriation, plaintiff's riparian rights were invaded and the accustomed flow of the South Fork of the American River through plaintiff's lands described in paragraph 5 of his amended complaint, was diminished to his substantial damage and that by reason thereof the value of said lands of plaintiff has been depreciated and damaged in the amount of \$5,000.00 but that the recovery thereof is barred by the provisions of subdivision 2, § 338, Code of Civil Procedure."

The plaintiff's application to quiet title and for injunctive relief was denied. On the theory that the diversion of water complained of constituted a trespass upon or injury to the real property of the plaintiff as distinguished from the taking or appropriation of a riparian interest in the property, the court found that the action was barred by the provisions of subdivision 2 of section 338 of the Code of Civil Procedure, since more than three years had elapsed since the increased diversion of water occurred. A judgment was therefore rendered against the plaintiff to the effect that he take nothing by his action. From that judgment, the plaintiff has appealed.

Two questions are raised by this appeal. It is asserted the plaintiff is entitled to an injunction to prohibit the defendants from continuing to divert the increased quantity of water which was appropriated from and after January 27, 1924, and that the court was in error in holding that the suit for damages for the taking and appropriation of plaintiff's riparian rights to water from the American river was barred in three years thereafter.

[1] The court properly denied the plaintiff's application for equitable relief in this case. The plaintiff waived his right to restrain the diversion and appropriation of the increased quantity of water which was taken by the defendants as public utility corporations, after January 27, 1924, by failing to object thereto for a period of over four years after he had knowledge of their expenditure of several millions of dollars in the construction of a dam, reservoir, and power plant to be used for diverting, storing, and using the increased quantity of water for hydroelectric power and other public purposes. The facts of this case bring it squarely within the preceding statement of the well-established rule of law. *Gurnsey v. Northern Cal. Power Co.*, 160 Cal. 699, 711, 117 P. 906, 36 L. R. A. (N. S.) 185; *Peabody v. City of Vallejo* (Cal. Sup.) 40 P.(2d) 486; *Sutro Heights Land Co. v. Merced Irr. Dist.*, 211 Cal. 670, 691, 296 P. 1088, 1096; *Collier v. Merced Irr. Dist.*, 213 Cal. 554, 2 P.(2d) 790; *Conaway v. Yolo Water & Power Co.*, 204 Cal. 125, 131, 266 P. 944, 58 A. L. R. 674. In the *Sutro Heights Land Company Case*, supra, the court quotes with approval from the *Conaway Case*, supra, as follows: "Where property is taken for a public use by a public service corporation and the owner of the prop-

erty has not in an appropriate way objected to its being so taken, but has, by silence or quiescence, permitted the public use to be inaugurated and carried on for some period of time, he has thus waived or lost his right to proceed against such use of his property by ejectment or abatement."

[2, 3] We are of the opinion the court erred in holding that the plaintiff's damages for the appropriation of the increased quantity of water from the American river to the detriment of his riparian right thereto, was barred in three years thereafter under the provisions of subdivision 2 of section 338 of the Code of Civil Procedure. It is the established law of this state that the riparian rights of an owner of real property to the use and benefit thereof is an inherent part of the land, and the appropriation of such water is therefore a detriment to the real property as distinguished from a mere trespass. *Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp.*, 202 Cal. 56, 65, 259 P. 444, 448, 56 A. L. R. 264. In the case last cited it is said in that regard: "We therefore here reassert the riparian right to be a vested property right inhering in and a part and parcel of the abutting lands—a right not gained by use or lost by disuse."

It follows that the defendants' appropriation of the plaintiff's riparian right to water from the American river adjacent to his Riverton property constituted a taking and damaging of the real property contrary to the provisions of article 1, § 14, of the Constitution of California, and the statutory limitation of time within which the owner thereof may recover damages therefor is not barred in three years, but the right of action for damages, under the circumstances of this case, does not expire short of the five years necessary for the defendants to have acquired title to the water by adverse possession. It may not be said the defendants' appropriation of the increased quantity of water was a mere trespass on the plaintiff's interest in the land. *Litka v. City of Anacortes*, 167 Wash. 259, 9 P.(2d) 88, 89. In the case last cited the contention of the city of Anacortes was precisely the same as that which is relied on by the defendants in this case. Like the present action, the *Litka Case* involved damages to the plaintiff's summer resort property which borders on Lake Campbell, from the appropriation of his riparian water rights incident thereto. The

city of Anacortes pumped water from the lake, to the detriment of plaintiff's riparian rights, to be used for its city water system. Suit for damages to his property was brought by plaintiff. The court said: "Riparian rights are recognized in law to be valuable property rights. * * * Since riparian rights are property rights, they cannot be taken by a municipality for public purposes without just compensation to the owner. * * * When the city appropriated the water from the lake, it took from the respondents the very thing that was necessary and essential to the use of their property, and a valuable property right; in other words, the city damaged the respondents' land."

It was also contended in that case that the appropriation of the water by the city of Anacortes was in the nature of a tort, and that the action was barred in two years thereafter by the provisions of a statute of that state similar to section 338 of the Code of Civil Procedure of the State of California. The court said in that regard:

"This contention presupposes, however, that the respondents' cause of action is a tort action—one for the recovery of damages for injury to property. It is clear, we think, that the action is not one to recover damages for injury to property, but one to obtain just compensation in payment of private property taken for public use. The city did not merely damage the respondents' property, but actually took from them the use of their riparian rights. * * * 'To hold that the action for compensation is barred in two years would be to read an exception into the ten-year statute relating to the recovery of real property. * * * His right of recovery is founded upon and grows out of his title to the land, and until such title is lost by adverse possession he should have the right to maintain an action to recover that which represents the property itself. Any other view is to sacrifice substance to mere form.' * * * The law is tersely stated in Lewis, Eminent Domain (3d Ed.) § 966, as follows:

"Where the constitution either expressly, or as interpreted by the courts, requires compensation to be first made for property taken for public use, a law which casts the initiative upon the owner and requires him to prosecute his claim for compensation within a time limited or be barred, is

invalid. When under such a constitution property is appropriated to public use without complying therewith, the owner's right to compensation is not barred, except by adverse possession for the prescriptive period.' "

[4] The court having found in the present case that the plaintiff was damaged in the amount of \$5,000 by the increased appropriation of his riparian water rights incident to his Riverton property, which finding is adequately supported by the evidence, and that five years have not elapsed since that taking was accomplished, it follows that he is entitled to judgment for that sum of money.

The judgment is reversed in so far as it seeks to determine that the ascertained damages to the plaintiff's land is barred by the provisions of section 338 of the Code of Civil Procedure, and the court is directed to render judgment for damages in favor of the plaintiff in the sum of \$5,000.

We concur: PULLEN, P. J.; PLUMMER, J.



8 Cal.App.2d 256

**MOTTASHED v. CENTRAL & PACIFIC
IMP. CORPORATION et al.**
Civ. 1711.

District Court of Appeal, Fourth District,
California.
July 1, 1935.

Hearing Denied by Supreme Court
Aug. 29, 1935.

1. Trusts $\Rightarrow$ 210

Ordinarily, beneficiaries of a trust are not liable for debts incurred by trustees.

2. Mortgages $\Rightarrow$ 556

While a contract made expressly for the benefit of a third person may be enforced by him, liability for a deficiency judgment on foreclosure of a mortgage depends on a promise to pay (Civ. Code, § 1559).

3. Contracts $\Rightarrow$ 187(1)

Test to determine whether a promise to pay inures to benefit of a third party so as to permit such party to enforce the promise is whether an intent so to benefit third party appears from terms of contract, and such intent must have been clearly manifested by

the contracting parties, and it is not sufficient that contract merely incidentally benefit third person (Civ. Code, § 1559).

4. Contracts ⇨187(1)

Rule that contract made expressly for benefit of third person may be enforced by him is based on equitable doctrine of subrogation on general principle that creditor is entitled to benefit of anything held by his debtor, which debtor has right to use and enforce for purpose of relieving himself from payment of debt (Civ. Code, § 1559).

5. Contracts ⇨187(4)

Ordinarily, a grantee is not liable to a third person on a promise to pay made to his grantor, unless grantor was himself personally bound (Civ. Code, § 1559).

6. Mortgages ⇨556

Promise of beneficiaries under declaration of trust of realty to pay all debts, taxes, and expenses connected with property held not to render beneficiaries personally liable for deficiency judgment on foreclosure of mortgage, since promise was merely incidental to real purpose of trust that trustee should hold property for purposes of renting, selling, and conveying, and was intended to apply as between beneficiaries and trustee for protection of trustee and not for benefit of mortgagee.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by J. A. Mottashed against the Central & Pacific Improvement Corporation and others, and R. H. Raphael and others. Judgment for R. H. Raphael and others, and plaintiff appeals.

Affirmed.

Wheeler & Wackerbarth and Henry O. Wackerbarth, all of Los Angeles, for appellant.

Harold M. Stern, of Los Angeles, for respondents Jacob Stern, Stern Realty Co., and Jacob Stern & Sons, Inc.

Edgar C. Smith, of Los Angeles, for respondent G. A. Miller.

Loeb, Walker & Loeb, of Los Angeles, for respondent Grace Hecht and Security-First Nat. Bank of Los Angeles, as trustee.

BARNARD, Presiding Justice.

This is an appeal on the judgment roll from a judgment rendered in favor of the respondents after their demurrers to the complaint were sustained.

The action was brought to foreclose a mortgage dated January 1, 1928, given to the appellant by the defendant Central & Pacific Improvement Corporation. The respondents were named as beneficiaries in a "declaration of trust," under the terms of which another defendant, Title Insurance & Trust Company, took title to the mortgaged premises, with the exception that two or three of them are assignees of original beneficiaries. In addition to foreclosing the mortgage, the complaint sought personal judgment against these respondents in proportion to their respective interests in the trust estate. This appeal concerns only the question as to the personal liability of these beneficiaries for the payment of any deficiency judgment.

The complaint alleges that the defendant title company executed a written declaration of trust relating to said premises, on July 14, 1915, which declaration was agreed to, confirmed, and approved in writing by the beneficiaries named therein. Portions of the declaration of trust are set forth in the complaint, in which the title company, as trustee, acknowledges that it has received a deed to the property in question subject to a mortgage then outstanding, and in which it is stated that the consideration for the property had been paid by the beneficiaries in certain named proportions, and including the following paragraphs:

"Now, Therefore, said Trustee hereby Certifies and Declares that it holds and will hold said real property for the purpose of renting, selling and conveying the same upon such terms and conditions as the said Trustee may deem best; * * * with power also to convey said property, to a Trustee for the purpose of executing a Mortgage, Deed of Trust or other hypothecation thereof as hereinafter provided. * * *

"If the funds in the hands of said Trustee belonging to this Trust are insufficient to pay, when due, the principal or interest of any Mortgage, Deed of Trust or other debt or incumbrances against the property covered by this Trust, or any taxes, insurance, assessment, lien or charge or expense necessary or proper for the preservation, maintenance or care of said property, or the title thereto, or the costs, charges and expenses of this Trust, then and in any such event each of the Beneficiaries hereunder does, by his approval of this Decla-

ration, well and truly bind himself to pay his proper proportion thereof before the same becomes delinquent. * * *

"The Trustee reserves unto itself the right, and shall have the power, for the benefit of the Beneficiaries hereunder, to replace, renew or extend any debt or incumbrance upon the herein described property, when the same becomes due or at any time such replacement, renewal or extension may be, in the judgment of said Trustee, for the best interests of this Trust or necessary to protect the trust property, and upon such terms and upon such conditions and by such means of security as said Trustee may deem proper, including the right and power to convey the fee title to said property to such person or corporation as it shall select for the purpose of executing and delivering the necessary Notes, Mortgage, Deed of Trust or other hypothecation to evidence and secure such debt or debts and of reconveying said property to said Trustee subject thereto; and, when such reconveyance shall have been so made to said Trustee, the said Trustee shall thereupon be restored to its full estate hereunder. * * *

The complaint then alleges that the title company conveyed the premises to the mortgagor; that the appellant executed a release of a pre-existing mortgage; that the mortgagor executed the renewal note and mortgage here sued on which was recorded; and that the mortgagor then reconveyed the property to the title company.

The appellant contends that it expressly appears from the language used in the declaration of trust, wherein the beneficiaries agreed to pay to the trustee in the event the funds in its hands were insufficient therefor, the amount of any mortgage or other debt and any taxes, assessments, or other expenses before the same became delinquent; that an agreement to pay this mortgage was made for the benefit of the appellant; and that he was, therefore, entitled to a deficiency judgment against them.

[1-3] Ordinarily, in a true trust, which we have here, the beneficiaries are not liable for debts incurred by the trustees (*Goldwater v. Oltman*, 210 Cal. 408, 292 P. 624, 71 A. L. R. 871), and it has even been held that the authority given to a trustee to mortgage the property of a trust estate does not include the power to personally bind the beneficiaries for the payment of the money (*Hall v. Jameson*, 151 Cal. 606, 91

P. 518, 12 L. R. A. (N. S.) 1190, 121 Am. St. Rep. 137). While a contract made expressly for the benefit of a third person may be enforced by him (Civ. Code, § 1559), liability for a deficiency judgment must always depend upon a promise to pay. *Windt v. Covert*, 152 Cal. 350, 93 P. 67. In deciding whether a promise to pay inures to the benefit of a third party, the test is whether an intent so to benefit the third party appears from the terms of the contract. *LeBallister v. Redwood Theatres, Inc.*, 1 Cal. App. (2d) 447, 36 P.(2d) 827. The rule is well established that in order to sustain such an action an intent to make the obligation inure to the benefit of the third party must have been clearly manifested by the contracting parties. *Wilson v. Shea*, 29 Cal. App. 788, 157 P. 543. It has frequently been held that where a contract incidentally benefits a third person, but is not expressly made for his benefit, he cannot recover thereon. *Chung Kee v. Davidson*, 73 Cal. 522, 15 P. 100; *Buckley v. Gray*, 110 Cal. 339, 42 P. 900, 31 L. R. A. 862, 52 Am. St. Rep. 88; *Smith v. Trust Co.*, 205 Cal. 496, 271 P. 898; *Ferguson v. Marsh*, 37 Cal. App. 482, 174 P. 678; *Diggs v. Pac. Gas, etc., Co.*, 57 Cal. App. 57, 206 P. 765. In the *Chung Kee* Case it was held that where it was agreed that the proceeds of a mine were to go to the defendants who were to pay the expenses of working the mine, the contract was only incidentally for the benefit of laborers who worked therein. In *Smith v. Trust Co.*, supra, it was held that the agreement of a loan company to advance money for certain building operations was incidentally but not expressly for the benefit of lien claimants. In *Ferguson v. Marsh*, supra, it was held that an agreement for hauling and to pay for the gasoline and oil used was not for the benefit of persons furnishing the oil. In *Diggs v. Pac. Gas, etc., Co.*, supra, it was held that a contract to furnish water for irrigation was only incidentally for the benefit of the mortgagee of a growing crop.

[4, 5] Many of the cases where this rule is invoked involve a grantee of mortgaged property who had assumed and agreed to pay the amount of the mortgage. In such a case it was held that an instrument by which a grantee agreed to hold the mortgagor harmless against an existing mortgage on the property indicated an intention to assume the debt. *Hopkins v. Warner*, 109 Cal. 133, 41 P. 868. The rule laid down in section 1559 of the Civil Code is

based upon the equitable doctrine of subrogation on the general principle that a creditor is entitled to the benefit of anything held by his debtor, which the debtor has the right to use and enforce for the purpose of relieving himself from the payment of the debt. But where it is sought to hold a grantee on a promise to pay made to his grantor, it has usually been held that he is not liable unless the grantor was himself personally bound. *Biddel v. Brizzolara*, 64 Cal. 354, 30 P. 609; *Ward v. De Oca*, 120 Cal. 102, 52 P. 130, 131; *Andrews v. Robertson*, 177 Cal. 434, 170 P. 1129; *Case v. Egan*, 57 Cal. App. 453, 207 P. 388, 389. In *Ward v. De Oca*, supra, the court said:

"It is true that in certain cases a mortgagee in an action to foreclose his mortgage may recover a deficiency judgment directly against the grantee of the mortgagor; but that right 'springs from a well-known rule in equity that a creditor is entitled to the benefit of any obligations or securities given by his debtor to one who has become surety of such debtor for the payment of the debt.' *Hopkins v. Warner*, 109 Cal. [133], 136, 41 P. 468, and cases there cited. This principle, however, is applicable only to a case where the mortgagor and grantor is himself personally liable for the mortgage debt. The principle, with its limitation, is expressed in *Williams v. Naftzger*, 103 Cal. 438, 37 P. 411, as follows: 'An agreement on the part of the grantee to pay and discharge a mortgage debt upon the granted premises, for which his grantor is liable, renders the grantee liable therefor to the mortgagee.' See, also, *Biddel v. Brizzolara*, 64 Cal. 354, 30 P. 609; *Keller v. Ashford*, 133 U. S. 610, 10 S. Ct. 494 [33 L. Ed. 667]; *Willard v. Wood*, 135 U. S. 309, 10 S. Ct. 831 [34 L. Ed. 210]; *Second National Bank v. Grand Lodge*, 98 U. S. 123 [25 L. Ed. 75]. If the grantee of the mortgagor is not dealing with the latter upon the theory that the mortgagor is personally liable to the mortgagee for the mortgage debt, and the grantee does not put himself in a position which creates the relation between him and the mortgagor of principal and surety as to the debt, then a recital in the deed similar to those in the case at bar does not inure to the benefit of the mortgagee, and does not give him the right to a personal judgment against the grantee in a suit to foreclose. In such a case the grantee makes no promise to and enters into no contract with the mortgagee; and when the grantor, the mortgagor, is not person-

ally liable for the mortgage debt, the principle that 'a creditor is entitled to the benefit of any obligations or securities given by his debtor to one who has become surety of such debtor for the payment of the debt' does not apply. The subject is fully discussed in *Biddel v. Brizzolara*, 64 Cal. 354, 30 P. 609, and the authorities there cited, and the court there say: 'Even where a rule has been established that the purchaser is bound by his promise as a promise made for the benefit of the mortgagee, it is still necessary that the grantor should be personally liable upon the mortgage, in order to render the grantee liable upon his covenant to the holder of the mortgage assumed.'"

In *Case v. Egan*, supra, in considering the liability of the transferee of real property to the mortgagee, the court holds that under either sections 2854 or 1559 of the Civil Code it is essential that the grantor of the property be personally liable for the debt before his grantee can be held liable to pay the mortgage, and, after citing a number of cases, the court says:

"While some of these cases do not expressly decide the precise question presented here, we are of the opinion that it is the general doctrine of them all that where the grantor of real property is not personally liable for a mortgage debt, a stipulation in a deed from him to his grantee that said grantee shall pay, personally, the mortgage indebtedness, will not be regarded in law or equity as a contract intended for the benefit of a third person within the meaning of section 1559, Civil Code, so as to entitle such third person to enforce the same."

The appellant seems to contend that a different rule applies in the case of beneficiaries in such a trust as this, and relies particularly on the cases of *Davies v. Union Trust Co.*, 125 Cal. App. 593, 13 P. (2d) 961, and *Weidner v. Ziegler*, 218 Cal. 345, 23 P.(2d) 515. In the first of those cases the trust company merely held the legal title and the beneficiaries, whom the plaintiff sought to hold, were in possession and management of the property, and this court held that it sufficiently appeared from the facts therein that they had personally agreed to pay the debt which the plaintiff was trying to collect. The second case arose out of the same transaction and contains a similar holding.

[6] The appellant argues that one of the express purposes for entering into this

declaration of trust was the imposing of a personal liability upon the beneficiaries for the payment of any mortgage which might be made a lien upon the trust property, since it appears from the face of the declaration of trust that its express purposes were: (1) To hold title to the property; (2) to convey the same in the event of a sale; (3) to convey the same to a third person for the purpose of mortgaging the trust property; and (4) "to give additional security to the mortgagee of any mortgage against the trust property by creating an express promise on the part of the beneficiaries to pay the mortgage debt in the event the funds in the hands of the trustee, belonging to said trust, were insufficient to pay same when due." We think it clearly appears from the language used in the declaration of trust that the trustee was holding the property for the purposes of renting, selling, and conveying the same, and that the power to convey the property to a third person in connection with renewing the mortgage was merely incidental to those express purposes. And, further, that the promise to pay all debts, taxes, and expenses, including any mortgage, was not only incidental to the real purposes of the trust, but the same was intended to apply as between the beneficiaries and the trustee, was for the protection of the trustee, and, at most, was to relieve the trustee from any liability to make such payments. It is clear that the trustee did not desire to assume any such liability and that this provision was inserted in order to relieve the trustee of any blame in the event a mortgage was foreclosed, and to provide for funds in the event it was desired to keep the trust property as a going concern. So far as appears, the respondents were not personally liable on the mortgage then existing, and, the instrument seems to have been carefully drawn to the end that in any renewal of the mortgage the trustee should assume no personal liability. It not only does not clearly appear that the beneficiaries intended to assume such a personal liability, but the contract, as a whole, indicates that the promise of the beneficiaries to pay was intended to apply as between them and the trustee and that the same was not made, expressly or otherwise, for the benefit of the mortgagee.

We are unable to see how this appellant is in any better position than is the mortgagee in the ordinary case where liability is sought to be imposed upon the grantee in a deed on the claim that he had agreed

to pay the debt. The trustee, with whom the agreement to pay was made, was not personally bound; the beneficiaries were not grantees and were not in control of the management of the property, being only entitled to receive its ultimate proceeds, if any; and it seems clear that the intention of the parties was merely to protect the trustee, and that any benefit to the mortgagee was incidental and not directly intended. Under the rules laid down in the above cases and the principles on which those rules are based, we think it appears from the face of this instrument that the promise to pay, relied on, was not one made for the benefit of the appellant.

In those cases where such a right has been allowed, the agreement was with a party who was himself liable and was really for his benefit in getting the debt paid, although this has been so extended as to be considered as expressly made for the benefit of a third person, under the theory of a subrogation or of a suretyship, as being a right possessed by the debtor to which the creditor was entitled. But where such an agreement is made with a party who is not himself liable, and where it is for his benefit in the way of limiting his duty, but not in connection with getting the debt paid, it is difficult to see how, under existing rules, this can be considered as something done for the benefit of the creditor and thus changed into a direct obligation to him.

Serious abuses have arisen in connection with deficiency judgments and one can but wonder why a mortgage was ever taken, in many such cases, in view of the way the mortgagee later claims to have relied upon the personal security of the mortgagor after the value of the property has gone down. An attempt is here made to extend this personal liability a step farther than has ever been done before, but, in our opinion, this promise to pay was for the benefit of the trustee exclusively and should not be tortured into one for the benefit of a creditor who was perfectly willing to loan to the mortgagor only, although he knew that the property was to be immediately transferred to a trustee who would not become liable and who was to hold and manage the property for the benefit of others.

The judgment is affirmed.

We concur: MARKS, J.; HARDEN,
Justice pro tem.

8 Cal.App.2d 54

**MIRABITO v. SAN FRANCISCO DAIRY
CO. et al.**
Civ. 9745.

District Court of Appeal, First District,
Division 1, California.

June 26, 1935.

As Amended on Denial of Rehearing
July 26, 1935.

Hearing Denied by Supreme Court
Aug. 22, 1935.

1. Corporations ☞1

Where unity of interest and ownership exists, fiction of separate existence of allied corporations will be disregarded if fraud or injustice would otherwise result.

2. Corporations ☞1

Rule that fiction of separate existence of allied corporations will be disregarded where fraud or injustice would otherwise result is not limited to suits in equity.

3. Limitation of actions ☞121(2)

Where the facts warrant such action, courts may amend pleadings to correctly designate the parties actually involved, even though the statute of limitations has run in favor of the party substituted.

4. Constitutional law ☞309(1)

Limitation of actions ☞121(2)

Where corporate defendant claimed that person causing damage by truck was employed by absent corporation, and Supreme Court, on appeal, declared that corporate defendant was merely the alter ego of absent corporation and affirmed judgment against corporate defendant, and litigation was financed in part by absent corporation, trial court's order adding name of absent corporation as a defendant to judgment so affirmed, notwithstanding running of statute of limitations, held proper and not an invasion of absent corporation's constitutional rights (Const. U. S. Amend. 14).

5. Removal of causes ☞79(1)

Failure to make timely motion to remove controversy to federal court held waiver of right thereto.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Edmond Mirabito, by his guardian ad litem, Katherine Mirabito, against the San Francisco Dairy Company and others. From an order denying motion of the Dairy Delivery Company, Incorporated, to set aside an order adding the name of movant as a defend-

ant to judgment theretofore rendered for plaintiff, the Dairy Delivery Company, Incorporated, appeals.

Affirmed.

Pillsbury, Madison & Sutro, of San Francisco, for appellant.

Sol Silverman and George Olshausen, both of San Francisco, for respondent.

PER CURIAM.

Appeal by Dairy Delivery Company, Inc., upon a bill of exceptions from an order of the superior court of the state of California, in and for the city and county of San Francisco, refusing to set aside its order of September 29, 1934, whereby Dairy Delivery Company, Inc., was added to the judgment in the above-entitled matter after the same had become final upon appeal, and the judgment of the Supreme Court affirming the same had been made and entered.

On June 18, 1931, respondent herein commenced an action against defendants "San Francisco Dairy Company, a corporation, Ray Vogel, John Paille, First Doe, Second Doe and Third Doe" for personal injuries sustained by reason of the alleged negligence of defendants Ray Vogel and John Paille. The alleged liability of San Francisco Dairy Company, a California corporation, is based upon the doctrine of respondeat superior for the alleged negligence of defendant Vogel. The first amended complaint charges negligence in the following language: " * * * that at the said time [October 6, 1930] the defendant Ray Vogel, while employed by the defendant and San Francisco Dairy Company and acting within the scope of his employment, and the defendant, John Paille so carelessly and negligently drove, operated, managed and controlled their respective automobiles * * * thereby inflicting on the plaintiff great bodily injury * * * " Thereafter, on July 14, 1931, defendants San Francisco Dairy Company and Ray Vogel filed their joint answer denying that defendant Vogel was employed by San Francisco Dairy Company and denying that at the time of the accident he was acting in the course and scope of any employment by San Francisco Dairy Company. Defendant Vogel's negligence was likewise denied. Thereafter the cause came on regularly for trial before a jury, during which trial evidence was

offered to the effect that Vogel was employed by Dairy Delivery Company Inc., and not by San Francisco Dairy Company. On May 13, 1932, the jury returned its verdict against defendants Vogel and San Francisco Dairy Company and in favor of defendant John Paille. On the same day judgment was entered against said defendants. Dairy Delivery Company, Inc., was not mentioned in the verdict and no judgment was entered against it. Defendant San Francisco Dairy Company appealed from the judgment, upon the ground, among others, that the evidence was insufficient to support the judgment that it employed Vogel, and on July 31, 1934, the Supreme Court affirmed the judgment against defendants San Francisco Dairy Company and Vogel. *Mirabito v. San Francisco Dairy Co.*, 1 Cal. (2d) 400, 35 P.(2d) 513. Thereafter on September 29, 1934, after due notice thereof, respondent moved the trial court for an order adding to the judgment herein following the words "San Francisco Dairy Company, a corporation," the words "Dairy Delivery Company, Inc., a corporation," which motion was granted and was thereafter entered on October 1, 1934. On October 4, 1934, Dairy Delivery Company, Inc., appearing herein specially and for the first time, gave notice it would move the superior court for an order setting aside its order of September 29. On October 5, 1934, the superior court made its order denying said motion, from which order Dairy Delivery Company, Inc., prosecutes this appeal.

It appears without contradiction that San Francisco Dairy Company is a California corporation. In July, 1927, said corporation conveyed all of its assets and property to Dairy Dale Company, a corporation, which in turn, for a consideration, in May, 1929, conveyed all of the said assets and property to Dairy Delivery Company, Inc., a Delaware corporation. The purpose of adding the name of Dairy Delivery Company, Inc., to the judgment herein was to enable respondent to collect his judgment, as there are no assets of San Francisco Dairy Company.

Appellant herein contends that the order of September 29, 1934, whereby the words "Dairy Delivery Company, Inc., a corporation" were added to the judgment, is in excess of the superior court's jurisdiction; that it is void for want of jurisdiction of said court over the appellant herein; that

said order and the refusal of the superior court to set the same aside was a denial of due process of law to appellant and violative of the Fourteenth Amendment to the Constitution of the United States; and that the addition of the words "Dairy Delivery Company, Inc., a corporation" to the judgment is not in conformity with the verdict nor supported by the pleadings or issues. Respondent, on the other hand, contends that by virtue of the inherent authority of a court to make its records speak the truth, the superior court had jurisdiction to amend the judgment because the evidence herein clearly showed, and the Supreme Court found, that "appellant San Francisco Dairy Company was merely the alter ego of the Dairy Delivery Company"; hence that the amendment did not add a new defendant to the judgment, but merely set forth the correct name of the real defendant. That a court may at any time amend its judgment so that the latter will properly designate the real defendants is not open to question. *Levison v. Swan*, 33 Cal. 480, 484; *Boust v. Superior Court*, 162 Cal. 343, 345, 122 P. 956; *City and County of San Francisco v. Brown*, 153 Cal. 644, 96 P. 281.

As pointed out in the Supreme Court decision, supra, the evidence discloses that both the San Francisco Dairy Company and Dairy Delivery Company, Inc., have the same president, vice president and secretary, and occupy the same offices in San Francisco; that the San Francisco Dairy Company is a nonoperating corporation, and that the president of the corporations testified that the San Francisco Dairy Company was a part and subsidiary of the Dairy Delivery Company; that the name of the San Francisco Dairy Company was used as a business name, and the corporation kept as is for that purpose, recognition of the name of the San Francisco Dairy; and that he did not deny having made the statement, "all these companies were one." It further appears that one of the trucks involved in the accident in question bore signs on both sides thereof with the name "San Francisco Dairy Company" thereon, and was kept with many other trucks bearing similar signs at the place where both corporations maintained their offices. The truck was registered in the name of Dairy Delivery Company. At this place the names "San Francisco Dairy Company" and "Riverdale Dairy Company" appeared at

the entrance. From the foregoing, and "upon all the testimony taken together" the Supreme Court determined "the only logical conclusion to be drawn was that appellant San Francisco Dairy Company was merely the alter ego of the Dairy Delivery Company." *Mirabito v. San Francisco Dairy Co.*, supra, 1 Cal. (2d) 400, page 406, 35 P.(2d) 513, 516. It having been heretofore determined, in so far at least as liability for respondent's injury is concerned, that the San Francisco Dairy Company and Dairy Delivery Company are one and the same, can appellant justly complain of the order amending the judgment?

It clearly appears that appellant Dairy Delivery Company, Inc., was fully aware of all the proceedings herein, as well as of all the facts and circumstances surrounding the accident itself. Its secretary, as the secretary of San Francisco Dairy Company, was regularly served with copy of the complaint and summons. Thereafter he fully verified the joint answer of San Francisco Dairy Company and Vogel. In this answer the contributory negligence of respondent was alleged as an affirmative defense. Subsequently, the answer was amended by striking therefrom this defense. However, the verification of the answer, coupled with the earnest contention of Dairy Delivery Company, Inc., that Vogel was the employee of it and not of San Francisco Dairy Company, convinces that appellant herein had complete knowledge of all of the details of the accident. *Smith v. Pickwick Stages System*, 113 Cal. App. 118, 124, 297 P. 940. In addition it appears without contradiction that in litigating the action the balance of the assets of San Francisco Dairy Company, to the extent of about \$500, was expended for costs and attorneys' fees and that appellant Dairy Delivery Company, Inc., thereupon assumed and discharged the balance due for such costs and fees. Also, the attorneys for one corporation were the attorneys for the other and have at all times acted herein—as was their right—with the view of protecting appellant Dairy Delivery Company, Inc., upon the basis of the separate identity of the two corporations.

[1-4] Separate corporate identity, however, is not always available as a defense. Where there is such a unity of interest and ownership that the separateness of the corporations has ceased and the facts are such that an adherence to the fiction

of separate existence of the corporation would under the particular circumstances sanction a fraud or promote an injustice, separate identity will be disregarded. *Minifie v. Rowley*, 187 Cal. 481, 487, 202 P. 673. Thus it has been held that where a corporation was but the instrumentality through which an individual for convenience transacted his business, all of the authorities, not only equity, but the law itself, would hold such a corporation bound as the owner of the corporation might be bound, or conversely, hold the owner bound by acts which bound his corporation. *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 214, 155 P. 986; *Industrial Research Corp. v. General Motors Corp.* (D. C.) 29 F.(2d) 623, 625. In the case of *Clark v. Millsap*, 197 Cal. 765, 782, 242 P. 918, 925, the court states: "The doctrine of corporate entity is not so sacred that a court of equity will hesitate to look through form to the substance of the thing, and it may, in proper cases, ignore it to preserve the rights of persons imposed upon or circumvented by fraud. In such cases, corporate fiction is disregarded." That this rule is not limited to equity is clearly stated in *Llewellyn Iron Works v. Abbott Kinney Co.*, supra, and the cases there cited. The rule has long been declared in California that where the facts warrant, courts may amend pleadings to correctly designate the parties actually involved, even though the statute of limitations has run in favor of the party substituted. *Thompson v. Southern Pacific Company*, 180 Cal. 730, 183 P. 153; *Smith v. Pickwick Stages System*, supra; *Walsh v. Decoto*, 49 Cal. App. 737, 740, 194 P. 298. The basis of the rule is, of course, that the court having acquired jurisdiction of the person of the defendant and of the subject of the action, it necessarily possessed the power to correct a misnomer. In the cases last mentioned, it is true, no judgment had been rendered at the time of the amendment. Where, however, as here, the Supreme Court has stated the evidence is sufficient to warrant the conclusion that in effect the two corporations are identical; where, as here, the action was fully and fairly tried with at least the direct financial assistance of appellant; and where, as here, nothing appears in the record to show that Dairy Delivery Company could have produced a scintilla of evidence that would have in any way affected the results of the trial, there is no basis for a different rule.

The trial court, having acquired jurisdiction of San Francisco Dairy Company, must likewise be held to have acquired jurisdiction of its alter ego, the appellant herein. To hold otherwise upon the facts herein would be to deny respondent the fruits of fairly contested litigation, place a premium upon acts and conduct which have misled a litigant, and frustrate the very purpose of our jurisprudence.

The Supreme Court having heretofore declared San Francisco Dairy Company to be merely the alter ego of appellant, the cases of *Burlingame v. Justice's Court*, 1 Cal.(2d) 71, 33 P.(2d) 669; *Chapman v. Western Irrigation Co.*, 75 Kan. 765, 90 P. 284, and *Walters v. Dock Commission of City of Portland*, 126 Or. 487, 245 P. 1117, 266 P. 634, 270 P. 778, upon which appellant relies, may be readily distinguished from the instant case, and the principles therein declared are not applicable herein.

[5] In answer to appellant's contention that the order amending the judgment has denied it the right to move for a transfer of the action to the federal court, it need only be pointed out that appellant's failure to make a timely motion for that purpose must be deemed a waiver of its right thereto.

The order appealed from is affirmed.



7 Cal.App.2d 722

In re MOORE'S ESTATE.

McDOUGLE v. ALLNETT.

Civ. 5395.

District Court of Appeal, Third District,
California.

June 21, 1935.

Hearing Denied by Supreme Court
Aug. 19, 1935.

1. Adoption Ⓒ21

Descent and distribution Ⓒ1

Descent and adoption are matters of statutory regulation (Probate Code, § 92; Civ. Code, § 228).

2. Evidence Ⓒ80(1)

In proceeding concerning right of child adopted under law of Texas to participate in legacy left to adopting father, presumption, in absence of pleading and proof, was that

the law of Texas was the same as the law of California (Probate Code, § 92; Civ. Code, § 228).

3. Adoption Ⓒ21

Adopted child held a "lineal descendant" of adopting father and entitled to participate in legacy left adopting father who predeceased his brother, the testator (Probate Code, § 92; Civ. Code, § 228).

[Ed. Note.—For other definitions of "Lineal Descendants," see Words & Phrases.]

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

In the matter of the Estate of Edgar Moore, also known as Edgar A. Moore, deceased. Proceeding by Willie Moore McDougale against Mary Agalice Moore Allnett. From an adverse order, Willie Moore McDougale appeals.

Affirmed.

George Mordecai, of Madera, for appellant.

Mason A. Bailey, of Madera, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This appeal is taken from a probate order made in a proceeding to determine conflicting interests of two claimants to the estate of Edgar Moore, deceased. Both claim a legacy by virtue of being daughters of a deceased devisee of Edgar Moore. Appellant, the daughter, by birth, of the legatee, claims the whole legacy. Respondent claims one-half thereof by virtue of being a daughter by adoption of the legatee. The facts are not in dispute.

Edgar Moore died in California leaving a will, which was duly admitted to probate in the county of Madera, in which he left all of his property, consisting entirely of personal property, to his brother, W. C. Moore, of Texas. W. C. Moore predeceased the testator by some thirteen months, leaving the two claimants to the estate. One of them, the appellant, Willie Moore McDougale, is his natural legitimate daughter, and the other claimant is respondent, Mary Agalice Moore Allnett, who was adopted by W. C. Moore and his wife by virtue of proceedings taken in the county court of Jefferson county, Tex., in 1916. She bears no relationship

as may have been created by such adoption proceedings. As the legatee, W. C. Moore, died before the testator, the legacy would have elapsed except for section 92 of the Probate Code. This section provides: "If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute another in his place; except that when any estate is devised or bequeathed to any kindred of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, or is dead at the time the will is executed, but leaves lineal descendants surviving the testator, such descendants take the estate so given by the will in the same manner as the devisee or legatee would have done had he survived the testator."

The testator having bequeathed his estate to his brother, a kinsman, who died before the testator, leaving admittedly one lineal descendant,—that is, his natural daughter,—the bequest did not lapse. The legatee also left respondent, an adopted daughter, who claims, by virtue of the adoption, a portion of the estate. The trial court found in favor of the adopted daughter, and hence arose the issue for our determination.

[1] It requires no extensive citation of authorities to establish the principle that both the right of inheritance and the subject of adoption, with the rights and obligations springing therefrom, are purely matters of statutory regulation. In *re Estate of Jobson*, 164 Cal. 312, 128 P. 938, 43 L. R. A. (N. S.) 1062; In *re Estate of Darling*, 173 Cal. 221, 159 P. 606.

[2] It is also true that in the absence of any pleading or proof as to what the law of Texas may be in regard to the subject of adoption, and here there was no such pleading or proof, we must indulge in the presumption the law of that state as to adoption and the reciprocal rights created thereby are the same as in California. *Nesbit v. MacDonald*, 203 Cal. 219, 263 P. 1007.

[3] The law applicable to the present controversy and creating the status is found in section 228 of the Civil Code, providing that "after adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation." It will be recalled, too, that inasmuch as Edgar Moore died tes-

tate, respondent herein, the adopted daughter of the predeceased W. C. Moore, and legatee under the will, is not seeking to inherit by substitution or representation but as "child" of her adopted father. That such adopted child is to be considered as "issue" and a lineal descendant of the adopting parent, has been on several occasions recognized by our courts. In *re Estate of Mercer, Deceased*, 205 Cal. 506, 271 P. 1067, the court directly holds that the word "children" should not be restricted in scope and meaning. To exclude adopted children from its scope would be to say that they are not entitled, as to the adopting parent, to the full rights of natural children, which is contrary to the express provision of the statute. (Secs. 227, 228, Civ. Code.) The *Mercer Case* also cites with approval the case of *Warren v. Prescott*, 84 Me. 483, 24 A. 948, 17 L. R. A. 435, 30 Am. St. Rep. 370, which holds that a legally adopted child is the lineal descendant of its adopting parents within the meaning of the statutes of Maine, and as such may take a legacy given by will to one of its adopting parents who predeceased the adopted child. It also quotes, with approval, the following sentence expressed in *Markover v. Krauss*, 132 Ind. 294, 31 N. E. 1047, 1050, 17 L. R. A. 806, as follows: "As before suggested, we do not mean by this that the legislature has attempted to perform the impossible feat of doing the work of nature, and of creating a child of one's blood out of a stranger. We simply recognize and acknowledge the untrammelled power of the legislature to fix the legal status of the respective parties, and to control absolutely the manner in which property shall descend and be distributed." See, also, In *re Estate of Hill*, 179 Cal. 683, 178 P. 710.

In *Re Estate of Winchester*, 140 Cal. 468, 74 P. 10, the court held that the word "issue," as used in the Civil Code in reference to adoption, and the word "child," in a section of that Code pertaining to law of descent and succession, are used in the same sense, and there can be no ground of distinction between the case of an adopted child and a natural child.

In *Estate of Newman*, 75 Cal. 213, 16 P. 887, 888, 7 Am. St. Rep. 146, the court said: "The language is general and comprehensive. The use of the word 'issue,' in section 1386, does not limit the right of inheritance to natural children only. That

section prescribes the rule of inheritance. The word 'issue' is there used in the same sense as the words 'child' and 'children.' If the adopted child is, by virtue of its status, to be 'regarded and treated in all respects as the child of the person adopting,' and is to 'have all the rights, and be subject to all the duties, of the legal relation of parent and child,' the right to succeed to the estate of the deceased parent must be included."

In re Estate of Darling, supra, holds that, under subdivision 1 of section 1386 of the Civil Code, an adopted child is entitled to succeed to a share in the estate of the father by blood to which such father by blood would have succeeded had he survived his own father.

Respondent, being, therefore, a linal descendent of her adoptive parent, is entitled to share in one-half of the estate, and the order appealed from should be affirmed, and it is so ordered.

We concur: PLUMMER, J.; THOMPSON, J.



8 Cal.App.2d 149

DEAUX v. TRINIDAD BEAN & ELEVATOR
CO. et al.
Civ. 9791.

District Court of Appeal, Second District,
Division 2, California.
June 27, 1935.

Rehearing Denied July 26, 1935.

Hearing Denied by Supreme Court
Aug. 26, 1935.

1. Warehousemen $\S$ 25(7)

Under contracts acknowledging receipt of beans and providing for delivery, to order of persons named therein, of identical beans received or at receipt holders' option, beans of equal grade and of same variety in public warehouse at California shipping point upon ten days' notice and for loan by warehouseman, title did not pass to warehouseman, and his shipment of beans outside of state without knowledge or consent of contract holders amounted to a conversion.

2. Warehousemen $\S$ 34(2)

Where warehouseman converted beans prior to dates on which loans made thereon were due, tender of amounts loaned held not essential to commencement of action by hold-

ers of warehouse receipts against warehouseman (Civ. Code, $\S$ 1515).

3. Warehousemen $\S$ 34(8)

Warehouseman guilty of conversion held liable to holders of warehouse receipts with interest from date of conversion (Civ. Code, $\S$ 3336).

4. Judgment $\S$ 253(2)

Where interest is allowable, judgment therefor may be rendered, though not prayed for in complaint (Civ. Code, $\S$ 3336).

5. Warehousemen $\S$ 25(7)

Where warehouseman was bound to hold beans subject to orders of receipt holders, but, instead, shipped beans without knowledge or consent of such holders, that warehouseman had in his possession same quantity of beans, of equal grade and of like variety, held no defense to action by receipt holders for conversion.

6. Pleading $\S$ 236(4)

Allowance of an amendment to pleading after decision rests in trial court's discretion.

7. Warehousemen $\S$ 25(8)

Where warehouse receipts required warehouseman to hold beans subject to orders of receipt holders, but warehouseman converted the beans, whether warehouseman was engaged in the business of storing agricultural products for a profit held immaterial to warehouseman's liability to receipt holders for conversion.

8. Appeal and error $\S$ 1050(1)

Where warehouseman's agent had testified to conversations with owners of beans before execution of storage receipts, admission of like evidence by receipt holders in action for warehouseman's conversion of beans stored held not error, since receipt holders were entitled to give their version of conversation, and if receipts were ambiguous, the evidence was admissible to explain it, but if no ambiguity existed, the evidence was harmless.

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Action by P. J. Deaux against the Trinidad Bean & Elevator Company and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

Hearing denied by Supreme Court; PRESTON, J., dissenting.

Chotiner & Chotiner and Alfred Gitelson, all of Los Angeles, for appellants.

W. M. Greathouse and C. E. McDowell, both of Los Angeles, for respondent.

WILSON, Justice pro tem.

This action is upon several assigned claims growing out of similar transactions between respondent's respective assignors, who were bean growers, and the appellants. The facts are the same in each transaction. The appellant Allard was the agent of the appellant Trinidad Company, hereinafter referred to as the company, and as such presented a plan to the growers whereby they delivered beans to the company in 1930, and received a loan thereon. Storage receipts were issued by the company, headed "Storage Receipt and Agreement," the pertinent language of which is as follows: "Received the following described beans to be delivered to the order of —, in warehouse California, subject to all the terms and conditions herein contained, upon return of this receipt properly endorsed. * * * Said beans to be kept fully insured under this receipt against fire without liability for loss or damage from other causes beyond control. It is hereby specifically agreed that delivery will be made to the holder of this receipt upon its proper endorsement and surrender, beans of equal grade and of the same variety in public warehouse at a California shipping point, at the election of the holder" upon ten days' notice. The receipt stated that no charge for storage or insurance would be made prior to June 1, 1931, "unless the above described beans are sold to other than" the company, in which event a stated charge would be made. When the beans were received by the company, they were stored in warehouses in its name. Subsequently, in some cases immediately upon receipt of the beans, the company shipped the same to various points outside California without the knowledge or consent of the growers. This action is to recover the value of the beans.

[1-4] The receipt can be given but one construction, to wit, that the beans stored were to be delivered to the order of the respective growers. Each grower retained title to his beans. The delivery to him of other beans "of equal grade and of the same variety," was an election to be exercised by him, and, unless exercised, he was entitled to receive the identical beans which he had delivered to appellants. Cases cited by appellants in which receipts expressly provided that commodities of equal test, or of equal value, or of equal quality might be returned are of no assistance. This contract did not pass title to the company. The latter was not entitled to treat the property

as its own, but was bound to return the same upon demand and upon payment of all charges due under the contract. The exercise by the appellants of dominion over the beans, in defiance of the rights of the growers, amounted to a conversion. *Glantz v. Freedman*, 100 Cal. App. 611, 280 P. 704; *Lowe v. Ozmun*, 3 Cal. App. 387, 86 P. 729; *Mier v. So. Cal. Ice Co.*, 56 Cal. App. 512, 206 P. 83. The conversion of the beans having taken place prior to the date on which repayment of the loans was due, it was not necessary that tender of the amounts loaned should antecede the commencement of this action. Civ. Code, § 1515; *Lowe v. Ozmun*, supra. The growers were entitled to interest from the date of conversion. Civ. Code, § 3336; *Sherman v. Finch*, 71 Cal. 68, 11 P. 847. When interest is allowable, judgment may be rendered therefor, even though not prayed for in the complaint. *Perry v. Magneson*, 207 Cal. 617, 279 P. 650.

[5] The appellants introduced evidence, over respondent's objection, that at all times prior to the commencement of the action they had in their possession beans in the same quantity, of equal grade, and of like variety as those received from the respective growers. This evidence constituted no defense, and the trial court did not err in refusing leave to amend the answer by adding allegations based thereon.

[6,7] After the judgment was entered the appellants asked, and the court refused, leave to amend their answer so as to deny that the company was engaged in the business of storing agricultural products for profit. The allowance of an amendment to a pleading after decision is in the discretion of the court. Furthermore, the receipts, which were the only agreements between the growers and the company, fixed the rights and liabilities of the parties, and whether the company was engaged in that or some other business is immaterial. This disposes of the asserted error in failing to make a finding as to whether the appellant company was a warehouseman.

[8] There was no error in the admission of evidence of the growers as to conversations had by them with Allard preceding the delivery of the beans and the execution of the storage receipts. If the contract could be considered as ambiguous, the evidence was admissible to explain it, and if no ambiguity existed, the evidence was harmless. *Provident Gold Mining Co. v. Manhattan Securities Co.*, 168 Cal. 304, 142 P. 884. Al-

lard had given evidence of the said conversations, consequently the growers were entitled to testify to the same.

The form of complaint used in this action was approved in *Glantz v. Freedman*, supra, and the demurrer thereto was rightly overruled. The findings are amply sustained by the evidence.

The judgment is affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.



8 Cal.App.2d 328

HOLM et al. v. DAVIS.
Civ. 9365.

District Court of Appeal, Second District,
Division 1, California.
July 5, 1935.

1. Courts ⇨472(7)

Justice's court, class A, has original and exclusive jurisdiction of cases at law in which value of property in controversy amounts to \$1,000 or less (Code Civ. Proc. § 112, as amended by St. 1933, p. 1814).

2. Courts ⇨472(7)

Justice's court, class A, had original and exclusive jurisdiction of action for possession of personal property where complaint alleged that value of property was \$750 and that value of use of property from time of detention was \$400 (Code Civ. Proc. § 112, as amended by St. 1933, p. 1814).

3. Justices of the peace ⇨44(8)

Recovery of attorney's fee provided for in contract is special damage and becomes part of demand to be considered in determination of whether entire demand is within jurisdictional amount (Code Civ. Proc. § 112, as amended by St. 1933, p. 1814).

4. Replevin ⇨80

Generally, there is no right to recover attorney's fees in replevin action (Code Civ. Proc. § 1021).

5. Courts ⇨472(7)

Justice's court, class A, had exclusive jurisdiction of possessory action for personal property where complaint alleged that value of property was \$750, and that plaintiff was entitled to reasonable attorney's fee under contract which provided that defendant would pay 10 per cent. as attorney's fee in

case suit was instituted to collect contract price of property (Code Civ. Proc. § 112, as amended by St. 1933, p. 1814).

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by Louisa Holm and another against F. E. Davis. Judgment for plaintiffs, and defendant appeals.

Reversed.

H. L. Duckett, Jr., and F. E. Davis, both of Hollywood, for appellant.

Walter F. Haas and Stanley F. Maurseth, both of Los Angeles (Gerald E. Kerin, of Los Angeles, of counsel), for respondents.

ROTH, Justice pro tem.

In this action instituted in the superior court of this state in and for the county of Santa Barbara, respondents as plaintiffs sued appellant for the possession of a silver-mounted and trimmed saddle, bridle, collar, reins, romal, and tie-down which had previously been sold to appellant by respondents' assignor on a conditional sales contract (hereinafter referred to as contract) for an agreed price of \$850; appellant having defaulted in payment in violation of the terms of the contract. The complaint alleges the reasonable value of the property to be \$750; that the reasonable value of the use from the alleged date of unlawful detention is \$40 per month for a period of ten months, or a total of \$400, and alleges further that plaintiffs are entitled to a reasonable attorney's fee in accordance with the purported provision of the contract providing therefor.

[1] Appellant first urges that the cause of action was one of which a justice's court, class A, had original and exclusive jurisdiction. Section 112 of the Code of Civil Procedure (St. 1933, p. 1814), as it was at the time the action was brought and as it is now, substantially, so far as it is applicable to the facts here, provided and provides that "justices' courts of Class A shall have original jurisdiction: (a) In all cases at law in which * * * the value of the property in controversy, amounts to one thousand dollars or less. * * *" It is settled that in such cases the jurisdiction of such justice court would be original and exclusive. *Shipp v. Su-*

perior Court, 209 Cal. 671, 289 P. 825; *Larson v. Du Bain*, 135 Cal. App. 433, 27 P.(2d) 393.

[2] Since the reasonable value of the property is alleged to be the sum of \$750, the remaining question is to determine what effect, if any, the allegations of the complaint with respect to the value of the use of the property in controversy has. This has been already determined, and it has been held that such allegations have no effect. *Connely v. Superior Court*, 34 Cal. App. 773, 774, 169 P. 355, where the court says: "In an action of claim and delivery the recovery of the property itself is the main demand—damages are incidental. In the case of *Astell v. Philippi*, 55 Cal. 265, our Supreme Court said: 'It would seem, in like manner, that, when the standard of jurisdiction is "the value of the property," the recovery of which is the main object of the proceeding, the incidental damages for the detention are not limited.' Respondent argues that this decision was rendered under a different state of the law; that the Constitution of 1849 was then in force, which did not contain provisions similar to that in section 11, article 6, referred to above. As a matter of fact, the Constitution of 1849 did contain, in the amendments ratified in 1862, the same provision in almost the identical terms. The case of *Astell v. Philippi* is in point."

[3-5] The complaint, as suggested, alleged that the contract in question authorized the employment of an attorney in the event action were instituted, and alleged further that plaintiff is entitled to recover "a reasonable attorney's fee and in an amount to be fixed by the court." It has been held that when a contract provides for an attorney's fee the recovery thereof is in the nature of special damage and becomes part of the demand, and that such special damage, added to the original demand, must be considered in determining whether or not the entire demand is within or in excess of the jurisdictional amount. *De Jarnatt v. Marquez*, 127 Cal. 558, 60 P. 45, 78 Am. St. Rep. 90; *Taylor v. Datig*, 123 Cal. App. (Supp.)

782, 11 P.(2d) 98; *Larson v. Du Bain*, 135 Cal. App. 433, 27 P.(2d) 393. In the instant case the reasonable value of the personal property, possession of which is demanded, is alleged to be \$750. No specific amount of attorney's fees is alleged as reasonable, nor is any specific amount prayed for, although the court did allow \$300. Aside from the fact that the allegations with reference to attorney's fees may be defective for the purpose of giving jurisdiction because of a failure to allege a specific sum as reasonable, it conclusively appears from the face of the complaint that the allegation cannot be considered for such purpose. Generally, there is no right to recover attorney's fees in a replevin action. Code Civ. Proc. § 1021; *W. R. Bradshaw & Co. v. Eggers*, 27 Cal. App. 132, 134, 148 P. 961. The right to attorney's fees, therefore, must obviously depend upon a contractual provision. The contract is set forth in the complaint in *hæc verba*. It provides: "And in case a suit * * * is instituted to collect the *money*, * * * I promise to pay *ten per cent* * * * as attorney's fees, * * *" (Italics ours.) The action in question is not a suit for the *money* due under the contract. It is a possessory action for the personal property covered by the contract and specifically described in the complaint. The contract made no provision for attorney's fees to cover such an action. Furthermore, assuming *arguendo* that the attorney's fee clause could be made applicable, the covenant is for "ten per cent." The reasonable value alleged being \$750, the attorney's fee allowed could not be in excess of \$75. Thus the greatest demand which can be set forth under the allegations of the complaint is \$750 plus \$75, or \$825.

Since the judgment must be reversed for the reason that the superior court had no jurisdiction to entertain the action, it is unnecessary to pass upon other questions raised.

The judgment is reversed.

We concur: HOUSER, Acting P. J.; YORK, J.

8 Cal.App.2d 166

**MELIKIAN v. INDEPENDENT PAPER
STOCK CO. et al.**
Civ. 10260.District Court of Appeal, Second District,
Division 2, California.

June 28, 1935.

Rehearing Denied July 24, 1935.

Hearing Denied by Supreme Court
Aug. 26, 1935.**1. Automobiles ⇨244(54)**

In action by truck driver for injuries sustained when another truck backed into him crushing him against his own truck, evidence held to sustain finding that truck driver was not contributorily negligent because of position on highway in which he stopped truck to close truck's end gates (St. 1931, p. 2129, § 138).

2. Appeal and error ⇨1001(1)

Jury's determination of facts, supported by substantial evidence, is conclusive on District Court of Appeal.

3. Appeal and error ⇨1069(2)

That jury was permitted to take instructions with them to jury room, while not authorized by law, was at most an irregularity insufficient to warrant reversal.

4. Evidence ⇨151(1)

In action by driver of rubbish truck for injuries sustained when, stopping truck to close truck's end gates, another truck backed into him, refusal to strike out driver's testimony that "It is against the city ordinance" having reference to his preceding statement that he had stopped to put gates on so that newspapers would not fall on ground held not error, since statement was competent, not as proof of city ordinance, but as proof of belief under which driver had acted in stopping truck.

5. Appeal and error ⇨1060(1)

Alleged misconduct of counsel in argument to jury in stating that opposing counsel in reading to jury from a law book resorted "to subterfuge and that is bunkum and pettifoggery" held not reversible error, even if the reading from the book was wholly proper.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by Egish Melikian against the Independent Paper Stock Company and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Jennings & Belcher, of Los Angeles (Louis E. Kearney, of Los Angeles, of counsel), for appellants.

E. B. Drake, of Los Angeles, for respondent.

FRICKE, Justice pro tem.

[1,2] Respondent, engaged in the rubbish business, after driving his truck from the premises of appellant company, proceeded about 35 feet west and stopped for the purpose of closing the end gates. While respondent was at the rear of his truck, a truck of appellant company backed up, going from east to west, a distance of 72 feet, and the rear of said truck struck respondent, forcing him against his own truck and causing injuries to him. The company's truck was operated by appellant Peach, its employee, and with its consent. Appellants do not contend that the verdict is excessive or that the evidence was insufficient to show negligence on their part, but do contend that respondent was negligent as a matter of law, because, as shown by some of the evidence, he stopped his truck on the roadway side of a truck parked at the edge of the highway, and at a point where his truck as well as the truck parked at the curb were partially in front of one of the entrances to a garage.

In connection with this contention, appellants claim error in the giving and refusal of instructions to the jury. The contention is based on appellants' choice of the conflicting testimony as to the position of the truck, and on the provisions of section 138 of the California Vehicle Act (St. 1923, p. 562, § 138, as amended by St. 1931, p. 2129) which make it unlawful to stop, stand, or park any vehicle in front of a public or private driveway, or on the roadway side of any vehicle stopped or parked at the edge or curb of a highway, except under certain conditions not present in this case, and upon article V, section 25, of Ordinance No. 50115, New Series, of the city of Los Angeles, as amended by Ordinance No. 72109, which prohibits, with like exceptions, the standing of any vehicle where it will obstruct the use of any driveway.

There is a conflict in the evidence as to the position of respondent's truck. The father of appellant Peach testified that at the time of the accident he was working

in front of the garage, and ran over to respondent and helped him up from the railroad track running north and south and located east of the garage. He also testified that the rear end of respondent's truck was on the railroad track, and marked the position of the truck on the diagram used at the trial. This evidence, if believed by the jury—and in view of the verdict we may assume they did believe it—entirely eliminates the question of a violation of statute and ordinance. The jury by its verdict acquitted respondent of contributory negligence, and their determination of the facts, supported by substantial evidence, is conclusive here.

We have examined the instructions, those given and refused, as to which appellants assign error, and also those not printed in the briefs. Taking the instructions as a whole, we find therein no ground for reversal. This is particularly true in view of the fact that it is difficult to see how the jury could justifiably have arrived at any conclusion other than that expressed by their verdict.

[3] The fact that the jury was permitted to take the instructions with them to the jury room, while not authorized by law, was at most an irregularity which under all the circumstances of the case will not warrant a reversal. See *Fererira v. Silvey*, 38 Cal. App. 346, 176 P. 371.

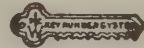
[4] Error is assigned because the court denied a motion to strike out the last sentence of respondent's answer: "I stopped there to put the gates on, so the newspapers would not fall on the ground. It is against the city ordinance." The answer was competent, not as proof of a city ordinance, but of the fact that, believing it to be against a city ordinance to allow newspapers to fall on the street, respondent stopped his truck and walked back to put the gates on the end of his truck to keep the papers therein from falling out.

[5] Appellants claim error in the refusal of the court to instruct the jury to disregard certain remarks of respondent's counsel which were assigned as misconduct. In making this point counsel refer to the reporter's transcript, which is not before us, and do not refer to the place where the incident may be found in the record here. The bill of exceptions shows that during argument to the jury respondent's counsel stated: "Now, during counsel's

argument to you he resorted to a subterfuge in reading to you the law from a law book * * * and I say that counsel did resort to subterfuge and that is bunkum and pettifogging." The bill of exceptions fails to set forth what was said by appellants' counsel in his reading, other than that he "read from the Motor Vehicle Act," and we are unable to determine whether what was said in the reading was fairly subject to the remarks of respondent's counsel or not. Even if we assume that the reading from the vehicle act was wholly proper, the misconduct of counsel referred to would be wholly insufficient to warrant a reversal.

Judgment affirmed.

We concur: CRAIL, J.; STEPHENS, P. J.



**DR. MILES CALIFORNIA CO. v. SONTAG
CHAIN STORES CO., Limited.***

Clv. 5332.

District Court of Appeal, Third District,
California.

June 29, 1935.

Hearing Granted by Supreme Court
Aug. 26, 1935.

1. Torts ☞4

Act lawful in itself does not become unlawful because of malicious or wrongful motive.

2. Trade-marks and trade-names and unfair competition ☞92

Complaint alleging that defendant retail dealer, who was denied contract to sell plaintiff's goods, obtained them and sold them at rates below those prescribed for retail dealers who had contracts to sell plaintiff's goods, and that defendant hired persons to inquire concerning plaintiff's goods at drug stores and state that they were cheaper at defendant's store, and that defendant advertised its intention to sell plaintiff's goods at cut rate and that many distributors were therefore canceling their contracts with plaintiff, held demurrable, since facts were not pleaded charging defendant with any unlawful acts.

3. Injunction ☞117

In suit for injunction to prevent defendant from selling plaintiff's products at less than established prices, allegations charging defendant with "an unlawful scheme and

☞For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 64 P.2d 726.

plan and maliciously carrying out of said plan" held demurrable as pleading conclusions.

4. Injunction ⇨12

Injunction lies only to prevent threatened injury and has no application to wrongs which have been completed and for which the injured party may obtain redress at law.

5. Trade-marks and trade-names and unfair competition ⇨97

In suit to restrain defendant from sale, offering for sale, or advertising for sale plaintiff's goods at less than established prices, allegations that defendant represented to wholesale distributor that he had retail contract and was entitled to purchase plaintiff's commodities, and that defendant thus obtained plaintiff's commodities held not to justify injunction, since, even if defendant's statements constituted fraud, the alleged wrong had been completed and there was no allegation of any threat to repeat the acts.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Suit by Dr. Miles California Company against Sontag Chain Stores Company, Limited. From a judgment for defendant, plaintiff appeals.

Affirmed.

Newlin & Ashburn, of Los Angeles, and Edward S. Rogers, of Chicago, Ill., for appellant.

Loeb, Walker & Loeb, of Los Angeles, for respondent.

RANKIN, Justice pro tem., delivered the opinion of the court.

Plaintiff below prosecutes this appeal from a judgment of dismissal of the action entered after a general and special demurrer to the amended complaint had been sustained with leave to amend, and plaintiff had elected to stand on the said amended complaint.

The facts material to a discussion of the question involved, to wit, Does the amended complaint state a cause of action, briefly stated, are as follows:

Prior to October 20, 1931, Dr. Miles Medical Company, an Indiana corporation, was sole owner of certain trade-marks used in connection with the manufacture, sale, and distribution of ten certain medicinal preparations and of the business and good will established in the distribution and sale thereof in the state of California. Said

owner did sell the same to wholesale druggists in said state. Some of said trade-marks, although not specifically designated in the amended complaint, were registered with the secretary of the state of California. On or about said date the owner sold and assigned to plaintiff the business in California, together with the good will pertaining thereto and exclusive rights in said state.

In the amended complaint in paragraphs 6 and 7 many facts and conclusions relating to the practice of "cut rate drug stores" and the resulting enactment of the Fair Trade Act (St. 1931, p. 583) are set forth. It is also alleged that plaintiff for its protection thereunder adopted a system of business contracts between itself and its distributors, correct copies of which are printed as Exhibits A and B in plaintiff's reply brief. The material feature of these contracts is the agreement therein that said preparations shall be sold by the distributors at specified prices. All wholesale druggists in the state of California and over 99 per cent. of the retail druggists therein have executed the said contracts and now observe and conform to the terms thereof. Defendant, prior to plaintiff's inauguration of its contract system, was a retail dealer in plaintiff's goods and did cut prices thereon and refused to execute said retail distributor's contract. Thereafter, plaintiff refused to sell its goods to defendant.

The gist of plaintiff's first cause of action is stated as follows:

"That upon plaintiff declining to sell its commodities to defendant except as aforesaid, defendant * * * conceived a wrongful and unlawful plan and scheme of harming, injuring and destroying plaintiff's said business and good will in the state of California by disrupting said system of lawful contracts existing between said plaintiff on the one hand and its wholesale and retail distributors on the other, and by unlawfully and unduly influencing, inducing, coercing and causing said wholesale and retail distributors to violate and cancel said contracts. That defendant has proceeded and is now proceeding to carry out said unlawful and wrongful scheme and plan in the manner more particularly hereinafter set out and in so doing has been and now is acting maliciously and without legal justification therefor.

"That in pursuance and as a part of said unlawful and wrongful plan and scheme, defendant has procured and now procures commodities bearing plaintiff's trade-marks, brands and names, and has continuously sold and is now selling said commodities at prices less than the minimum resale price prescribed in said contract. * * *

"That in further pursuance and as a part of said unlawful and wrongful scheme and plan * * * defendant has employed and is now employing persons to impersonate consumers and has caused them to visit various retail druggists in the City of Los Angeles who have executed with plaintiff the contracts hereinbefore referred to. That such persons, pursuant to instructions of defendant, call at such drug stores and inquire the price of plaintiff's goods, and when told the price thereof which in each instance has been the minimum price prescribed in said Exhibit B, such persons state in substance, pursuant to defendant's instructions, that such goods are being sold at defendant's stores at a lower price, and thereupon leave the stores of said retail dealers without making any purchases. That such pretended purchasers are not in good faith desirous of buying the plaintiff's goods, but are sent by defendant to the stores of retail distributors under contract with plaintiff for the sole and only purpose of creating dissatisfaction among retailers who have signed plaintiff's contract, and to unlawfully and unduly influence and induce them to cancel or violate such contracts and to obstruct and destroy plaintiff's lawful system and method of doing business.

"That in further pursuance of said unlawful and wrongful plan and scheme defendant has been and now is engaged in informing retail dealers under contract with plaintiff, as well as the public generally, by widespread advertising in newspapers and elsewhere, and by divers other means, of his intention to sell plaintiff's goods at the cut prices aforesaid.

"* * * That a large number of plaintiff's most important distributors are being unlawfully and unduly influenced, induced and coerced by the acts of defendant complained of herein into canceling their existing contracts with plaintiff, and have informed and now inform plaintiff that because of the acts of defendant complained of herein they will be compelled to cancel said contracts with plaintiff."

In a second cause of action plaintiff alleges: "That in furtherance and as a part of said unlawful and wrongful plan and scheme defendant has on one or more occasions since October, 1931, represented to a wholesale distributor known by defendant to be under contract with plaintiff, as aforesaid, that defendant was entitled to purchase plaintiff's commodities from such wholesale dealer by virtue of having entered into a retail contract with plaintiff. That said representations when made were untrue and were known by defendant to be untrue, and were made by defendant for the purpose of inducing said wholesale distributor to sell to defendant various of plaintiff's commodities in violation of said wholesale distributor's contract with plaintiff. That said wholesale distributor believed in and relied upon said false representations, and, induced thereby and relying thereon, at various times sold and delivered various of plaintiff's commodities to defendant to the damage of plaintiff as hereinafter shown. That upon another occasion defendant and plaintiff entered into an agreement wherein and whereby certain of plaintiff's commodities theretofore delivered by plaintiff to defendant were to be returned to plaintiff upon defendant's failure to sign a retailer's distributing contract in the form of Exhibit B. That upon the failure of defendant to execute said contract, defendant returned some of plaintiff's commodities, stating to plaintiff that said returned commodities were all that remained of those theretofore delivered by plaintiff remaining unsold and that defendant retained none of said commodities in its possession. That said representations were false at the time they were made and were known by defendant to be false."

The prayer is for an injunction restraining defendant from selling, offering for sale, or advertising for sale, any of plaintiff's commodities.

Counsel for appellant discuss at some length and cite authorities in support of their contention that appellant's contracts are valid under the provisions of the Fair Trade Act, and arrive at the conclusion that the contracts, such as are involved in the case at bar, were valid even prior to the passage of the Fair Trade Act. We do not deem it necessary to discuss that question, nor do we here decide the constitutionality of said act. Neither do we find

it necessary to decide the question whether or not appellant has a monopoly of the described products in the state of California.

The general demurrer presents two questions: First, whether the purposes of the defendant were unlawful; second, if such purposes were lawful, whether they were sought to be accomplished by unlawful means.

[1] In deciding whether the acts and conduct of defendant as alleged are or are not actionable, it is not necessary to discuss or analyze the numerous authorities cited, many of which are from other jurisdictions, for the reason that the rules of law applicable have been carefully considered and established by the decisions of the California courts. In the case of *Boyson v. Thorn*, 98 Cal. 578, 33 P. 492, 21 L. R. A. 233, the Supreme Court adopted the rule that an act lawful in itself does not become unlawful because of a malicious or wrongful motive. We cannot agree with appellant in its assertion that *Boyson v. Thorn*, is the only case of the hundreds that have passed upon the doctrine that lends itself to the rule therein stated, or that if it stands as the law of this state it stands alone. In view of the numerous expressions of the courts of this state upon the subject, we cannot hold with the appellant to the effect that the *Boyson* Case is without support in subsequently decided cases. The doctrine of the *Boyson* Case is supported by the following: *Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 P. 1027; *People v. Schmitz*, 7 Cal. App. 330, 94 P. 407, 419, 15 L. R. A. (N. S.) 717; *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 P. 324; *Union Labor Hospital v. Vance Lumber Co.*, 158 Cal. 551, 112 P. 886, 33 L. R. A. (N. S.) 1034; *American Automobile Association v. Automobile Owners' Association*, 216 Cal. 125, 13 P.(2d) 707, 83 A. L. R. 699; *Katz v. Kapper* (Cal. App.) 44 P.(2d) 1060.

[2] It very clearly appears from the allegations of the amended complaint that the purpose of the defendant was to secure trade for itself by selling such commodities at prices lower than those fixed by the plaintiff in its contracts. The means resorted to by defendant to carry out its purpose as alleged consisted of its procuring said commodities and selling at prices less than the price prescribed in

said contracts; employing persons to call at drug stores, inquire the price and state that such goods are sold at defendant's store at a lower price; and by widespread advertising in newspapers and elsewhere its intention to sell plaintiff's goods at cut prices. The defendant is not charged in any of these allegations with any effort to deprive plaintiff of its business, except by transferring the same to itself. The defendant did, or threatened to do, nothing other than to gain business advantage in the sale of said products. There is no allegation of any act or threat of defendant which caused the cancellation of any contract made by plaintiff. The allegations of the amended complaint charging the defendant with an unlawful scheme and plan, and maliciously carrying out said plan, are simply statements of conclusions of the pleader. The facts stated wholly fail to show any unlawful acts of defendant.

[3-5] Plaintiff's second cause of action differs from the first only in the allegations relating to the means by which defendant sought to accomplish its purpose. The means alleged consist of representations to a wholesale distributor that defendant was entitled to purchase plaintiff's commodities by virtue of having entered into a retail contract with plaintiff, which representations were untrue, and defendant's failure to carry out an agreement between plaintiff and defendant whereby certain of plaintiff's commodities in the possession of defendant were to be returned to plaintiff. As to these matters, even if it could be held that defendant's statements constituted fraud as alleged, the matters all occurred before this action was commenced, and there is no allegation of any threat to repeat these acts. An injunction lies only to prevent threatened injury, and has no application to wrongs which have been completed and for which the injured party may obtain redress by an action at law. There is, therefore, no basis for enjoining such acts as alleged in the second cause of action. *Parkinson Co. v. Building Trades Council*, supra; *Blake v. City of Eureka*, 201 Cal. 643, 258 P. 945; *John D. Park & Sons Co. v. Hartman* (C. C. A.) 153 F. 24, 12 L. R. A. (N. S.) 135; *Ford Motor Co. v. International Automobile League* (D. C.) 209 F. 235.

We therefore conclude that the amended complaint fails to allege any unlawful pur-

pose or act of defendant, and that no facts are alleged sufficient to support the proposition that the purposes of the defendant were sought to be accomplished by any unlawful means, and it is equally clear that no cause of action in support of an injunction is shown by the alleged second cause of action.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; THOMPSON, J.



8 Cal.App.2d 251

PEOPLE v. CALKINS.

Cr. 182.

District Court of Appeal, Fourth District, California.

July 1, 1935.

1. Criminal law ☞1023(3, 8)

Orders which denied motion to set aside information, denied plea of former jeopardy and acquittal, and permitted association of counsel for prosecution as special counsel, *held* not appealable (Pen. Code, § 1237).

2. Libel and slander ☞145

Newspaper article which accused sheriff, who had been defeated for re-election and was either out of office or serving unexpired portion of term, of commission of crimes and acts of misfeasance and malfeasance in office, *held* to constitute unwarranted libel, unless charges were true.

3. Indictment and Information ☞137(5)

Motion to set aside information on grounds that defendant was not in legal custody because he was never served with warrant issued for his arrest, and that justice of the peace before whom complaint was filed refused to disqualify himself after defendant claimed bias and prejudice, *held* properly denied (Pen. Code, § 995).

4. Criminal law ☞227

Preliminary examination in libel prosecution need not be held in township where offense charged was committed.

5. Criminal law ☞756

Inclusion of brief and fair definition of issues of fact presented by evidence under law applicable to case with instructions to ju-

ry *held* not error where trial judge was careful to advise jury that they were sole judges of facts, and that what he said was merely advisory and not binding on them (Const. art. 6, § 19, as amended in 1934).

6. Criminal law ☞640

Permission of association of member of bar with district attorney in libel prosecution *held* not error.

7. Criminal law ☞829(4)

In libel prosecution, instruction that where defendant seeks to justify by reason of truth of imputation, it is only necessary for him to raise reasonable doubt in minds of jury as to truth of charge, *held* properly refused, when subject-matter was covered by another instruction.

8. Criminal law ☞633(2)

Where defendant had made no objection to form of information which contained libelous article in full prior to reading of information to jury when he objected to reading of libelous article in full because it contained disparaging remarks concerning persons other than complaining witness, but defendant refused to consent to omission of reading of parts of information objected to and to waive possible error arising therefrom, reading of information in full to jury *held* not prejudicial error (Pen. Code, § 1093).

9. Criminal law ☞295

Record of previous libel prosecution based upon publication of article at different time and in different language than that for which defendant was being prosecuted, introduced by defendant in support of plea of former jeopardy and acquittal, *held* properly stricken.

10. Criminal law ☞195(1)

Acquittal in prosecution for publication of one of two allegedly libelous articles *held* not bar to prosecution for publication of other.

11. Criminal law ☞1186(4)

Where guilt of defendant in libel prosecution was conclusively established by evidence, conviction *held* not reversible for mere technical errors (Const. art. 6, § 4½).

Appeal from Superior Court, Kings County; Arthur Allyn, Judge.

Malcolm F. Calkins was convicted of criminal libel, and he appeals.

Affirmed.

Albert Peterson, of Hanford, for appellant.

U. S. Webb, Atty. Gen., Paul D. McCormick, Deputy Atty. Gen., and Roger R. Walch, Dist. Atty., of Hanford, for the People.

MARKS, Justice.

[1] Defendant was convicted of the crime of criminal libel of W. V. Buckner by the publication on December 23, 1934, of an article appearing in the Corcoran News, a newspaper published in Corcoran, Kings county, of which he was the publisher and editor. Besides appealing from the judgment and order denying his motion for new trial, defendant has attempted to appeal from an "order denying a motion to set aside the information," an "order denying the plea of former jeopardy, and the plea of former acquittal," and "the order * * * permitting the association of counsel for the prosecution as special counsel." The three orders latterly specified are not appealable orders, and the attempted appeal from them is dismissed. Section 1237, Pen. Code.

[2] W. V. Buckner was sheriff of Kings county. He had been defeated for reelection and at the time of the publication of the article in question was either out of office or was serving the unexpired portion of his term. The article was a vicious attack upon him and his conduct in office. It accused him of the commission of crimes and acts of malfeasance and misfeasance in office which need not be specified. Unless the charges made were founded on fact and were true, they constituted an unwarranted and unjustified libel of the worst kind.

Defendant urges that the trial court erred in denying his motion to set aside the information against him. He divides his argument in support of this contention into three subdivisions: (1) That he was not in legal custody, contending that the warrant of arrest issued by the justice of the peace before whom the original complaint was filed was never served upon him. (2) That this justice of the peace refused to disqualify himself after defendant claimed prejudice and bias. (3) That the committing magistrate did not have jurisdiction to conduct the preliminary examination.

[3, 4] The first two grounds specified may not properly be urged in support of a motion to set aside an information. Section 995, Pen. Code; 14 Cal. Jur. 74 et seq. Even though we could consider

these grounds, there is no record to support them. The files of the committing magistrate are not before us. (Rule II, Rules of the Supreme Court and District Courts of Appeal.) In support of his third ground, defendant argues that as the offense charged was not committed in Hanford township, the justice of the peace of that township had no jurisdiction to hold the preliminary examination. This argument is answered by the case of *People v. Van Zandt*, 123 Cal. App. 520, 11 P.(2d) 645.

[5] Defendant next urges that the court erred in reading what counsel calls "his written opinion" with his instructions to the jury. The trial judge very briefly and fairly defined the issues of fact presented by the evidence under the law applicable to the case. He is permitted to do this under the provisions of section 19 of article 6 of the Constitution since its amendment in 1934. He was careful to advise the members of the jury that they were the sole judges of the facts in the case, and that what he said was "merely advisory and not binding upon you."

[6] The trial judge permitted a member of the bar to be associated with the district attorney in the prosecution of the case. We know of no rule of law, and have been cited to none, prohibiting such procedure.

[7] Defendant complains of the refusal of the trial judge to give the following instruction requested by him: "You are instructed that where the defendant seeks to justify by reason of the truth of the imputation, it is only necessary for him to raise a reasonable doubt in the minds of the jury as to the truth of the charge." Assuming that this instruction contains a correct statement of the law, its subject-matter was covered by another instruction.

Defendant states, "Appellant submits to the court that the evidence was insufficient to sustain the verdict of the jury upon information." This bald statement is made without quotation from or reference to the record, or summary of the evidence, or any supporting argument. Overlooking the unusual manner of presenting this question, we have studied the record and find that the evidence amply supports the verdict and judgment.

[8] Defendant claims error in the fact that when the information was being read to the jury he objected to the libelous ar-

ticle being read in full because it contained disparaging remarks concerning persons other than the complaining witness.

The information set forth the libelous article in full. No prior objection was made by defendant to the form of the information. During the reading of the information the district attorney offered to have omitted the reading of those parts of the article referring to persons other than the complaining witness if defendant would consent to such procedure and waive any possible error resulting therefrom. This counsel for defendant refused to do. Section 1093 of the Penal Code provides that in felony cases the information must be read to the jury and that "in all other cases this formality may be dispensed with." Under the circumstances, we can find no prejudicial error in the procedure followed.

[9,10] Appellant entered a plea of former acquittal and former jeopardy. In support of this plea he introduced in evidence a portion of the record of a case tried in Tulare county where he was acquitted on a charge of libeling W. V. Buckner, the complaining witness in the instant case. The charge in the Tulare county case was based on an article written and published by defendant on November 2, 1934, which did not name Buckner as the officer who was charged with doing certain unlawful acts. The basis of the prosecution in the instant case was an article written and published by defendant on December 23, 1934, which named Buckner and specifically charged him with various crimes and misfeasance and malfeasance in office. On motion of the district attorney the record of the trial in Tulare county was stricken from the evidence. There was no error in this ruling, as the two informations charged two separate libels couched in entirely different language and published at different times. The second article charged Buckner with acts and conduct not hinted at in the first. Two separate libels were charged, and the acquittal of one was not a bar to prosecution for the other. *People v. Perry*, 99 Cal. App. 90, 277 P. 1080.

[11] Defendant claims error in the trial court's ruling on the admissibility of evidence. We have examined those particularly complained of and can find no error in them. The guilt of defendant is so conclusively established by the record that

we would find it impossible to reverse the judgment for mere technical errors, if they existed, in view of the provisions of section 4½ of article 6 of the Constitution.

The judgment and order appealed from are affirmed.

We concur: BARNARD, P. J.; HARDEN, Justice pro tem.



LERTORA v. RILEY, State Controller, et al.*

BIGGIO v. SAME.

Civ. 9608.

District Court of Appeal, First District.
Division 1, California.

July 5, 1935.

Rehearing Denied Aug. 3, 1935.

Hearing Granted by Supreme Court
Aug. 30, 1935.

1. Mandamus ☞164(1)

Where defendants, who were state officers, filed unverified answers to petitions for writs of mandate, issues raised by answers held properly before trial court, since answer of officer of state of California need not be verified.

2. Animals ☞36½

Destruction of healthy cattle under color of police regulation or for benefit of public health is without authority of law and cannot form basis of claim against state.

3. States ☞78

State is not answerable in damages to individual for injury resulting from alleged misconduct, negligence, or tortious acts of its officers or agents.

4. States ☞66

Person dealing with state agency is chargeable with knowledge of extent of power of officers of such agency, of mode of its exercise, and that acts beyond scope of such power are void.

5. Eminent domain ☞2(1)

In exercise of police power, use of property may be restricted or it may be destroyed, and no legal liability arise to compensate owner.

6. Animals ☞36½

Burden is upon person seeking indemnity for destruction of diseased stock by state to present convincing evidence that property de-

☞For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 57 P.2d 140.

stroyed was such as contemplated by statute (St. 1931, p. 2392).

7. States ⇐119

Payment of indemnity by state for destruction of healthy cattle slaughtered with reacting animals under Bovine Tuberculosis Law held unconstitutional as a gift of public money to individual (St. 1931, p. 2392; Const. art. 4, § 31).

8. States ⇐114

Expenditure of public funds must be for public as distinguished from private purpose.

9. States ⇐177

Persons having claims against state for which an appropriation has been made must comply with rules of state board of control before being entitled to payment (Pol. Code, §§ 664, 669).

10. Animals ⇐36½

Cattle owners failing to show compliance with restrictions of tuberculosis law regarding payment of indemnity, who presented no affidavit of officer responsible for indebtedness as required by rules of state board of control, and whose claim did not segregate diseased cattle from healthy ones which were slaughtered at same time, held not entitled to indemnity claimed, since claims were not presented in compliance with law (Pol. Code, §§ 664, 669; St. 1931, p. 2394, § 9 (c) (g)).

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Applications by A. Lertora and Eugene Biggio for writs of mandate directed to Ray L. Riley, as State Controller, and others to compel the State Controller and State Board of Control to indemnify petitioners for the value of cattle slaughtered pursuant to Bovine Tuberculosis Law. Judgments for petitioners, and defendants appeal.

Reversed.

U. S. Webb, Atty. Gen., and Darwin Bryan and Ralph O. Marron, Deputy Attys. Gen., for appellants.

Arthur H. Barendt, and J. R. Klawans, both of San Francisco (James, Brann & Rowe, of San Francisco, of counsel), for respondents.

PER CURIAM.

The trials of the two actions herein involved were consolidated. Separate findings were made by the court, but they are in all essentials the same except as to the amounts of money embraced in the claims

of the respective petitioners who are respondents herein.

The trial court granted each of the respondents a peremptory writ of mandate commanding the state controller and the state board of control to proceed forthwith in the performance of all acts necessary to indemnify each of the respondents in a certain sum, being one-third of the total appraised value of his cattle, as provided for the indemnity of owners of cattle condemned under the Bovine Tuberculosis Law (Stats. 1931, p. 2392). The sum required to be paid in the case of respondent Lertora is \$6,668.07, and in the case of respondent Biggio, the sum of \$1,757.43, both with legal interest.

About November 15, 1932, in accordance with the provisions of the Bovine Tuberculosis Law, the director of agriculture of the state of California declared the county of Marin a tuberculosis control area. Respondents, during the year 1932, became the owners on separate ranches, but under similar conditions, of a large number of adult cattle, ostensibly for dairy purposes. Many of these were purchased at low prices, and were cattle which had been culled or rejected from other herds.

In December, 1932, veterinarians, representing the department of agriculture of the state of California and the bureau of animal industry in the department of agriculture of the United States government, went upon the lands of the respective petitioners and subjected a large number of cattle thereon to the tuberculin test prescribed by the Bovine Tuberculosis Law. From 85 per cent. to 90 per cent. of the Lertora herd of 506 cattle, and about 67 per cent. of the Biggio herd of 134 cattle reacted to the tuberculin test, which is a standard test recognized by veterinarians and by the California statute. Shortly after the tests were made all of the adult cattle in the Lertora and Biggio herds were branded as tuberculous, and condemned, appraised, and slaughtered under the direction of agents of the department of agriculture. In addition to the adult cattle above, about 162 head of calves belonging to Lertora were branded as tuberculous and condemned and slaughtered. None of them were tested or given a physical examination for the purpose of determining whether or not they were tubercular, but apparently they were condemned and ordered slaughtered under some kind of an agreement or understanding between the

veterinarian in charge of the testing operations and the petitioner Lertora that they should be sold for veal, and an indemnity of \$12 per head should be paid, dependent upon whether or not the carcasses should show tubercular lesions upon a post mortem examination.

The petitioners and respondents filed separate claims for the respective amounts hereinabove stated with the state controller about July 22, 1933. These claims were rejected by the controller upon the ground that the respective claims did not comply with the rules and regulations of the state board of control governing the presentation and audit of claims against state funds and appropriations, and were not legal or proper demands against the state of California. Thereafter the claims were referred to the state board of control, which, on December 15, 1933, disallowed each of the claims.

To the verified petitions of the petitioners, the appellants filed unverified answers in which they denied generally and specifically all of the allegations of the petition. As a second defense, they charged a conspiracy between the petitioners and certain employees and officers of the department of agriculture of the state of California to defraud the state and the government of the United States. As a third defense, the respondents alleged that the claims as presented did not comply with rules 3 and 4 of the rules and regulations adopted by the state board of control, in that they were not accompanied by an affidavit of the officer directly responsible for the indebtedness, or approved by the state officer in the manner provided by rule 4 of such regulations.

The trial court found that all of the allegations of the respective petitions were true; that all of the allegations of the answers were untrue, with certain minor exceptions, and further found that R. E. Duckworth, veterinarian of the state department of agriculture, did test some of the cattle in the herds of petitioners, and did, without the knowledge of petitioners, subsequently brand substantially all of the cattle in said herds as reactors, although in fact a great number of the cattle in said herds so tested and branded failed to react to the tuberculin test so administered, and although in fact the tuberculin test was not administered to any of the calves of petitioner Lertora in his herd so branded.

[1] The trial court's finding as to the alleged conspiracy cannot be disturbed, but other questions are involved in the appeal which require more serious consideration. The appellants contend that the officers of the state of California are not authorized to pay indemnity under the Bovine Tuberculosis Law for cattle which have not reacted to the tuberculin test, or which have not been adjudged tuberculous upon physical examination; that payment under such conditions would be a gift of public money contrary to the provisions of section 31 of article 4 of the Constitution; and further, that the controller and the state board of control are prohibited by law from authorizing the payment of a claim against the state when the same has not been presented for payment in accordance with law and the rules and regulations of the board of control. These issues were properly before the trial court upon the answers of the appellants. The answer of an officer of the state of California to a complaint or petition need not be verified. *Seckels v. Department of Industrial Relations*, 98 Cal. App. 647, 277 P. 497.

The Bovine Tuberculosis Law provides, in part (St. 1931, p. 2394, § 9 (c)), as follows: "Sec. 9. * * * (c) Disposition of reactors. Payment to owner of reactor. Any bovine animal, in a tuberculosis control area, reacting positively to a tuberculin test conducted by a representative of the federal or state department of agriculture, or adjudged tuberculous upon physical examination by said representative, shall immediately be segregated from other bovine animals which are not reactors. Within thirty days after the appraisal of said reacting bovine animal, as provided for herein, it shall be slaughtered under the direction of the department of agriculture; and in consideration of the fact that the eradication of bovine tuberculosis is beneficial to public health and welfare, before said animal is slaughtered, its value shall be determined by appraisement by a representative of the said department of agriculture or a representative of the bureau of animal industry of the United States department of agriculture, and the owner or his agent. In case of failure to agree on the valuation, said reacting bovine animal shall be appraised by the chief appraiser of said department of agriculture or his representative. In either event, the value determined shall be final. Except as hereinafter provided, the State of California

shall pay to the owner of any reacting bovine animal slaughtered under the provisions of this section one-third of the difference between the appraised value of such reacting bovine animal and the proceeds from the sale of the salvage, and the owner shall also receive the proceeds from the sale of the salvage, provided that in no case shall any payment by the State of California, hereunder, exceed thirty-five dollars (\$35) for any grade animal or seventy dollars (\$70) for any purebred animal, and no payment shall be made unless the owner has complied with all the provisions of this act relating to tuberculosis control areas and the regulations promulgated by the department of agriculture for its enforcement."

[2,3] The repeated use of the words "reacting bovine animal" very certainly indicates that the Legislature did not contemplate the payment of indemnity for healthy animals. Contact with reacting animals or exposure to diseased animals is not defined or fixed by the act as a ground for condemning or for awarding indemnity for slaughtered animals. The wording of the law and considerations of public policy justify payment of indemnity only in cases of cattle which are found to be reactors or adjudged, after a physical examination, to be actually infected with tuberculosis, and the conclusion must be that the officers of the state are authorized to pay indemnity only for diseased, and not for sound animals. The weight of authority in other jurisdictions, involving the construction of similar laws, is that the destruction of sound or healthy cattle under color of police regulation, or for the benefit of public health, is without authority of law and cannot form the basis of a claim or action against the state. *Shipman v. State Live-Stock Sanitary Commission*, 115 Mich. 488, 73 N. W. 817. In *Houston v. State*, 98 Wis. 481, 74 N. W. 111, 113, 42 L. R. A. 39, the court said: "The law is well established that neither the state nor the United States is answerable in damages to an individual for an injury resulting from the alleged misconduct or negligence or tortious acts of its officers or agents." See, also, *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850. The Legislature of California did not authorize the misconduct of its officers who condemned the petitioners' cattle without test or examination. In *Gibbons v. United States* 8 Wall. (75 U. S.) 269,

274, 19 L. Ed. 453, the Supreme Court of the United States said: "But it is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the government responsible for the unauthorized acts of its officer, those acts being in themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents. In the language of Judge Story, 'it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests.'"

[4] The testimony of Dr. R. E. Duckworth was that he tested 134 head of cattle in the Biggio herd; that 89 reacted, and that he branded the remaining 45 as reactors without making a physical examination, and that such action was taken upon the instructions of a superior officer whose office was in Sacramento; that in the Lertora herd, 85 to 90 per cent. reacted, and all were branded, besides 160 to 170 calves which were not tested at all, and of which no physical examination was made. No testimony was offered, or is found in the record to rebut the statements of Duckworth as to the procedure adopted in testing and branding the cattle or Lertora calves, and the evidence does not support the finding of the court that all of the allegations of the petitioners' petitions are true. The point is made by petitioners and respondents that the trial court found the veterinarian's acts were done without the knowledge of the petitioners. Any person dealing with a state agency is chargeable with knowledge of all of the powers possessed or which may be legally exercised by the officers in charge of such agency, and all acts of such officers which go beyond the scope of the power vested in the officer exercising the functions of such agency are void, and knowledge must be presumed to be had, not only of the extent of the power, but also of the mode of its exercise. *Bottoms v. Madera Irrigation District*, 74 Cal. App. 681, 242 P. 100.

[5] In the exercise of the police power, the use of property may be restricted or it may be destroyed, and no legal liability arises to compensate the owner therefor. *Patrick v. Riley*, 209 Cal. 350, 287 P. 455, 457.

[6] "Any provision for the payment to the owner of certain sums on account of the destruction of diseased stock is a pure 'gratuity,' for 'the Legislature might have directed the destruction of such animals without any compensation under the police power.'" Patrick v. Riley, supra; quoting from Knox County v. Kreis, 145 Tenn. 340, 343, 236 S. W. 1, 2, and citing other cases. Under such circumstances the burden is upon the person seeking indemnity to present clear evidence of convincing force that the property destroyed was such as is contemplated by the statute.

[7] The Bovine Tuberculosis Law provides for the immediate segregation of reacting animals, and not for the destruction of nonreactors or those coming in contact with reactors. The statute does not define the destruction of healthy animals as necessary for the preservation of the public health, and the destruction of such animals was not within the jurisdiction of the department of agriculture or its officers, and would not be for a public purpose as determined by the Legislature; consequently the payment of an indemnity for such purpose would fall within the inhibitions of section 31 of article 4 of the Constitution of California.

In Conlin v. Board of Supervisors, 99 Cal. 17, 33 P. 753, 755, 21 L. R. A. 474, 37 Am. St. Rep. 17, the court said: "The legislature is to be regarded as holding the public moneys in trust for public purposes, and this limitation of the constitution is directed against its disposal of these funds except in accordance with such purposes. All those moral considerations or demands, resting merely upon some equitable consideration or idea of justice, which in an individual, acting in his own right, would be upheld, are insufficient as a basis for making an appropriation of public moneys. An appropriation of money by the legislature for the relief of one who has no legal claim therefor must be regarded as a 'gift,' within the meaning of that term, as used in this section; and it is none the less a gift that a sufficient motive appears for its appropriation, if the motive does not rest upon a valid consideration."

[8] It is fundamental that the expenditure of public funds must be for a public as distinguished from a private purpose. City of Oakland v. Garrison, 194 Cal. 298, 228 P. 433; Patrick v. Riley, supra.

The claims of the respective petitioners were in substantially the same form, and

were verified by the claimants, but were not accompanied by the affidavit of any officer of the department of agriculture, or approved by the director of agriculture or his deputy.

Section 9 (g) of the Bovine Tuberculosis Law (St. 1931, p. 2394) provides as follows: "Each claim against the state for payment in consideration for the slaughter of any reacting bovine animal shall be presented to the state controller, audited and paid out of appropriations or funds available therefor, in accordance with law."

Section 664 of the Political Code provides in substance that the board of control shall adopt general rules and regulations governing such matters as are specifically committed to the jurisdiction of said board, and governing the presentation and auditing of claims against the state, and in accordance with such general rules and regulations, the state controller shall audit such claims before drawing his warrant therefor as prescribed by law, and any person having a claim against the state for which an appropriation has been made, may present the same to the state controller in the form and manner prescribed by such general rules and regulations.

It appears that in conformity with section 664, the board of control adopted certain rules, among which is rule 3, as follows: "Affidavit. Every claim, unless otherwise provided by law, must be accompanied by affidavit of the officer directly responsible for the indebtedness to the effect that the services were actually rendered, and the indebtedness incurred solely for the benefit of the state in accordance with the provisions of law;" and rule 4, which provides that each claim must be approved by the state officer or his chief deputy, or in the case of boards and commissions, by a majority of the members, or by a finance committee duly authorized to act by such board or commission, except as otherwise provided by law.

Section 669 of the Political Code provides in part as follows: "The controller must not draw his warrant for any claim until it has been audited by him in conformity with the general rules and regulations adopted by the board of control governing the presentation and audit of claims, and when hereafter, the controller is directed to draw his warrant for any purpose, this direction must be construed as subject to the provisions of this section,

unless the direction is accompanied by a special provision exempting it from the operation of this section."

[9, 10] These sections of the Political Code have the effect of incorporating in the law of the state the rules of the board of control so far as they relate to matters specifically committed to the jurisdiction of that board. Section 9 (g) of the Bovine Tuberculosis Law simply says that claims for indemnity shall be presented to the state controller, audited and paid out of appropriations available therefor in accordance with law. It provides no procedure for such payments, and the law governing the same is found in sections 664 and 669 of the Political Code together with the rules of the state board of control. The legal force and standing of those rules cannot be ignored in the absence of a showing of capricious acts on the part of the state controller or the board of control, or in the absence of a showing of willful or unreasonable refusal on the part of the officers of the department of agriculture which had the duty of enforcing the Bovine Tuberculosis Law, to execute an affidavit. The wisdom of the requirement of the board of control expressed in its rules, is demonstrated in the instant case. The tuberculosis law provides for various restrictions on the payment of indemnity. The animals destroyed must be reacting animals, or adjudged to be tuberculous upon physical examination; no indemnity shall be paid for animals brought into a tuberculosis control area which react to a tuberculin test applied within 30 to 90 days, or brought into such area contrary to any law, or the rules or regulations of the state or federal department of agriculture; or for any reacting animal until the premises where said animal had been kept, have been cleaned and disinfected in a manner approved by the department of agriculture; or for any reacting animal which has not been slaughtered within 30 days. The respective claims presented by the petitioners neither negative nor affirm the existence of any of these conditions, or show their compliance with such conditions. Furthermore, it appears that as to a large number of the

calves condemned and slaughtered, there was an undefined agreement or understanding between the owner and the examining veterinarian that indemnity at the rate of \$12 per head for the calves would be paid dependent upon whether or not the carcasses showed tubercular lesions upon a post mortem examination. Appraisal must be made before slaughter, and must be based upon the actual value of the animal at the time of appraisal and after a condemnation, and not upon its market value as a healthy animal. Assuming solely for the purposes of the case that such an agreement was made, and could form the basis of a legal claim, no report was returned in any form by the petitioners, or the officers of the department of agriculture of the result of such post mortem examination, if any was made. To hold that it was unnecessary to obtain an affidavit required by the rules of the board of control, would be to open the way to the practice of fraud upon the state. The provisions of the tuberculosis law that the value determined by the appraisal should be final mean nothing more than that in the absence of fraud, the decision of the appraisers as to the value of the animals condemned and slaughtered could not thereafter be disputed by the owners, or by the state or its officers. The finality of the appraisement cannot operate to foreclose the state or its officers from contesting irregularities involved in the proceedings which form the basis of the claim, or from disputing the legality of any matter involved therein other than the matter of valuation. In the claim presented to the controller, diseased cattle were not segregated from the healthy ones, and it was impossible for the officers to whom the claim was presented, to make any segregation from any information contained in the respective claims. The burden is upon the claimant to present a claim in compliance with the law. The appellants properly rejected each claim, and the trial court erred in granting a peremptory writ of mandate.

In our opinion, it is unnecessary to discuss other minor points which have been presented in the various briefs.

The judgments are reversed.

DWELLY v. McREYNOLDS et al.*

Civ. 9510.

District Court of Appeal, First District,
Division 1, California.

July 2, 1935.

Hearing Granted by Supreme Court
Aug. 29, 1935.**1. Witnesses** ⇨222

Party seeking to suppress evidence as confidential communication has burden to show that such evidence is within terms of statute (St. 1931, p. 2130, § 142).

2. Witnesses ⇨216

Statements made to officers in reporting automobile accident to be privileged and inadmissible in evidence must come within express terms of statute (St. 1931, p. 2130, § 142).

3. Appeal and error ⇨992

Whether statements made to officers in reporting automobile accident were privileged was for trial court's determination, and trial court's decision on conflicting evidence was conclusive (St. 1931, p. 2130, § 142).

4. Witnesses ⇨216

Where statements made to officers in reporting automobile accident were not on requisite forms or filed or used as provided by statute, statements were not privileged so as to be inadmissible in evidence (St. 1931, p. 2130, § 142).

5. Automobiles ⇨151

No duty rested on road watchman to warn motorcyclist of danger equally known to motorcyclist.

6. Automobiles ⇨245(82)

Where motorcyclist, after being signaled by night watchman to proceed along highway under construction, collided with truck, lights of which motorcyclist saw when he passed watchman, whether motorcyclist's general knowledge of truck's movements over highway should have caused him to anticipate danger when he saw lights of truck held for jury.

7. Automobiles ⇨201(1)

Night watchman's negligence in permitting motorcyclist to proceed along highway under construction, although watchman saw lights of truck and knew driver would turn truck across motorcyclist's path, held a proximate cause of collision between motorcyclist and truck, so as to entitle motorcyclist to recover for injuries sustained in collision.

8. Negligence ⇨136(9)

Contributory negligence is question of law only when court is impelled to say that from facts reasonable men can draw but one

inference and that an inference pointing unerringly to negligence of plaintiff contributing to his injury.

9. Automobiles ⇨245(82)

Where motorcyclist was familiar with highway and knew that highway was being reconstructed and saw in advance headlights of truck with which he collided, after he had been signaled by night watchman to proceed along highway, whether motorcyclist was guilty of contributory negligence as a matter of law in failing to anticipate that truck would cross his path without warning held for jury.

10. Automobiles ⇨213

Motorcyclist was not negligent in failing to anticipate that truck driver would violate vehicle act by failing to signal before turning so as to bar recovery for injuries sustained when motorcycle collided with truck (St. 1925, p. 413, § 130).

11. Automobiles ⇨245(82)

Where motorcyclist, after being signaled by night watchman, advanced along highway under construction and collided with truck, whether motorcyclist made reasonable effort to avoid collision held for jury.

12. Damages ⇨132(3)

\$17,500 held not excessive for injuries sustained by motorcyclist colliding with truck, where motorcyclist suffered concussion of brain, which rendered him unconscious for two weeks, fractures of pelvis, wrist, and elbow, and injuries were of permanent nature.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Suit by Vernon Edward Dwelly against O. McReynolds and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Charles V. Barfield, of San Francisco, for appellants O. McReynolds and G. R. Burgin.

Bronson, Bronson & Slaven, of San Francisco (John H. Painter, of San Francisco, of counsel), for appellants Lloyd E. Arrowsmith and Peninsula Paving Co.

Martinelli & Gardiner, Jordan L. Martinelli and Samuel W. Gardiner, all of San Rafael, for respondent.

GRAY, Justice pro tem.

On the night of the accident, respondent Vernon E. Dwelly, as a state traffic officer, was patrolling, on his motorcycle, the state

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 56 P.2d 1232.

highway between San Rafael and Sausalito, in Marin county. The portion of this highway between Sausalito and Waldo was being reconstructed by appellant Peninsula Paving Company under a state contract. In such work, dirt was hauled southerly from a steam shovel, westerly of the highway, to a fill, easterly of the highway, by trucks, which were rented, with drivers, by appellant O. McReynolds, to the company. To control traffic, the company stationed a flagman at each end of the portion of the highway over which the trucks moved. Immediately before the accident respondent had stopped on signal of the northerly flagman, appellant Lloyd E. Arrowsmith, and, after proceeding southerly about 125 feet, collided with one of such trucks, operated by appellant G. R. Burgin, when it, in going to the steam shovel, made a sharp left turn from the easterly side of that highway across respondent's course. For the resultant injuries, respondent sued all four appellants and was awarded by a jury damages against all in the sum of \$17,500. The paving company and its flagman, jointly, and the truck owner and its driver, jointly, have separately appealed from the judgment, entered in accordance with the verdict.

Over such appellants' separate objections that they were privileged and confidential communications under section 142 of the California Vehicle Act (St. 1923, p. 563, as amended by St. 1931, p. 2130), respondent was permitted to read into evidence, statements as to the accident, made by appellants Arrowsmith and Burgin, and to cross-examine each as to his statement. The pertinent part of this section reads as follows: "The driver of any vehicle involved in any accident resulting in injuries * * * to any person, shall within twenty-four hours forward or file or cause to be filed a report of such accident to the division, or any of its branch offices or local headquarters of the California highway patrol. * * * All accident reports shall be made on forms approved by the division. * * *

"The division may require drivers * * * involved in accidents to file supplemental reports and may require witnesses of accidents to render reports to it upon forms furnished by it whenever the original report is insufficient in the opinion of the division.

"All accident reports together with all supplemental reports above mentioned

shall be without prejudice and shall be for the confidential use of the division of motor vehicles and shall not be used in any manner whatsoever as evidence, or, for any other purpose in any trial, civil or criminal arising out of such accident."

[1-4] "The burden is upon the party seeking to suppress the evidence to show that it is within the terms of the statute." Sharon v. Sharon, 79 Cal. 633, 677, 22 P. 26, 39, 131; Collette v. Sarrasin, 184 Cal. 283, 193 P. 571. The statements to be privileged and hence inadmissible must come within the express terms of the section. Edison Electric Light Co. v. United States Electric Lighting Co. (C. C.) 44 F. 294; Peden v. Peden's Adm'r, 121 Va. 147, 92 S. E. 984, 2 A. L. R. 1414; Hawthorne v. Delano, 183 Iowa, 444, 167 N. W. 196; Thaden v. Bagan, 139 Minn. 46, 165 N. W. 864. The question of privilege was a matter for the trial court's determination, and its decision, upon conflicting evidence, is conclusive. Stewart v. Douglass, 9 Cal. App. 712, 100 P. 711. The testimony discloses that both appellants, at the request of a traffic officer, reported, the day after the accident, to the highway patrol office in San Rafael; that Arrowsmith then signed a statement in the presence of such officer and the latter's superior; that Burgin, after being sworn by a notary public, was questioned by the two officers and signed a transcription of such interrogation; that neither statement was on the specified division form, nor filed as provided in the section; and that the officers obtained the statements for the benefit of their injured fellow officer and not for official use, nor had they been so used. Since, as the trial court correctly stated, the statements were neither made by appellants on the requisite forms, nor filed nor used as provided by the section, they were not privileged but were admissible.

[5-7] In addition to the general verdict, the jury returned two special verdicts, in which they found that Lloyd Arrowsmith was guilty of negligence as charged in the complaint and that O. McReynolds was an independent contractor. Respondent cannot question the sufficiency of the evidence to support the second finding, and the judgment as to the Peninsula Paving Company and Lloyd Arrowsmith can only be sustained if the evidence supports the first finding. Hudgins v. Standard Oil Co., 136 Cal. App. 44, 28 P.(2d) 433. The complaint charged that Arrowsmith was sta-

tioned by his employer, Peninsula Paving Company, as a flagman to protect the public, including respondent, from injury arising from the movement of the trucks upon the highway; that Arrowsmith, although aware of the direction in which Burgin was operating his truck, failed to halt respondent or to protect him from the danger arising from such operation, but negligently permitted and invited him to proceed. Appellants Peninsula Paving Company and Arrowsmith argue (1) that, since respondent had knowledge as to manner of operating all trucks used in the work, equal to that of Arrowsmith, the latter owed no duty to warn him of the particular movement of Burgin's truck; (2) that, since Arrowsmith had stopped respondent, he had discharged all duty he owed; and (3) that Arrowsmith's negligence, if any, was not a proximate cause of the accident. No duty rested on Arrowsmith to warn respondent of a danger equally known to him. *Molles v. Dollar Steamship Lines, Inc.*, 136 Cal. App. 369, 29 P.(2d) 308. Respondent had patrolled the highway nightly for two months before the accident, during which time its reconstruction was progressing and was therefore aware that trucks crossed the highway to and from the steam shovel. He also saw the steam shovel in operation and the headlights of Burgin's truck as it proceeded from the fill northerly, but did not know whether they belonged to a truck or automobile. He stopped at Arrowsmith's signal and conversed with him. He told the latter that he was going south, the latter said, "Okay," and he moved on. Arrowsmith knew that Burgin's truck was approaching and that it was dangerous for respondent to proceed. Respondent would not have proceeded if Arrowsmith had told him the headlights were those of Burgin's truck. This testimony shows that respondent did not have actual knowledge of the danger created by this particular truck and whether his general knowledge of truck movements should have caused him to anticipate danger when he saw headlights presented a question for the jury. Since Arrowsmith had superior knowledge that the headlights belonged to Burgin's truck, he should have warned respondent of the danger, of which, it is apparent, he knew the latter was oblivious. Arrowsmith's negligence was a proximate cause, although Burgin's negligence intervened, because it is clear from the above testimony that Arrowsmith not only should have but actually did an-

ticipate that Burgin would turn his truck across respondent's path. *Sawyer v. Southern California Gas Co.*, 206 Cal. 366, 274 P. 544.

[8-11] O. McReynolds and G. R. Burgin make no claim that the evidence does not show that the operation of the truck was negligent, but they, like the other appellants, contend that the evidence establishes that respondent was contributorily negligent, as a matter of law. All appellants argue that since respondent was familiar with the highway, knew that its reconstruction was in progress and that trucks crossed the highway in the vicinity of the collision and actually saw the headlights of the approaching truck, he was guilty of contributory negligence, as a matter of law, in failing to realize that the headlights belonged to Burgin's truck and in failing to anticipate that the truck would cross his path without warning or signal. "'Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury.'" *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 336, 208 P. 125, 128; *Smith v. Southern Pacific Co.* [201 Cal. 57], 255 P. 500. In all other cases the question of contributory negligence is a question of fact for the jury. *Wahlgren v. Market St. Ry. Co.*, 132 Cal. 656, 663, 62 P. 308, 64 P. 993; *Jansson v. National Steamship Co.*, 189 Cal. [187] 192, 208 P. 90; *Smith v. Southern Pacific Co.*, supra." *Flores v. Fitzgerald*, 204 Cal. 374, 376, 268 P. 369, 370. Whether or not respondent acted with ordinary care under the circumstances and with his knowledge presented a question of fact for the jury's decision. He was not negligent in failing to anticipate that the truck driver would violate section 130 of the California Vehicle Act (St. 1923, p. 558, as amended by St. 1925, p. 413). *De Arman v. Connelly*, 134 Cal. App. 173, 25 P.(2d) 24. The reasonableness of respondent's conduct in seeking to avoid the collision also was a matter for the jury's determination. *Kearney v. Castellotti*, 5 Cal. App. 541, 203 P. 1029; *Mast v. Claxton*, 107 Cal. App. 59, 290 P. 48.

[12] Their soft and mild recital of respondent's injuries and expenditures sufficiently refute the argument of appellants McReynolds and Burgin that the verdict is excessive merely because he was not so in-

capacitated as to be unable to resume his occupation after four months. The special damages for medical and hospital services and loss of earnings amounted to \$3,790. He suffered a concussion of the brain, which rendered him unconscious for two weeks, and fractures of the pelvis, wrist, and elbow. He was confined in the hospital for ten weeks. At the time of trial, six months after the accident, he still limped but was gradually improving. Then, there was a permanent loss of one-third of the normal motion in the left wrist. The flexion of the left elbow had improved under treatment and was pretty good at time of trial, but its extension would not improve. Appellants concede that the injuries were severe and painful.

The judgment is affirmed.

We concur: TYLER, P. J.; CASH-IN, J.



7 Cal.App.2d 512

In re SHORT'S ESTATE.

PULLIAM v. BANK OF AMERICA NAT.
TRUST & SAVINGS ASS'N et al.
Civ. 5394.

District Court of Appeal, Third District,
California.
June 12, 1935.

As Amended on Denial of Rehearing July
12, 1935.

1. Depositions ⇨56(2)

To introduce deposition against party, it is necessary that notice required by Code should be given, or that party should have entered stipulation for taking of deposition (Code Civ. Proc. § 2031).

2. Depositions ⇨56(5)

Contestant's deposition taken in will contest by stipulation with proponent held inadmissible as to legatee who subsequently appeared in contest as proponent and who did not receive notice of taking of deposition or enter into stipulation, notwithstanding fact that one of attorneys for proponent which entered into stipulation afterwards appeared for legatee, or may have actually been tentatively her attorney at time of taking of depo-

sition (Probate Code, § 370; Code Civ. Proc. § 2031).

3. Depositions ⇨56(5)

Deposition taken without notice to all parties is admissible against such defendants as have been notified, provided nature of action allows of separate verdicts (Code Civ. Proc. § 2031).

4. Wills ⇨314

Contestant's deposition was inadmissible in will contest where one of proponents did not receive notice of taking of deposition, or enter into stipulation therefor, since separate verdict could not be rendered (Code Civ. Proc. § 2031).

5. Depositions ⇨107(1)

Overruling objections made on trial to questions propounded to deponent and refusal to strike out irresponsible, irrelevant, and incompetent answers, because objections were not made when deposition was taken, held error (Code Civ. Proc. § 2032).

6. Evidence ⇨474(4)

Wills ⇨324(2)

Subscribing witness to will or intimate acquaintance may give his opinion as to sanity of signers of instrument, and question of competency is for jury (Code Civ. Proc. § 1870, subd. 10).

7. Evidence ⇨568(2)

Lay witness' opinion as to testator's mental capacity has no greater probative force than facts given by him as basis of his conclusions.

8. Wills ⇨55(5)

Evidence as to unsoundness of mind of 59 year old testatrix who was suffering from Bright's disease and died from heart failure held insufficient to support verdict denying probate of will.

9. Wills ⇨52(1)

Testamentary capacity is always presumed.

10. Wills ⇨55(5)

Physical weakness, while it may be considered, is not alone sufficient to support verdict setting aside will.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

In the matter of the estate of Julia M. Short, also known as and called Julia Jasper Short, deceased. Will contest by Mary Ellen Jasper, opposed by the Bank of America National Trust & Savings Association and another, proponents,

wherein Dixie Pulliam, as executrix of the last will and testament of Mary Ellen Jasper, deceased, was substituted as contestant. From a judgment refusing to admit the will to probate and an order refusing a judgment admitting the will to probate notwithstanding the verdict, proponents appeal.

Reversed and remanded, with directions.

Clarence N. Riggins, of Napa, for appellants.

E. L. Webber and Nathan F. Coombs, both of Napa, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon an appeal by the Bank of America National Trust & Savings Corporation, a corporation, and Laura Treadway, from a judgment of the trial court refusing to admit the will of Julia M. Short to probate, and from an order denying a motion for judgment admitting the will to probate, notwithstanding the verdict. The contest filed in this action was based upon three grounds: (1) Unsoundness of mind; (2) undue influence on the part of Laura Treadway; and (3) nonexecution of the will.

When the taking of testimony was terminated, the court granted a nonsuit as to the second and third grounds of contest, leaving for the determination of the jury before which the cause was being tried the question of the alleged unsoundness of mind of the testatrix. The defendants, also, in addition to their motion for nonsuit, moved for a directed verdict, which was denied. The jury before which the cause was tried rendered a verdict that the testatrix was of unsound mind at the time of the execution of the will. Following the rendition of the verdict, a motion for judgment, notwithstanding the verdict, was made by the defendants, and denied by the court.

Julia M. Short died on April 12, 1933, at the St. Helena Sanitarium, where she had been a patient for approximately four weeks. The will was executed three hours before her death, in the presence of Dr. H. W. Vollmer, medical superintendent of the sanitarium, Clarence N. Riggins, the attorney who drew the will, and Elsie Magee, a nurse. Dr. Vollmer and Mr. Riggins signed the will as witnesses. At the time of her death Mrs. Short was approximately 59 years of age. Her husband, Harry Short, had died three years

previously. Mrs. Short left no children. Her father was not living, and the only relative left her surviving was a mother, Mary E. Jasper, contestant herein, and a brother, John D. Jasper. Mrs. Laura Treadway and Mrs. Short had been close friends for many years. The will left the entire estate in trust to the Bank of America National Trust & Savings Association, with directions to use the income and so much of the principal thereof as might be necessary for the support, maintenance, and comfort of Mary E. Jasper during her lifetime. The residue was devised to Mrs. Laura Treadway. The testatrix expressly declared in the will that she had intentionally made no provision for her brother, John D. Jasper. The bank was appointed executor. The bank presented the will for probate and the contest was filed in the name of the mother. The mother, Mrs. Jasper, died on August 6, 1933, during the pendency of the action. The estate left by the testatrix was of the value of about \$18,000; was earned by the testatrix and her husband in conducting a florist shop in the city of Napa.

Upon this appeal it is urged that the court erred in admitting in evidence the deposition of Mary E. Jasper taken on the 29th day of April, 1933; that the court erred in overruling the defendants' objections to certain portions of the deposition of Mary E. Jasper; and in denying the defendants' motions to strike out certain portions thereof; that the court erred in its instructions to the jury; and finally, that there was not sufficient evidence to support the verdict of the jury.

The contest was filed by Mrs. Jasper on the 26th day of April, 1933. Her deposition was taken on the 29th day of April, 1933, at the instance of her attorneys. It was taken on a written stipulation prepared by the attorneys for the contestant and is in the following words and figures, to wit:

"It Is Hereby Stipulated and Agreed between the attorneys for the proponent, Bank of America National Trust and Savings Association, a banking corporation, and for the contestant Mary Ellen Jasper, that the deposition of Mary Ellen Jasper, a witness on behalf of the contestant in the above-entitled matter, may be taken before E. P. Locarnini, a Notary Public in and for the County of Napa, State of California, at the home of said witness, 293 Brown Street, in the City of Napa,

County of Napa, State of California, on the 29th day of April, 1933, at the hour of 11 o'clock a. m. of said day, and that if said deposition is not completed on said day, it may be continued from day to day successively thereafter and over holidays in the same place until completed, and when taken, the said deposition may be used on trial of said action, subject to the same oppositions, except as to the form of interrogatories, as if the witness were personally present and testifying therein.

"Dated: April 29, 1933."

The notary's certificate is to the effect that on the 29th day of April, 1933, Clarence Riggins, Esq., and Thomas C. Anglin, Esq., appeared for the proponent, Bank of America National Trust & Savings Association, and that Caulfield & Keil, Esqs., and E. L. Webber, Esq., appeared for the contestant, Mary E. Jasper. No other appearances are shown, and no other parties appear to be represented before the notary upon the taking of the deposition of Mary E. Jasper.

Preceding the reading of the deposition before the jury, objection was made there-to on the ground that the defendant Laura Treadway was not served with notice of the time and place of taking the deposition; that the stipulation for the taking of the deposition was not signed by Laura Treadway, nor by any person for her. The court overruled the objection and permitted the deposition to be read to the jury. The defendant Laura Treadway did not appear in the action by filing any papers, or otherwise, until on or about the 24th day of May, 1933. The record shows that Clarence N. Riggins had advised her in relation to her rights in the matter, and some time before the filing of the answer by Laura Treadway, prepared the answer for her. Mrs. Treadway, in her answer, appeared in her own proper person. Thereafter she did appear by her attorney, Clarence N. Riggins.

Section 370 of the Probate Code, relative to the filing of contests against the probate of wills, directs that a citation shall be issued to all persons interested in the will, including devisees and legatees. Section 2031 of the Code of Civil Procedure allows any party to a trial or proceeding to take a deposition before a judge or officer authorized to administer oaths, by serving notice upon adverse parties, giving at least five days' notice of the time

and place for the taking of such deposition. The deposition of Mrs. Jasper was taken two days after the filing of the respondent's contest, and therefore precludes any presumption that notice was given to Laura Treadway in accordance with the terms of section 2031, supra. The contest filed named Laura Treadway as one of the persons beneficially interested under the terms of the will, as the residuary legatee, which, of course, brought to the attention of the contestant the necessity of giving her notice of the taking of the deposition in question, or of obtaining a stipulation from her for the taking of the deposition, just as was obtained from the proponent of the will. The stipulation prepared by counsel for the contestant sought only a stipulation on the part of the bank, and was signed by counsel for the bank, as requested by counsel for the contestant.

[1, 2] In order that a deposition may be introduced against a party, it is necessary either that the notice required by the Code should be given, or that the party should have entered a stipulation for the taking of the deposition. The record in this case shows for whom the parties appeared. The mere fact that one of the attorneys for the bank afterwards appeared for Laura Treadway, or may have actually been tentatively her attorney at the time of the taking of the deposition, does not make her a party to the taking of the deposition, or constitute an appearance for her. The stipulation itself and the record of the notary taking the deposition limits the parties appearing therein to the contestant and the bank as the proponent of the will. Oversight or failure to give notice, or to obtain a stipulation for the taking of the deposition cannot be charged to the appellant Laura Treadway. That notice must be given requires no citation of authority. However, we will call attention to 9 California Jurisprudence, page 411, section 14.

[3, 4] In the instant case it is manifest that a separate verdict could not be rendered. It is simply a question of whether the instrument filed as the last will and testament of Julia Jasper Short is, or is not, a valid will. In actions for damages against several defendants, where judgment may be entered against one and not against the other, then the rule adopted in the case of *Jones v. Pitcher et al.*, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716, applies

where it is said (we quote from the syllabus): "A deposition taken without notice to all parties is admissible against such defendants as have been notified, provided the nature of the action allows of separate verdicts." See, also, the case of *Hanly v. Blackford*, 1 Dana (Ky.) 1, 25 Am. Dec. 114, where the same rule is adopted.

[5] Did the court err in overruling the appellants' objection to certain questions propounded to Mrs. Jasper in the taking of her deposition, and also in denying the motion of the appellants to strike out certain irresponsible, irrelevant, and incompetent answers? We think so. Before the deposition was read to the jury, it was taken up before the court; objections made to questions and motions to strike out answers; a proceeding which appears to be approved. The court, after insistence of the respondent, held that if objections were not made to questions at the time of taking of the deposition, and a motion made to strike out irresponsible answers, that such objections could not be taken, or motions made at the trial. In this manner the court was led into error. Section 2032 of the Code of Civil Procedure specifically and directly provides that when the deposition is offered in evidence, it is subject to all legal exceptions, save and except as to the form of the questions, in the same manner, and to the same effect as though the witness were upon the stand testifying at the trial.

In the case of *Lawrence v. Fulton*, 19 Cal. 683, 684, the precise question which we are considering here was before the court. It was there said: "The objection to this proof was not waived by not being raised when the deposition was taken. By section 430 of the Civil Practice Act, depositions are subject to all legal exceptions at the trial, but the single objection to the form of an interrogatory in case the parties attend the examination." The court in that case excluded certain portions of the deposition. Section 430 of the Civil Practice Act, adopted in 1851 (St. 1851, p. 119), is identical in substance and almost identical in language with section 2032, *supra*. It reads: "* * * And thereupon such deposition may be used by either party upon the trial, or other proceeding, against any party giving or receiving the notice, subject to all legal exceptions." It is then provided that if the parties attend at the

taking of the deposition, objections to the form of the questions must be made at the time the deposition is taken.

In volume 4, *Encyclopedia of Evidence*, page 554, the rule relative to objections is thus stated: "In most jurisdictions objections to the competency and relevancy of all or part of a deposition may be made when it is offered in evidence." This rule is supported by a large number of cases, too numerous to be listed, set forth in the footnotes. It may be observed, however, that in a large number of jurisdictions the statutes or codes require notice to be given that objections or motions will be made at the trial, and that such notice must be given a certain number of days before the cause is called for hearing. There are no such provisions in our codes.

The rule which prevails in this state is set forth in 9 *California Jurisprudence*, page 432, as follows: "Objections to the relevancy or competency of the evidence in a deposition may be made at trial. If, in a deposition, the witness' answer to an interrogatory is not responsive, it may be stricken out." The same paragraph from which we are quoting sets forth the proper procedure as to a preliminary examination of the deposition being given by the court before it is read to the jury, so that improper and inadmissible answers may be stricken out.

The rules which we have set forth are also to be found in volume 7, *Standard Encyclopedia of Procedure*, page 438, where it is said: "In many jurisdictions, objections to answers as irresponsible must be made before the trial, but in some states that may be taken at the trial." And then follows a statement of the rules showing that in some jurisdictions notice must be given, as we have stated, preceding the actual date of the hearing, as to what objections and motions will be made.

Under the Code sections and the authorities cited, it must be held that the court erred in adopting the rule that objections and motions came too late when only made at the trial, and not at the time of the taking of the depositions. Without further discussion of the law we will here set forth questions and answers where the court overruled the objections of appellants, and also denied their motions to strike out the answers. After some preliminary questions, some testimony which will hereafter be referred to, the following questions and answers were given:

"Q. Do you remember the hour she came there, Mrs. Jasper?" (This refers to a visit made by Laura Treadway to the sanitarium on April 12th.) The answer is as follows: "She came about the noon hour, and I was surprised. I was sitting like you are, and this is Mrs. Short's bed, here, and the door was there (indicating), and the door opened and someone came in, and I looked up; I thought it was strange, because everybody up there always rapped before they came into the room, before they came in the door, and I looked up, and I was sitting there, sewing, and I looked up and I saw Laura Treadway come, and I says, 'What are you doing up here? How did you get here?' And she made some laughing remark, I don't remember just what it was. Well, from that time on she took a seat right there, and I sat there, and this was Mrs. Short's bed right here (indicating), and she laid there all that morning. Mrs. Short didn't know anything; she had laid there all that morning; she didn't even know me."

Counsel for the appellants moved to strike out all of the answer after the words "she came about the noon hour," on the ground that it was irresponsible, incompetent, irrelevant, etc. This motion was denied.

We may here state, parenthetically, that Laura Treadway came to the sanitarium on April 12th in response to a special delivery letter which had been sent by the deponent to her at the city of Napa on the preceding day. It requires no argument to show that the voluntary statement of the witness was not an answer to any question, and that no foundation had been laid therefor. We will later refer to testimony showing that several people were in the room that same day who testified that Mrs. Short was rational.

The next question which we will consider is as follows: "Q. (By Mr. Webber): Now, Mrs. Jasper, how long did Mrs. Treadway (Laura Treadway), remain in the room where you and Mrs. Short were, if you remember; as near as you can, please tell us. A. How long she remained? Well, I will tell you. We sat there and talked a little while Mrs. Treadway and I, and she always called me 'Duckey' because 'Duckey' is my daughter's pet name for me, and she says to me, 'Duckey, let's go outside. You have been inside so long that you need a little fresh air.'

Well, I hesitated because I knew that Mrs. Short was in a very dangerous condition then, for her head was thrown back and her eyes and her mouth were both open, which was unusual for her, and I hesitated at the foot of the bed, and she says, 'Oh, come on. You need some fresh air.' Now, that must have been about one or two o'clock. It might have been two o'clock and it might have been three o'clock, but she took me, Mrs. Treadway did, and I didn't want to go, I didn't feel like I ought to leave Julia, I said, because if she wakes up, she will want me, and she said, 'Come on, you need a little fresh air,' and she took me by the hand and led me down that long aisle, if you know anything about the Sanitarium up there, you know that long aisle that goes from one end to the other, she took me down to the very furthest seat, except one, on that side (indicating), and she sat me down. 'Now,' she says—I mean, I says, 'I don't want to go so far because, if Julia calls, I want to be there, I want to be near her,' and she says, 'See here. You can hear her from here. You can hear her from here very easily,' but I knew that I couldn't. So she took me and put me on the outside seat, she gave me the outside seat and she sat inside, so that I couldn't get out without stepping high, unless I stepped over her feet. There is a stool that sets at the end of the aisle, and she put her foot on that stool and that barred me from getting out, and all of the time I was restless and I didn't want to stay there, and she kept me there, and I says, 'Laura, I must go and see Julia. I know she wants me,' and just as we raised up to go, she hesitated, she hadn't still gotten up, she didn't say, 'All right, we will go then,' but I got up, and just as I did, then I saw the nurse walking hurriedly down this aisle corridor and I then hurriedly got on my feet, and by that time the nurse was there, and she says, 'Which one of you is Mrs. Jasper? Mrs. Short is not so well. We thought maybe'—well, she says, 'You had better come up to her.' So I hurried along as fast as I could, and, when I got there, she was practically dead. She didn't know me or anybody else, and her head was thrown back and her mouth was wide open, and I knew then that she was dead, and then Mrs. Treadway just took me away, and then she brought me home that night."

To this answer, appellants moved to strike out all except the statement, "Now, that must have been about one or two o'clock; it might have been three o'clock." We may add here that the record shows that it was one of the nurses who led Mrs. Jasper from the room occupied by Mrs. Short, and assisted her down the hallway, and that afterwards Laura Treadway left the same room, went down the hallway and out to a court some distance from the place where the nurse had conducted Mrs. Jasper.

After testifying that Mrs. Short did not sign any papers, the witness was asked this question:

"Well, now, let me ask you this question: On this particular day when she passed away, from your observation of Mrs. Short while she was in bed there, and during the time you were there, what would you say as to whether or not she was competent or incompetent? (It appears that this question was objected to not only at the trial, but at the time of the taking of the deposition. The objection was overruled, and was answered as follows): A. Mrs. Short didn't know anything at all from the time I woke up that morning until she passed away that afternoon.

"Q. Well, was she competent in your opinion, or incompetent? A. She didn't know anything, because she just laid there and slept, and consequently she was not able to sign anything, or any papers."

The objection of counsel to these questions and the motions to strike out were overruled and denied.

[6] Subdivision 10 of section 1870 of the Code of Civil Procedure permits the asking of a subscribing witness to a will, and also of an intimate acquaintance, questions eliciting the opinion of the witness as to the mental sanity of the signers of the instrument. The question of competency is for the jury. In support of this statement we need only cite the case of *In re Estate of Taylor*, 92 Cal. 564, 28 P. 603, where it is said in substance: The capacity of a testator to make a will involves a question of law as well as of fact, and is for the jury to determine under instructions from the court; and the opinion of a witness as to such capacity is not admissible in evidence upon the hearing before a jury of a petition to annul the probate of a will on

the ground of the alleged incompetency of the testator.

Another question which elicited a statement apparently intended only to prejudice the jury is as follows:

"Q. Did Mrs. Short have some silverware in the house? A. Yes, sir.

"Q. And do you know what became of it? A. When we left here, that silverware was on the sideboard in that dining room out there, and, when I came back, that was the first thing that I noticed. You know the shock of Mrs. Short's death up there almost made me unconscious, but still I retained enough in my mind to know some things, and, when we came back, the first thing I missed was the silverware off of the sideboard. Well, I never thought anything about it just then. I thought maybe she had given it to some of the neighbors to take care of, to take care of it while we were gone, because we expected to be gone about two weeks, and possibly we would be gone longer than that. So, when I came back, that silverware was all gone, and it was my sister, I think, she told Mrs. Treadway about it; she got to inquiring about it; she had said that we had missed it off of the sideboard, and I think she told my sister that Mrs. Short had given it to her. Now, I don't believe that Mrs. Short had ever given that silverware to Laura Treadway or anybody else because she fully expected to come back home."

Appellants' motions to strike out were denied.

We may here properly insert the Proponent's Exhibit F, which shows the disposition of the silverware preceding Mrs. Short's going to the sanitarium. It is as follows:

"Napa, Cal., March 14, 1933.

"Mrs. Laura Treadway, Division St., Napa, Cal.

"Dear Laura: I am sending some of my silverware for you to take care of for me. In case of my death I want you to have it as a gift from me regardless of anyone. The half doz. teaspoons & sugar-shell that Minnie Jasper of Wheatland gave me, and half doz. tablespoons that Harry gave me I will lable and want Minnie to have (as they nearly match). Hope this will not be to much bother Will see you when I come back.

"With love.

"Julia Jasper Short."

Two more questions and answers illustrate the irresponsible nature of many of the answers contained in the deposition, which is too lengthy for us to fully set forth herein:

"Q. Were there any stronger ties of friendship, as far as you know, between Julia Short and Mrs. Laura Treadway, than there was between Julia Short and any other friends she had? A. No. I will tell you one thing. I have been thinking about that all morning too. For years Laura Treadway never came inside this house. She never seemed to care any more for Mrs. Short than she did anybody else, and she never came here at all. Well, all of a sudden she took to coming down here and spending her evenings, and brought her work with her." (Appellant's motion to strike out all the answer after the word "no," was denied.)

"Q. How long ago was that, when she started to come and spend the evenings with you? A. That was about six or eight months ago; and she came down here, and she is a terrible coward, and, when she would sit here with her work until about ten o'clock, and Mrs. Short and I would sit there and talk; we would talk to her, of course, she was our guest, and then, when about ten o'clock would come, and she would get ready to go home, she was afraid to go home alone in the dark, she was afraid, terribly afraid of the dark, so Mrs. Short always took her home in her car. She got her car out and took her home about ten o'clock at night, she did that, and that kept up for several weeks and I guess maybe for three or four months." (Appellant's motion made to strike out all after the words, "that was about six or eight months ago," was denied.)

The record shows that Mrs. Jasper was of the age of about 86 at the time of the taking of the deposition, and was physically in an enfeebled condition; that her memory did not serve her accurately, is shown by the record in her testimony, to the effect that while she and Mrs. Short were at the sanitarium for practically four weeks, she thought they had been there about three days; that she did not remember who led her from Mrs. Short's room; did not remember having written to Mrs. Treadway on the 11th day of April, 1933, requesting Mrs. Treadway to call at the sanitarium. The record further shows that when Mrs. Short proposed going to the sanitarium, she ask-

ed Mrs. Treadway to make preparations and arrangements at the sanitarium in order that her mother, Mrs. Jasper, might go to the sanitarium and be cared for, on the theory that the mother was unable to care for herself. What we have set forth of the rambling nature of the answers, which should have been stricken from the deposition, we think sufficiently shows that the testatrix had in mind, and kept in thought, the fact that provision should be made in her will for the care of her mother, and that the mother would not be able to care for herself, or for any estate that she, Mrs. Short, might leave, and accounts for the trust provision in the will evidencing that testatrix's clearness of perception that some such provision should be made to insure proper care being given both to the person of her mother and the estate which would be left to be used for her support and maintenance. This is further evidenced by testimony of witnesses which will hereinafter be set forth, showing that the testatrix was anxious to leave her property in such manner that it could not be wasted, and yet would be available for the protection of her mother, whom she felt was unable to care for herself, evidencing not an unnatural will, but the execution of a natural will containing such provisions as would best accomplish the purpose of the testatrix, to wit, the care and maintenance of her mother.

The testimony also shows that the testatrix had in thought that her brother would not probably care for the property, and would be likely to waste the same. There is also testimony in the record that the testatrix and Laura Treadway were very close friends. This intimacy is evidenced by the fact that when the testatrix and her mother went to the sanitarium, the testatrix, before going, called upon Laura Treadway to make all the arrangements. The will itself is dated April 12, 1933. It first gives all the property to the bank in trust, to be held, managed, and cared for, to use both the income and principal, or the proceeds from any sale from any portion of the estate, for the care, comfort and proper protection of the mother. The will by its terms authorized the trustee to use any portion of the principal that might be necessary to properly care for the mother during the remainder of her lifetime. At the termination of the trust estate, whatever there might be as residue was willed to Laura Treadway. To use her

own language, "To my friend, Laura Treadway." The will expressly stated that the testatrix intentionally omitted to make any provision for her brother, John D. Jasper.

The testatrix, at the time of her death, was of the age of about 59 years, and had been engaged in business as a florist for a number of years, and was the owner of a florist shop in Napa at the time of her decease.

[7,8] Does the testimony in this case support the verdict of the jury and the judgment of the court as to the unsoundness of the mind of the testatrix and her incapacity to execute a will? A careful reading of the testimony leads us to the conclusion that the appeal taken by the proponent and by Laura Treadway is well founded, and that there is in fact no substantial testimony showing incapacity on the part of the testatrix. Preliminarily, in view of the testimony, we may state that the opinion of a lay witness as to the mental capacity of a testatrix has no greater probative force than the facts given by him as the basis of his conclusions. This is clearly set forth in the opinion in *Re Estate of Sexton*, 199 Cal. 759, 251 P. 778. This observation applies to the testimony of the witness, Mrs. Jasper, if it should be considered that the deposition was admissible in this case. Her opinion as to the mental condition of the testatrix was based upon the fact that the testatrix slept a great deal, and that she was very sleepy on the morning of April 12, 1933. There is not a word in Mrs. Jasper's deposition to the effect that the testatrix was in a condition, mentally, so as not to be able to understand the nature of her act when executing a will, the situation of her property, and also the persons entitled to her bounty.

Excluding the portions of the deposition which we have held it was error on the part of the court not to strike out, there is not one word of testimony by any witness in this case to the effect that Julia M. Short was irrational on the day of the execution of the instrument involved in this action. There is not one word in the testimony to the effect that she had ever been mentally affected; nor one word in the testimony, that she did not, on the afternoon of April 12, 1933, recognize exactly what she was doing, the provision which she was making to insure the care of her mother, whom she

felt was physically unable to care for herself.

In view of what we have set forth in the record as to the lapse of memory on the part of her mother, and the rambling nature of her testimony, the terms of the will we think indicate that the testatrix realized just what was best to be done with her property in order to protect her mother during the remainder of her life. The testatrix, of course, could not appreciate that her mother would not long survive. All there is in the testimony simply indicates a weakened physical condition of the testatrix, which finally culminated in a heart attack and sudden death.

The disease from which the deceased was suffering when she went to the sanitarium is known as "Bright's disease," with which she had been afflicted for a long time.

A review of the testimony shows the following: Dr. Baker, a witness called on behalf of the contestant, testified that he had been Mrs. Short's attending physician for two years prior to her death, and that she had chronic Bright's disease, which is known as a disease of the kidneys, or uremic poisoning; that the effect of uremia is that a patient will become more or less comatose; that means they get drowsy-like. The doctor testified that the last time he saw Mrs. Short was in February at her home in Napa; that there was quite an improvement in her condition at that time; the main complaint she had at that time was extreme weakness; the albumen in the urine indicated kidney destruction. When the kidneys do not function the uremia is kept in the blood. It affects all the organs of the body and the mind. It produces coma and a comatose condition. Mrs. Short was mentally clear the last time I saw her. The true cause of her death was due to the kidneys, but she could have had a heart attack at that time, and the heart attack could cause death. Dr. Baker testified that the last time he treated Mrs. Short was shortly before Christmas; that he examined her heart at that time; that it had a condition usually found in chronic nephritis, leaky valves and an enlargement of the heart; that Bright's disease weakens the heart in two different ways: First, usually high blood pressure under which the heart generally weakens. Second, it affects the heart directly by the poisoning of the uremic conditions over the body, including the heart muscles; that at any

time the heart becomes overtaxed and stops functioning, the patient dies. "I found a dilation of Mrs. Short's heart when I treated her. Either the Bright's disease so poisons a person that they lapse into a coma and die therefrom, or before they come to that stage, the heart itself fails and they die from a failure of the heart to pump the blood through the system. I cannot say which is the most common." The doctor testified that he did not see Mrs. Short after February, and had no personal knowledge of what took place at the time of her death, and further, that the last time he saw Mrs. Short, her mind was clear. The doctor further testified as follows: "I would not say that all persons who have Bright's disease have an unsound mind. In a complete coma the patient lapses into unconsciousness, which will first manifest itself in drowsiness. If a patient does not die from failure of the heart to function, they will gradually lapse into complete unconsciousness and pass out that way. The last time I saw Mrs. Short on February 28th, her mind was clear, and she had suffered from Bright's disease for several years. She was running a florist business and attending to her business during the two or three months that I treated her. I would say she was mentally able to carry on the business. I cannot say from my own observation and knowledge that Mrs. Short ever became of unsound mind." The substance of the doctor's testimony was simply that Mrs. Short was suffering from Bright's disease, and that if she did not die from heart failure, in due time the progress of the disease would cause her to lapse into a coma, and then to pass out in that condition. There is nothing, as we have stated, in his testimony to warrant the conclusion that Mrs. Short was of unsound mind at the time of the execution of the will, or even at the time of her death.

Two physicians who saw the patient on the day of her death, Dr. Vollmer and Dr. Nelson, both testified that Mrs. Short's mind was clear, and that she died from failure of the heart to function.

Laura Treadway, called for cross-examination by the contestant, testified as follows: That she had lived in Napa all her life; knew Mrs. Short and her mother for over 35 years; had visited their home very frequently on an average of once a week or more; that she and Mrs. Short were very close friends; that Mrs.

Short had been ill for some time; that she made the arrangement for Mrs. Short to go to the St. Helena Sanitarium at the request of Mrs. Short; that the mother went with Mrs. Short, and occupied the same room. (Parenthetically we may say that the two women occupied twin beds in the same room.) The witness testified that she saw Mrs. Short on April 10th; visited her April 10th, just before noon; visited her again Monday evening. "I went to Mrs. Short's room. She was in bed. Her mother and the nurse were there. I just said, 'Hello, Julia,' and she said, 'Hello, Laura.' She said, 'Sit down,' and I said, 'How are you feeling?' She said, 'Pretty good.' I said that everything was going along nicely (referring to her business). The two young ladies were running it, and one was with me at the time; she had driven me up to the sanitarium. I went back to the sanitarium Monday evening. The girls from the store went up with me. I remained there about an hour and a half. Mrs. Short had a nurse. I did not see the nurse give her anything. Mrs. Short did not complain of anything. I went up again on Tuesday evening because Mrs. Jasper had sent me a special delivery letter that I received Tuesday. The brother of one of the girls in the store took me up." The witness testified she did not talk very much to Mrs. Short because the nurse asked her not to do so; that Tuesday night she noticed a change in Mrs. Short's condition; that she was not quite so well; that she had a talk with Mrs. Short's doctor after she left Mrs. Short.

Dr. Nelson said that their latest test did not look good; asked if Mrs. Short had her business arranged. Dr. Nelson asked if the witness knew who Mrs. Short's attorney was. The witness replied, "Mr. Riggins." The doctor said, "Mr. Riggins? I know him very well. Get in touch with Mr. Riggins and bring him up here so that Mrs. Short will be given an opportunity to straighten up her business affairs." The witness testified that she called on Mr. Riggins at his office the following morning, April 12th; told him of the conversation with Dr. Nelson, and that she knew it would be the wish of Mrs. Short that the mother should be protected during her lifetime. That day, April 12th, Mr. Riggins, accompanied by the witness, went to the sanitarium and to Mrs. Short's room. When she got there she motioned to the nurse, who stepped

out into the hall with her, and she explained her errand to the nurse. I told her that Mr. Riggins wanted Mrs. Jasper to leave the room. The nurse asked Mrs. Jasper to leave, and she went out with the nurse. I then went back and stepped over to Julia. I said, "Julia," and she said "Yes." I said, "Julia, do you remember on many occasions you have said to me that in case you were to pass away you would like to be given the opportunity to make a will?" And she said, "Yes." I said, "Now, Dr. Nelson tells me you are having quite a little spell, and, while you may come out of it all right, in case you do not, she thinks you should be given the opportunity to straighten up your business affairs, if you care to." I said, "I have brought Mr. Riggins up here with me for that purpose. Would you like to see him?" And she said, "Good, Laura."

The witness then asked Mrs. Short if she should bring Mr. Riggins in, and Mrs. Short said yes. Mr. Riggins came in and asked the witness to leave the room, and she went outside the building. Afterwards Mr. Riggins called her back to the room for a minute, and said Mrs. Short had said there were some papers in the dresser drawer, and asked her to look for them, as he did not like to look through Mrs. Short's things; that she looked, but found nothing of consequence, and again left the room. The witness testified that she remained out of the room until after the will was executed and Mr. Riggins came out of the room, and testified that she remained in the room with Mrs. Jasper until the nurse called her back into the room. When the witness returned to the room she found Dr. Nelson and two nurses with Mrs. Short.

Clarence Riggins, a witness called by the contestant, after testifying that he made certain preparations which would aid in drafting a will, and stating that he went to the sanitarium by automobile, after reaching the sanitarium testified to the following facts, after entering Mrs. Short's room: "Mrs. Jasper was out of the room when I arrived. I spoke to Mrs. Short and asked her how she was, and she spoke to me. I know that she knew me. I asked Mrs. Treadway to go out before I said anything to Mrs. Short in a business way. I told her that I had been asked by Mrs. Treadway to come up for the purpose of making such arrangement of her affairs, if anything happened to

her, as she would want, and I did not want to intrude myself on her unless she wanted me. She said she did. I said, 'Well, you have an old mother who ought to be protected and taken care of during her lifetime,' and that I would advise either the making of a trust deed or will for the purpose of taking care of the property for the benefit of her mother during her lifetime, and using both the income and principal, if necessary, for the mother, and that at the time of her mother's death, the balance to go to whomsoever Mrs. Short wished. I said further, 'I haven't time to make a deed, and when you get back to Napa, if you want, we can make a deed, but I think you had better make a will at this time.' She said she thought there might be some deeds or papers in the bureau. I did not want to look in the drawer myself, and I stepped out and called Mrs. Treadway back to the room, and asked her to look. Mrs. Treadway opened the drawer and we found a few papers, but there was nothing of any assistance, and I asked Mrs. Treadway to again leave the room. Mrs. Short was propped up in bed with pillows. I did not notice her breathing. I had no trouble in understanding everything she said to me, I am satisfied she understood what I said to her. After looking in the drawer I told Mrs. Short there was nothing in the drawer that would be of any assistance to us, and I thought she should make a will, such as I have explained, for her mother's protection, if she wanted it that way, and she said, 'All right, go ahead.' I sat down at the table next to the window and took out my material and started to prepare the will. I used in writing the will an ordinary steel pen that was lying there. * * * I did not know Mrs. Treadway's first name, and when I came to write it in the will, I asked Mrs. Short what the first name of Mrs. Treadway was, and she spelled it out for me. I also asked her if Mrs. Treadway was not the former wife of a man, who at one time lived in Napa, mentioning him to Mrs. Short, and she said she was."

The witness testified, after discussing with Mrs. Short the provisions of the trust for taking care of the mother during her lifetime, he asked Mrs. Short whom she wanted to take the remainder after her mother's death, and she said "Mrs. Treadway." He also asked her if she didn't want to make provision for her brother, and she said "no." He explained

to Mrs. Short that it would be necessary to name a trustee, and mentioned the Bank of America, and told her the trustee would be paid commissions, and asked her whom she would prefer, and she said she wanted the bank. He testified, further, that no one other than Mrs. Short suggested anything to him as to the disposition of her property by the will, and that Mrs. Treadway did speak to him about Mrs. Short's mother being protected; that after completing the writing of the will he sat down by Mrs. Short's bed and read the will to her, explaining those portions that he thought might require explanation, while he was reading the will; that when he was nearly through reading it, the door opened and a nurse, Miss Magee, came into the room and gave Mrs. Short something she took from a stand between the two beds (the testimony elsewhere shows that the patient was given lemon water quite frequently as an antidote for nausea); that he stopped reading the document when the nurse came into the room, but said to the nurse, in the presence of Mrs. Short, that he had been preparing a will, and that he would like to have Dr. Nelson (Mrs. Short's doctor) act as a witness if agreeable to Mrs. Short; that he then discontinued reading of the will; that the nurse came back and said that Dr. Nelson was away, but that she could get Dr. Vollmer; that a few minutes later Dr. Vollmer came into the room, and at that time he stated to Dr. Vollmer, in the presence of Mrs. Short, that he had prepared her will, and that he would like to have him act as a witness, if he was satisfied in his own mind that Mrs. Short was in a condition to make a will, and Dr. Vollmer turned and talked with Mrs. Short, and then he said it would be all right for her to make a will. The witness testified that he had already asked Mrs. Short, in the presence of Dr. Vollmer, if he had read the will to her, and she said that he had; that when the nurse was there he asked Mrs. Short if the will was clear to her, and she said it was; that he thought that was in the presence of Dr. Vollmer, also. The testimony of the witness is also to the effect that Mrs. Short then signed the will, and in signing the will it became necessary to change the pens which had been offered to Mrs. Short for her use, on account of a defect in one of them.

After the testatrix had signed the will, the witness Riggins, and Dr. Vollmer sign-

ed the same as witnesses. The witness testified that he had known Mrs. Short for nearly 20 years; that he had acted as her attorney on previous occasions; that at the time of the execution of the will, Mrs. Short's mental condition was excellent; that she had sufficient mental capacity to be able to understand the nature of the act which she was doing, and to recall the nature, situation of her property, and the claims of those who were entitled to her bounty. The witness testified that he explained to Mrs. Short that a private person could be selected as a trustee, or the bank might be selected, and that Mrs. Short made her selection of the bank. "When I read the will to Mrs. Short she stated that she understood its provisions, and at that time she had the appearance of a rational, intelligent woman, and answered all questions intelligently."

Dr. Vollmer, called as a witness, testified that he was a physician and surgeon at the St. Helena Sanitarium; had been there for ten years, that he knew Julia Short; saw the document that was offered in court as her last will; that he entered the room of Mrs. Short about three o'clock in the afternoon on April 12, 1933; that he turned to Mrs. Short and greeted her, and asked her how she was, and that he noticed her condition. He testified that in his opinion she was competent to sign a will; that the name "Julia Short" was written by Mrs. Short herself; that Mrs. Short remarked she could not sign it lying in the position that she was in; that he sent for a nurse and she came in and assisted in propping her up with pillows; that the nurse was Miss Elsie Magee, who remained in the room while the will was signed; that Mrs. Julia Short wrote the entire signature that appears upon the will; that she said it was her will and wanted them to sign as witnesses. The witness further testified as follows: "At all these times I observed Mrs. Short. Her mind was clear. In my opinion at the time Mrs. Short signed the will, and at all times during that day when I was there, Mrs. Short had sufficient mental capacity to understand the nature of a will, and to be able to understand the nature and situation of her property, and remember and understand her relations of the persons who had claims upon her bounty, and who are interested, or would be affected by the provisions of her will." He further testi-

fied that Mr. Riggins asked Mrs. Short, while he was there, if she wanted him to read the will over again, and she said it was not necessary; that he was in the room ten or fifteen minutes; that the will was signed between 3 and 4 p. m.; that the amount of uremia shown by the chart was not sufficient to affect Mrs. Short's mind; that she did not die from toxic poisoning, but from heart failure; that it is true that ordinarily there are two ways in which we may have a fatal termination; one is, they go under a coma, or the picture may be terminated by a sudden heart breaking or failure; that this was so in Mrs. Short's case; that one can never tell in these cases which is going to be fatal, whether they will terminate suddenly by heart failure, or whether they will terminate in uremic coma; that the majority of these cases, in his experience, in this type of Bright's disease, terminate by heart failure.

Miss Elsie Magee, a witness called by contestant, testified that she was a nurse at St. Helena Sanitarium; that she remembered Julia Short; was a special nurse on her case. The witness also testified concerning a daily report which she kept of entries made by Lulu White (another nurse), and herself. The chart was admitted in evidence. The witness testified that she arrived on the case at about 1 o'clock in the afternoon; gave Mrs. Short lemon water, and made an entry on the chart at that time; at about 1:20 the same afternoon she gave Mrs. Short another teaspoonful of lemon water; that Dr. Nelson entered about this time; that she was the attending physician; that at 1:30 she gave Mrs. Short another teaspoonful of lemon water, and at 1:40 gave her rice water; at 1:50 gave her lemon water; at 2:00 rice water; at 2:10 more lemon water; at 2:20 rice water; at 2:40 a teaspoonful of rice water; that at 2:50 Mrs. Short was left alone in the room with Mrs. Treadway; that Mrs. Treadway came in at 2:40; that there were friendly greetings between Mrs. Treadway and Mrs. Short and her mother; that at ten minutes past three that afternoon, another teaspoonful of lemon water was given Mrs. Short; that at 3:30 she took Mrs. Short's pulse and asked the patient if she was comfortable; that when she entered the room the will was being read to her (Mrs. Short). The witness testified that she did not hear any of it, but she did hear attorney Riggins

ask Mrs. Short if it was plain, and heard her answer, "Yes, it was"; that she was there when the will was signed. She further testified that the chart did not show the conversations with Mrs. Short; that when she gave her the lemon water she said it was refreshing and tasted good; that Mrs. Short was lying in bed, propped up with pillows; that when Dr. Nelson came in Mrs. Jasper was sitting in an easy-chair at the foot of Mrs. Short's bed. The witness testified: "I went out in the hall with Mrs. Jasper. Mrs. Treadway did not go with us. We went to the fish pond. It is on the opposite side of the building from the court." (Mrs. Treadway testified that she went out to the court.) "I saw Mrs. Short again after I went out with Mrs. Jasper. It was about 3:30." It was when he asked her if the will was plain, and she answered yes, it was plain. The witness further testified that Mr. Riggins asked her to call Dr. Nelson; that she was unable to find her, and called Dr. Vollmer; that she was asked to put Mrs. Short in a better position for writing; that she added a pillow to Mrs. Short's back; that Mrs. Short started to write, "Mrs. Harry Short," and was told to write her own name; that they left shortly after the will was signed; that she wrote up the chart that night from the pad; that no medicine was given Mrs. Short by her on that day; that no hypodermic injections were given her; that at 4:15 Mrs. Short was wide awake, and very talkative, saying she was very glad to know that her mother would be taken care of; that she spoke of Mrs. Treadway being her best friend, how good she had been to her mother, and how they all loved her. The witness testified that Mrs. Short's appearance that day, up to the time she executed the will, her conduct, demeanor, and conversation, indicated she was very rational; that she based her opinion upon Mrs. Short's conversation, answers to questions, her actions, and the witness' experience with patients like her.

Dr. Ida S. Nelson, a witness called by the proponent, testified that she had been a member of the medical staff at the sanitarium for 22 years; that she was the attending physician for Julia Short; that Julia Short died on the 12th day of April, 1933; that she saw Mrs. Short once and twice a day during the four weeks she was there; that the disease was diagnosed as "Bright's disease"; that Bright's

disease may cause the heart to become weakened, and the heart valves may give out; that she saw Mrs. Short three times on the day of her death about 11 o'clock; then a little after 12 o'clock; and then around 5 in the afternoon; that the condition of her mind the first two times she saw her that day was normal bright; that when she saw her at five in the afternoon her mind was still clear; that at that time she was suffering from a heart attack; that she died at six that afternoon; that when she went into the room at 5 o'clock, the superintendent was there and the nurse, Miss Magee; that Mrs. Jasper was not in the room; that no oxygen was administered to Mrs. Short the day of her death; no medicines of any kind were administered to her the day of her death, except a heart stimulant just a few minutes before she died; that Mrs. Short had told her, soon after she came to the sanitarium, that she and Mrs. Treadway had been girl friends; that Mrs. Treadway was her best friend, and that they had been present at each other's weddings.

Lulu White testified that she was one of the nurses for Mrs. Short; that Mrs. Short was rational at all times; that everything Mrs. Short said, and everything she did, would indicate that she was rational.

Miriam Stevens, a night nurse on the case, testified that Mrs. Short's manner and conversation were always rational; that she talked about different things; about the flower shop; about her friends; answered questions in a rational manner; that she always answered as anybody else would, and that she did not have any reason to think that she was not rational.

Catherine Epp, medical superintendent at the sanitarium, testified that she visited Mrs. Short every day while she was there; the first time, April 12th, it was probably about 1:30; the second time, about 4 o'clock in the afternoon; that she had a conversation with Mrs. Short when she was there at 4 p. m.; that Mrs. Short's manner and words at that time were rational; that her reasons for believing that Mrs. Short was rational were that she answered all questions like any one else would answer the same.

The testimony of E. O. Heinrich relative to the signature of Mrs. Short is of no importance. It was to the effect that different inks had been used in the sig-

nature. The witnesses to the will testified that a change was made in the pens given to Mrs. Short on account of some defect therein. This, of course, has no bearing upon any issues presented upon this appeal.

In connection with the testimony of the nurses, the charts kept by them were introduced in evidence, showing the condition of the pulse, temperature, etc., of Mrs. Short, from day to day. In view of the testimony of Dr. Vollmer that the charts did not show sufficient uremia in the blood to affect Mrs. Short's mind or mental condition, we do not deem it necessary to lengthen this opinion by a discussion of what is exhibited by the charts. We may note, however, that Dr. Baker, upon whose testimony contestants place great reliance, did not testify that the charts showed sufficient uremia to affect the mental condition of Mrs. Short, his testimony going only to the effect that uremic poisoning might affect not only the physical, but the mental, condition of a patient, and not that such was the case with Mrs. Short.

A number of witnesses were called and testified as to the friendly relations between Mrs. Short and Mrs. Treadway, and also, there is testimony in the record indicating, to say the least, that the brother of Mrs. Short was not frugal in his habits.

As indicating, and, as we think, clearly establishing the mental condition of Mrs. Short, and her capacity to understand the nature and condition of her property and those who were entitled to her bounty, we incorporate in this opinion a letter written by Mrs. Short after she had been at the sanitarium for about three weeks. The letter is somewhat lengthy, but it speaks forcibly for itself:

"Sanitarium, Sat. A. M.

"Dear Aunt Dixie and Carrie:

"We received your letter and was glad to hear from you. We expect to go home this Wed. Will be here three weeks. Am lots better but do not feel like I can afford to stay here longer. The ink has given out. Now, Aunt Dixie, I don't want you to feel like you have to be nurse again after all you and Carrie have gone through this winter. We will be glad to have you, but it will not be much joy around for awhile, for I am so weak and shaky that I can't do very much. I have had a woman come once

a week since I have been sick; and clean and dust. Mama has picked up and looks fine. I have gained eleven pounds. My kidneys are still bad, but will be O. K. I certainly will be glad when I am well again; seems like have had a little too much. I am just crazy about this place; so restful and quiet; although we get lots of company and callers. This is an Adventist affair, but their religion is all right with me. I do not think Genevieve is going to Italy; do not think she has enough money. At any rate I am not going back to the store for awhile, not to work at any rate. Never thought I would have to draw a line on myself. Aunt Dixie, if you do come be sure and bring your table-cloth, for I want you to get that finished, and the front porch will be a good place to see your work. Well, Carrie, you certainly earned yours with the coal. I do not see how you stood it, but I tell you there is grit there. It is too bad that some of it can't be spread on some of my in-laws. Lazy huzzy, excuse the English. Marion expects the stork again in July, and is coming up here. Laura comes up every day or two. I do not know what would have happened to me if not for her, as she was the only one close by. Now, do not worry about me because I am doing fine, and if you would like to come, we will make it as pleasant as we can, but do not want you to neglect your own there. I think it mighty nice that you would come all that way and expense for us. Let us hear from you at home, as we will be home when you get this, I think. Brother is not working yet, but they are too busy doing nothing to be bothered with us. I will tell you a few things when we see you. Will close for this time with lots of love.

"Julia."

Other letters written by Mrs. Short while at the sanitarium likewise indicate the clearness of her mentality, but we think the foregoing sufficient.

In view of the fact that there is no substantial testimony in the record, as shown by the foregoing, of any lack of capacity on the part of Mrs. Short to execute a will, it seems almost unnecessary to review any of the cases cited either by counsel for the proponent or by counsel for the contestants. We will, however, refer to a few cases, some of which were decided by this court.

Contestants place reliance upon the case of *In re Estate of Alexander*, 111 Cal.

App. 1, 295 P. 53. A reference to the facts in that case show that a number of witnesses testified as to the extreme age of the testator, his illiteracy, his feebleness, his eccentric habits, the manner in which he acted, indicating that the testator was afflicted with senile dementia. There is no testimony of that kind in the instant case. Mrs. Short was not a woman of extreme age.

In the *In re Estate of Johnson*, 72 Cal. App. 663, 237 P. 816, the testimony of a number of witnesses was to the effect that Johnson was of unsound mind, and further shows that he was adjudged insane and committed to the State Hospital for the Insane at Napa. An examination of that case shows from the acts and conduct, conversation, etc., of the testator, that he was suffering from some form of paresis. In that case physicians testified to the fact that Johnson was suffering from softening of the brain.

[9,10] We do not need to cite authorities to the effect that testamentary capacity is always presumed, and while physical weakness may be considered, that alone is not sufficient to support a verdict setting aside a will.

As completely answering every legal question that can be raised in that case as to the capacity of Julia M. Short to execute a will on the 12th day of April, 1933, we cite the cases of *In re Estate of Sexton*, 199 Cal. 759, 251 P. 778; *In re Estate of Dolbeer*, 149 Cal. 227, 86 P. 695, 9 Ann. Cas. 795; *In re Estate of McDonnell*, 109 Cal. App. 577, 293 P. 651; *In re Estate of Finkler* (Cal. Sup.) 46 P.(2d) 148, 149.

It follows from what we have set forth herein that the order of the trial court denying proponents' motion to admit the will to probate, notwithstanding the verdict, should be, and the same is hereby reversed. That the judgment of the trial court based upon the verdict of the jury denying probate of the instrument filed as the last will and testament of Julia M. Short, deceased, be, and the same is hereby reversed, and the cause remanded to the trial court with directions to admit the writing, dated April 12, 1933, to probate as the last will and testament of Julia M. Short, deceased.

We concur: PULLEN, P. J.; THOMPSON, J.

CASSERLY v. CITY OF OAKLAND et al. *

ERNY v. SAME.

SHERRY v. SAME.

Civ. 9485-9487.

District Court of Appeal, First District,
Division 1, California.

July 11, 1935.

Rehearing Denied Aug. 10, 1935.

Hearing Granted by Supreme Court
Sept. 5, 1935.

1. Municipal corporations ⇨187, 200

State for number of years has maintained liberal attitude toward pensions awarded persons employed in hazardous duties of police and fire departments of its various municipalities, and pension statutes are to be liberally construed.

2. Municipal corporations ⇨187, 200

Principle that pension is merely a bounty or gratuity has never obtained in California.

3. Municipal corporations ⇨187, 200

Upon happening of event which is fixed as occasion for allowance of pension, right to pension becomes vested and cannot be taken away or impaired by amendment of charter, ordinance, or statute under authority of which pension was originally granted.

4. Municipal corporations ⇨187, 200

Pensions awarded members of police and fire departments under charter of city of Oakland, which established relief and pension funds for such departments, could not be reduced below amount of basic award on ground that city was confronted by economic emergency, especially where such members while in service of city made monthly contributions to such funds.

Appeal from Superior Court, Alameda County; John D. Murphey, Judge.

Separate actions by Nora Casserly, A. E. Erny, and by J. J. Sherry against the City of Oakland and others for peremptory writs of mandamus. From judgments denying the writs, petitioners appeal.

Reversed.

See, also, 215 Cal. 600, 12 P.(2d) 425.

Decoto & St. Sure and John D. Martin, all of Oakland, for appellants.

C. Stanley Wood, former City Atty., F. Bert Fernhoff, City Atty., and John W. Collier, Asst. City Atty., all of Oakland, for respondents.

PER CURIAM.

This is a consolidated appeal from the judgments in three separate actions denying to the respective petitioners and appellants a peremptory writ of mandamus. The principal question involved in each appeal is practically the same.

The appellant Nora Casserly is the widow of William Casserly who, for nineteen years and continuously up to the time of his death on December 21, 1930, had been a member of the fire department of the city of Oakland. At the time of his death he held the rank of hoseman, and received an annual salary of \$2,400. Section 104 of the charter of the city of Oakland provides that the board of trustees of the Firemen's Relief and Pension Fund shall, out of said fund, provide for the family of a member of the department who may be killed while in the performance of his duty, as follows: "(a) Should the decedent be married, his widow shall, as long as she shall remain unmarried, be paid a pension equal to one-half of the salary attached to the rank held by the decedent at the time of his death, which pension shall be payable in equal monthly installments." On August 9, 1932, said board of trustees granted to said appellant a widow's pension of \$1200 per year.

The appellant A. E. Erny was, on June 8, 1933, retired for disability as a member of the police department of the city of Oakland. He had held the rank of patrolman for a year prior to the date of his retirement. His disability resulted from injuries received while in the performance of his duties, which injuries necessitated the amputation of one leg and prevented future active duty as a police officer. At the time of his retirement, he was awarded an annual pension of \$1200, being one-half of his salary as a patrolman. Section 95 of the Oakland charter provides for the retirement, for disability resulting from bodily injuries sustained in the performance of duty, upon a pension equal to one-half of the amount of salary attached to the rank which the member of the department, so retired, held one year prior to the date of such retirement, such payment to be paid to him during his life, and to cease at his death. In case disability should cease, his pension should cease, and he would be restored to the service in the rank he occupied at the time of his retirement.

Appellant J. J. Sherry was a member of the police department of the city of Oakland from April 7, 1896, until May 27, 1932, at which time he was 63 years of age, and was retired under the provisions of section 94 of the Oakland charter, which provide, in substance, that the board of trustees of the Police Relief and Pension Fund may retire and relieve from service any aged, infirm, or disabled member of the police department who has arrived at the age of 60 years, upon a monthly pension equal to one-half of the salary attached to the rank held by him one year prior to the date of his retirement. Such person must have been an active member of the department for 20 years. Appellant Sherry had held the rank of sergeant for more than one year prior to the date of his retirement at a salary of \$220 per month, and was accordingly awarded a pension of \$110 per month for the remainder of his life.

In July, 1933, certain amendments to sections 91 and 97 of the Oakland charter became effective; these amendments providing, in substance, that no compensation or salary less than that specified in the respective sections of the charter shall be paid; provided, however, that when it shall be found by the city council of the city of Oakland, by ordinance adopted by not less than six affirmative votes, that an economic emergency confronts the Oakland city government due to extraordinary conditions beyond the control of said city government, said council may, by ordinance, provide for and effect a reduction of not to exceed 10 per cent. of the annual salaries fixed by each section. In accordance with the authority granted under said sections, the Oakland city council on July 31, 1933, enacted an ordinance reducing the salaries of the members of the fire and police departments. Later, the board of trustees of the Firemen's Relief and Pension Fund reduced all fire department pensions, including that of appellant Casserly, to one-half of the amount fixed as salaries by the city council, by its ordinance, and a pension reduced by 10 per cent. of the amount originally awarded was allowed to the appellant Casserly. The board of trustees of the Police Pension Fund took similar action by resolution dated August 30, 1933, and awarded pensions based upon the salaries as fixed by the city council for active ranks, and this reduction amounted to 10 per cent. of the

monthly pension originally awarded to appellants Erny and Sherry. The charter of Oakland also contains provisions, both as to police and fire departments, that there shall be deducted from each monthly installment of salary, a sum equal to 5 per cent. of such salary, which sum so deducted shall be retained by the city treasurer, and forthwith paid by him into the police or firemen's relief and pension fund (as the case may be), and the city shall contribute the balance necessary to maintain said fund pursuant to the provisions of the charter, and no other or further deductions shall be made from the pay of any officer or member of the respective departments for any fund or purpose, unless the same is authorized by the charter. Respondents point out that salaries in all ranks in the police and fire departments were increased in 1919, 1923, and 1925, but it should be noted that no increase occurred after the award of the respective pensions involved in this appeal.

It is contended by respondents that the amount of money received monthly as a pension is reduced proportionately upon the reduction of the salary attached to the active ranks in the police and fire departments, while appellants urge that the right to the pensions awarded respectively to them vested in them immediately, and constitutes a minimum below which the original award may not be decreased. While we have some dicta in the decisions of the California courts which might be interpreted as tending to support the principle that the basic pension originally awarded may be reduced, the statements of the courts seem to be confined to and properly applied to the state of facts then before them, and we have been able to find no case in which the question directly involved in this appeal has been brought to the attention of, or decided by, any court of this jurisdiction.

[1] The state of California has for a long number of years adopted a liberal attitude in regard to pensions awarded to persons employed in the hazardous duties of the police and fire departments of its various municipalities. It has often been held that pension statutes are to be liberally construed. *O'Dea v. Cook*, 176 Cal. 659, 169 P. 366, 367; *Aitken v. Roche*, 48 Cal. App. 753, 192 P. 464; *Klench v. Board of Pension Fund Commissioners, etc.*, 79 Cal. App. 171, 249 P. 46, 49.

The policy and purpose of pension statutes have been admirably stated by Mr. Justice Hart in *Douglas v. Pension Board*, 75 Cal. App. 335, 242 P. 756, 757, and in *Klench v. Board of Pension Fund Commissioners, etc.*, supra. In *Hurley v. Sykes*, 69 Cal. App. 310, 231 P. 748, 751, the court said: "The spirit of these provisions is to protect all members of the fire department in the benefits which the fund insures, and they should not be narrowed by any strict or technical construction, but should be interpreted on broad principles. Any other construction would result in a limitation of the beneficial provisions of the act, and render nugatory the manifest intention of the law-making power, and do violence to its apparent purpose."

[2] While many jurisdictions have adopted the view that a pension is merely a bounty or gratuity, that principle has never obtained in California. "A pension is a gratuity only where it is granted for services previously rendered, and which at the time they were rendered gave rise to no legal obligation. * * * But where, as here, services are rendered under such a pension statute, the pension provisions become a part of the contemplated compensation for those services, and so in a sense a part of the contract of employment itself." *O'Dea v. Cook*, supra; *Aitkin v. Roche*, supra; *Jackson v. Otis*, 66 Cal. App. 357, 225 P. 890; *Klench v. Board of Pension Commissioners, etc.*, supra.

[3] Upon the happening of the event or contingency which is fixed as the occasion for the allowance of a pension, the right to such pension becomes vested and cannot be taken away or impaired by the amendment of the charter, ordinance, or statute under authority of which the pension was originally granted, and it is not competent for the Legislature or any other authority to deprive the pensioner of his vested right. *Kavanagh v. Board of Police P. F. Commissioners*, 134 Cal. 50, 66 P. 36; *Sheehan v. Board of Police Commissioners*, 47 Cal. App. 29, 190 P. 51. In *Klench v. Board of Pension Commissioners, supra*, the court said: "* * * while no public officer or employee of the government is entitled as of right to a pension (*Douglas v. Pension Board of the City of Sacramento* [75 Cal. App. 335], 242 P. 756), still, when once the government establishes a retirement pension system for its officers and employees and pro-

vides the funds and means for administering it according to its design, any such officer or employee, when the conditions arise or occur upon which, under the rules and regulations of the system, he becomes eligible to be retired and placed upon the pension roll, and he having met all the requirements entitling him to be so retired has in fact been retired and enrolled upon the pension list, has then acquired a vested right to draw his pension and to receive as such whatever sum or sums of money may be provided for such purpose for officers or employees of the class to which he belongs. The petitioner here, as the admitted averments of the petition disclose, had become eligible, under the terms of the Pension Act of 1889, to be retired. All the conditions upon which his retirement on a pension could be effected had occurred, and he was accordingly legitimately retired and placed upon the pension roll. His right to be paid the money provided for police officers of his class or rank had become vested, and hence it does not lie within the power of the city council by ordinance, or by inaction with respect to the enforcement of such ordinance, in effect to destroy that right, until the conditions upon which he was retired and placed upon the pension roll have ceased to exist. * * * It is to be conceded, however, that it is within the power of the Legislature, state or local, to repeal, change, or modify a pension law passed for the benefit of its officers or employees, yet, until that is done, and there is a pension system duly established by law, either by direct action of the Legislature or by a local political subdivision under its charter, and the conditions or contingency happen upon which an officer or employee of the government becomes eligible to be placed upon the pension rolls and is actually so placed, such officer or employee then acquires a right to be paid the money provided for his relief under such law of which he cannot legally be divested."

How consistently the courts of this state have recognized the vested right of the pensioner is illustrated by the following cases: In *Jackson v. Otis*, supra, a police officer of the city of Alameda was retired for disability and placed upon the pension list. Later, he was elected constable, and it was sought to restrain the payment of his police pension. The court

held that he could continue to draw his pension. The court quoted from *O'Dea v. Cook*, supra, to the effect that, when services are rendered under a pension statute, the pension provisions become a part of the contemplated compensation for those services and so in a sense a part of the contract itself. In the case of *Douglas v. Pension Board*, supra, the charter of the city of Sacramento provides that all employees of the city who have served the city continuously for 20 years in any capacity, except as an elective officer or city manager, should be eligible to relief and pension, and that certain employees who have passed the age of 60 years and shall be found unfit for the performance of their duties shall receive an annual pension equal to one-half of the salary paid them one year prior to their retirement. The plaintiff had been employed continuously by the city of Sacramento for more than 20 years at a daily wage. During the last year of his employment he was unable to work during a period of approximately three months because of illness, and actually received a much smaller total compensation for that year than the preceding years. The court held that the intent of the charter was that a per diem employee, upon his retirement at the end of his twentieth year of continuous employment in the service of the city, should receive a pension in an amount equal to one-half of what his compensation would total in the twentieth year, counting every working day, regardless of whether or not he was actually working on every such day. The court, in the course of its opinion, spoke as follows:

"The effect of laws providing for the payment of retirement pensions to public officers or employees is to increase the compensations of such officers and employees, and they are so intended. This proposition has particular force as to public officers who perform services as such subsequent to the passage of the law granting such pensions. * * * While, of course, no public officer or employee is entitled as of right to be granted a pension, still, when a government has adopted a retirement pension system, it should be so administered as to bring about the efficacious results which it is intended to produce. It should not be so construed and administered as to confer its benefits upon those not actually entitled thereto, nor so that those so entitled should be denied their just rights thereunder.

"By the provisions of the charter of the city of Sacramento establishing a retirement pension system it was intended, of course, that every officer or employee of said city who has performed services for the city for the specified number of years, based either upon the age limit or disability, shall, upon his retirement, receive the compensation or pension specified in the instrument, and that intention should be carried out in all proper cases, and never set at naught in any particular instance, except it is plainly apparent that the conditions upon which pensions are to be granted do not exist."

In *Watkins v. Pension Board*, 91 Cal. App. 542, 267 P. 323, the plaintiff had been for over 21 years continuously employed as a member of the fire department of the city of Sacramento in the capacity of "Superintendent of the Fire Alarm System." He was relieved because of disability, upon a pension equivalent to one-half of his salary. Later, the city of Sacramento adopted a new charter by which the position formerly held by plaintiff was discontinued, and the position of "City Electrician" was created. That position provided for additional duties and more technical knowledge, and was combined with duties of other officers. A larger salary was provided for the new position, and plaintiff sought an increased pension upon the theory that the city electrician was an officer of the same rank as the superintendent of the fire alarm system. The court held that the two positions were not the same and plaintiff was not entitled to the increased pension, but it was conceded by counsel for both parties that petitioner had a vested right to a pension in the original sum awarded to him, and the court accepted that concession.

[4] The pension being a part of the compensation of the employee to whom it has been awarded, and therefore a part of the contract itself, it must be something capable of exact definition. The pensioner must have assurance that the consideration as in any other contract will be paid when he has done his part, and the contingency upon which the pension is based has arrived. If the pension can on one occasion be decreased because of an economic emergency or by reason of some other amendment to the charter of the city, there is no assurance that other changes will not be made which will further encroach upon the vested right of the pen-

sioner and destroy the safeguards which the law intends, and which it has been the policy of the state to carry out.

The Oakland charter purports only to reduce salaries, and there is no direct authority or direction in the charter itself for the reduction of pensions. The right to a pension contemplated by the law is not a phantom right, but one of substance. To offer anything else to the pensioner who may be a widow, or a person who has been so seriously injured, or has become so infirm, that he cannot expect to return to active service, would be to defeat the purpose of the law, as suggested in the cases which have been cited.

For the reasons stated, we must conclude that the pension involved in each of the cases represented in this appeal cannot be reduced below the amount of the basic pension originally awarded, and in which the respective appellants and petitioners have acquired a vested right. The petition for a peremptory writ of mandamus in each case should have been granted. The judgments are reversed.

4 Cal.2d 86

STATE BAR OF CALIFORNIA v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.
L. A. 15170.**Supreme Court of California.**
July 23, 1935.**1. Mandamus ☞57(1)**

In proceeding by state bar to have designated persons declared in contempt, where superior court assumed jurisdiction and determined that facts stated did not constitute contempt, writ of mandate would not lie to review such determination (Code Civ. Proc. § 1209, subd. 13).

2. Mandamus ☞60

Writ of mandate lies to compel contempt proceedings where that is only method whereby party's right may be protected.

3. Contempt ☞66(2)

Court's dismissal of contempt proceeding is final and not reviewable where no particular party is interested.

In Bank.

Petition by the State Bar of California for a writ of mandate against the Superior Court in and for the County of Los Angeles and Thomas L. Ambrose, judge thereof, to compel the respondent court to exercise its jurisdiction and to determine whether the acts set forth in affidavits filed by petitioner in support of a certain petition in the superior court, seeking to have designated persons declared in contempt of court, constitute contempts of court.

Alternate writ of mandate dismissed.

Philbrick McCoy and W. E. Simpson, Sp. Counsel, both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for respondent.

CURTIS, Justice.

Petitioner, the State Bar of California, sought by petition, supported by affidavits, filed in the superior court of Los Angeles county, to have Joseph Levy, H. W. Chapin, and Sam Cantor declared in contempt of court. The order of contempt was sought upon the ground that by participating in the adjustment of the claims of one Wareham and one Comer for dam-

ages for personal injuries sustained by them in certain automobile accidents, they had committed several acts which constituted the practice of law without having been licensed as attorneys to practice law.

The superior court made an order dismissing said proceeding. The order dismissing the contempt recited that, "The court finds that the facts set forth in the 'Suggestions of the Special Committee of the State Bar' and affidavits attached thereto, in these entitled matters, do not contain certain facts sufficient to constitute contempt of court." Petitioner seeks in this court a writ of mandamus to compel the respondent superior court to exercise its jurisdiction and to determine, after a hearing, whether the acts set forth in the affidavits filed in support of the petition in the superior court constitute the practice of law and thereby constitute contempts of authority of the superior court within the meaning of subdivision 13 of section 1209 of the Code of Civil Procedure.

[1-3] While we recognize the desirability of a determination by this court as to whether the facts set out in the affidavits filed in support of the petition in the superior court constitute the practice of law and whether such acts which admittedly were not committed in the presence of a court nor with respect to any litigation or matter pending in any court constitute contempt of court, such a determination on our part would be futile. As we view the order dismissing the contempt, the superior court assumed jurisdiction and in the exercise thereof determined that the facts set forth in the affidavit were not sufficient to constitute contempt of court. Under these circumstances, the determination of the respondent court is final and may not be reviewed on mandate. Whether the ruling is erroneous is immaterial, for, since it is not the function of mandate to review error, conceding its existence, no relief can be had in the instant proceeding. *Lapique v. Superior Court*, 24 Cal. App. 313, 314, 141 P. 223. Although mandate may be used to compel contempt proceedings where that is the only method by which the right of a party may be protected, where there is no particular party interested, the dismissal by the court or judge of a contempt proceeding is final and conclusive and beyond review by any other tribunal. *People v. Latimer*, 160 Cal. 716, 117 P. 1051; 5 Cal. Jur., p. 959.

It cannot be held that in this matter there is any party beneficially interested.

It is hereby ordered that said alternate writ of mandate be dismissed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.; SHENK, J.



4 Cal.2d 99

SHAW et al. v. JOHNSON.

S. F. 15404.

Supreme Court of California.

July 24, 1935.

Appeal and error — 780(1)

Supreme Court refused to dismiss appeal by executor of estate of insured from judgment that proceeds of policy belonged in trust for benefit of plaintiffs and did not belong to estate of insured, on ground that executor was not proceeding in good faith and probate court had issued order directing him to dismiss appeal, where estate was heavily indebted and no creditors had been paid.



In Bank.

Action by Thomas Van Dyke Tyler Shaw, also known as Thomas Van Dyke Tyler, a minor, by Clair W. MacLeod, his general guardian, and another against Edward E. Johnson, as executor of the last will and testament of Frances Tyler Shaw, deceased. From a judgment in favor of plaintiffs, defendant appeals. On plaintiffs' motion to dismiss the appeal.

Motion denied.

James E. Colston and John G. Alioto, both of San Francisco, for appellant.

Courtney L. Moore, of San Francisco, for appellees.

PRESTON, Justice.

Motion to dismiss appeal.

Respondents, as plaintiffs, sued the appellant, among others, as defendants on the equity side of the court to have it adjudicated that they were the beneficiaries

of a declaration of trust affecting the death benefits under a policy of insurance upon the life of Frances Tyler Shaw. It need only be recited that the insured is now deceased and the proceeds of the policy were paid into court and all other defendants are without pecuniary interest in this appeal, save alone the appellant, who is the executor of the estate of the insured. The estate appears to be heavily indebted, and no creditors have as yet been paid.

The issue is as to whether these proceeds belong in the trust or belong to the general estate of the insured. The court below has made findings and given judgment establishing the validity of the trust and denying all relief to the executor.

The executor has appealed. He claims to be acting at the unanimous demand of the creditors and upon the advice of his attorneys. Respondents assert he is only looking for an enhancement of his commissions.

We see nothing whatever upon which we could be warranted in saying that the executor is not proceeding in good faith. The sole ground of the motion is that the judge of the probate court has issued an order directing the executor to dismiss his appeal. We are pointed to no authority, and we think none may be found, supporting any such order.

The respondents are the aggressors, pursuing the defendant and forcing him into the arena of the courts. The rules of the contest require that he be allowed to resort to all appropriate weapons of defense, and an appeal is one of these.

It seems to be overlooked that this case is not the administration of assets of an estate, but, on the contrary, is basically a proceeding to determine whether these funds are assets of the estate. The probate court in no event could pass upon this question. The position of respondents is not materially strengthened by the fact that one of the respondents is the sole legatee under the will of decedent. His best interests lie in fighting for the trust and not for a doubtful legacy.

The motion is denied.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; THOMPSON, J.; SEAWELL, J.; SHENK, J.

4 Cal.2d 82

COCORES v. ASSIMOPOULOS et al.

S. F. 15115.

Supreme Court of California.

July 10, 1935.

Rehearing Denied Aug. 8, 1935.

1. Sales ☞467

Where fire destroyed portion of equipment, machinery, and supplies in confectionery store which had been sold under contract providing that title should remain in seller until purchase price with interest was paid, loss held to fall upon seller, since title was vested in him.

2. Sales ☞479(7)

In action by seller to recover possession of property sold under conditional sale contract in which buyer filed cross-complaint alleging right to possession of any articles not covered by contract, evidence that insurance paid buyer on part of property destroyed by fire was for seller's account held properly rejected, since such loss fell on seller.

3. Costs ☞32(5)

In action to determine right to possession of property under conditional sale contract in which defendants disclaimed any interest, but in which one defendant prevailed on his cross-complaint for possession of property not covered by contract, plaintiff held not entitled to judgment for costs on his complaint, but defendant was entitled to costs on his cross-complaint (Code Civ. Proc. §§ 739, 1022, 1024).

In Bank.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by Daniel Cocores against Anthony Assimopoulos and another, in which defendant Anthony Assimopoulos filed a cross-complaint joining William J. Emig, sheriff, as cross-defendant. Judgment for plaintiff on his complaint and for cross-complainant on cross-complaint, and cross-defendants appeal.

Affirmed.

James Snell and Chester E. Ross, both of Hollister, for appellant.

William R. Biaggi, of San Jose, for respondents.

SHENK, Justice.

The record presents an appeal by the plaintiff and William J. Emig, as sheriff of Santa Clara county, from a judgment

against them as cross-defendants after a trial of the issues raised by a complaint and a cross-complaint in claim and delivery.

In October, 1924, the plaintiff and the defendant Helen Assimopoulos entered into a written contract under which the latter agreed to buy the lease, stock in trade, furniture, fixtures, equipment, and good will of the Elite confectionery store owned by the plaintiff and located in Gilroy. The contract contained a detailed list of the articles and stock sold. The sale price was \$5,500, payable in monthly installments during a period of three years beginning January 1, 1925. It was provided that title to all of the property should remain in the plaintiff until the full purchase price with interest should be paid. The buyer agreed to take proper care of the property and keep the machinery in a good state of repair, but there was no agreement that she would replace or restore lost or destroyed articles, or any stock in trade or supplies removed in the course of business, or that she carry insurance on any of the property involved.

The defendant Helen immediately went into possession of the store and business, and conducted it until December 31, 1927. At that time she was in arrears on the installments and informed the plaintiff that the business did not warrant her continuing under the contract; that she desired the plaintiff to retake possession of the store as it was with anything added thereto, and that she be released from the contract. The plaintiff requested the defendant Anthony to take a transfer of the business from Helen and conduct it on his own account, to which Anthony consented. A transfer from Helen to Anthony was made on December 31, 1927. Up to that date \$3,050 had been paid to the plaintiff on account of principal and interest, and after that date the defendant Anthony paid the sum of \$350 thereon.

On August 21, 1929, a fire occurred in the rear part of the premises and destroyed a considerable portion of the equipment, machinery, and supplies, which was replaced by the defendant Anthony from funds collected under the provisions of insurance policies theretofore taken out by him.

In May, 1931, the plaintiff sued in claim and delivery to recover possession of the entire contents of the store, and possession

thereof was taken by the sheriff under a void writ of attachment *Cocores v. Assimopoulos*, 127 Cal. App. 360, 15 P.(2d) 892.

The defendants Helen and Anthony filed an answer admitting the right of the plaintiff to the possession of any articles covered by the terms of the contract of conditional sale. The defendant Anthony filed a cross-complaint against the plaintiff and the sheriff alleging his right to possession of any articles which were not subject to the conditional sale contract, and specifying the equipment, machinery, fixtures, and stock which had been purchased by the defendant Anthony while he conducted the business.

The trial court concluded that certain designated articles, which were found to have been purchased by the defendant Anthony, belonged to him, and that the plaintiff had no right, title, or interest therein. Other articles and equipment the court concluded belonged to the plaintiff pursuant to the terms of the contract of conditional sale.

[1, 2] The main questions on the appeal relate to the sufficiency of the evidence to support the findings of the trial court which involve the right of the defendant Anthony to claim the property described in the cross-complaint and adjudged to belong to him. The answers to the main contentions are resolved by an investigation into the propriety of the trial court's construction of the conditional sales contract and the rights of Anthony, the assignee thereof. Also involved is the question of the law as to which of the parties should bear the loss resulting from the destruction of a part of the subject-matter of the contract.

The property affected by the contract of sale was divisible in its nature, and the parties themselves still considered the contract in force after the fire which destroyed a part thereof on August 21, 1929. Therefore, the problems discussed by the plaintiff as to what should be the solution when there is a partial as distinguished from a total destruction are not pertinent. At the time here in question, section 1742 of the Civil Code, added by St. 1931, p. 2242, was not the law. The law applicable to this case is stated in *Kirtley v. Perham*, 176 Cal. 333, 168 P. 351, and in 22 Cal. Jur., p. 942 et seq. and 1104 et seq., to the effect that in the absence of any special agreement between the parties, and here there is none, as to who should bear the

loss in the event of destruction of the goods without the fault of either party, the loss must fall upon the person, here the plaintiff, in whom title was vested. In this and in other respects concerning the depletion and loss of the property in the ordinary course of business without the fault of the defendants, the court correctly construed and applied the provisions of the contract. It follows that the court did not err in sustaining an objection to the introduction of evidence designed to show that the payment of the insurance money by the insurance carrier to the defendant Anthony was for the plaintiff's account.

The appellants express some apprehension lest the judgment of the court will be read to double their liability as to certain articles adjudged to belong to the defendant Anthony and which are enumerated in two places in the judgment. The appellants' fears are groundless, however, since a reading of the judgment makes it obvious that the same articles are merely referred to twice for distinct purposes and that double liability on that account was not intended, and does not result.

There is no merit in the contention that the record is lacking in evidence to support the court's finding that Helen Assimopoulos was the real party to the contract of conditional sale and that Anthony Assimopoulos, her husband, was not an owner of the business until he took it over as assignee of Helen on December 31, 1927.

[3] The plaintiff contends that the court erred in awarding costs to the defendant Anthony Assimopoulos on his cross-complaint and in denying the plaintiff a judgment for costs on his complaint. As a result of the transfer of the possession of the property to the appellant, Emig, as sheriff, under the void attachment, the controversy resolved itself into a trial of the respective claims of title. In so far as the plaintiff's cause was concerned, and in the light of the judgment, the record shows that the defendants Anthony and Helen disclaimed any interest in any property covered by the contract of conditional sale. The defendant Anthony prevailed against the plaintiff and the cross-defendant Emig in respect to the property which was not the subject-matter of the contract, but as to which the plaintiff claimed an interest. Pursuant to the applicable Code sections in force at the time of trial and judgment,

the plaintiff was not entitled to any judgment for costs on his complaint, while the defendant was entitled to costs on his cross-complaint. Code Civ. Proc., §§ 1022, 739 and 1024; see Hoyt v. Hart, 149 Cal. 722, 731, 87 P. 569.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.



4 Cal.2d 125

**FOSTER v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.**

S. F. 15376.

Supreme Court of California.

July 30, 1935.

Prohibition § 5(2)

Prohibition held to lie to restrain superior court from making any order which would place child beyond operation of process of court prior to final determination of right to child's custody, where husband, who was non-resident, had moved to vacate all orders giving temporary custody to wife, after he had been given custody and had been ordered to keep child within state until ten days after entry of final judgment, since order which would permit child to be taken from state would render futile any appeal and so would be in excess of jurisdiction.

In Bank.

Proceeding in prohibition by Iva Gilbertson Foster against the Superior Court of the state of California, in and for Los Angeles County, and the Honorable Lewis Howell Smith, a judge thereof.

Writ of prohibition granted

See, also, 41 P.(2d) 187.

Walter F. Haas, Stanley F. Maurseth, and G. E. Kerrin, all of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, D. De Coster, Chief Deputy Co. Counsel, Fred M. Cross, Deputy Co. Counsel, Gurney E. Newlin, and Michael G. Luddy, all of Los Angeles, for respondents.

PRESTON, Justice.

Proceeding in prohibition.

The action sought to be prohibited concerns the custody of an infant born in 1927 and known as Whitney Foster, the adopted son of petitioner and her former husband, John Morrell Foster. These spouses were divorced in March, 1933, by the court of Minnehaha county, S. D., and the custody of the child was divided between them as follows: To the wife from June 1st to September 1st and to the husband for the remaining portions of each year.

Petitioner has established a residence in California; the husband has kept his residence in South Dakota. During the period of 1934 when the infant was lawfully in petitioner's custody, to wit, on August 29th of said year, she instituted in respondent court an action against her said former husband whereby she sought the exclusive custody of the child. In said action the husband defended by answer and cross-complaint, praying himself for full-time custody of the child. The cause came on for trial on November 20, 1934, and was heard over a considerable period. On December 12, 1934, the court filed therein a memorandum opinion holding that the terms of the South Dakota decree should be adopted without modification. No final judgment has yet been entered. After filing its written opinion and on December 14th, the court gave an order continuing the temporary custody with petitioner pending entry of final judgment and for a period of ten days thereafter. Later and on December 20th the court so modified this order as to award the custody of the child to defendant husband as of December 27, 1934, except that he was required to keep the child in California until ten days after entry of final judgment in the action. Now said defendant husband has moved to vacate all existing orders purporting to give temporary custody of said child to petitioner. Petitioner avers that the court intends to vacate all said orders and to give both temporary and full custody of said child to defendant with express authority to remove him out of the state and beyond the reach of process of the court. The truth of this averment seems to be conceded.

Said threatened action by the court has caused a great deal of maneuvering by the

respective parties, by petitioner to retain and by the husband to regain temporary custody of the child. The theory upon which each is acting is that if petitioner (plaintiff in said cause) has temporary custody when judgment is entered, her custody, upon appeal or appeal and writ of supersedeas, will continue throughout the period elapsing before a final judgment of this court is had on the merits; likewise, if custody is transferred to the husband (defendant in said cause), it will not be disturbed by an appeal by plaintiff and meanwhile he may remove the child from this jurisdiction to South Dakota.

It seems clear that an order which so disturbs the custody of the child as to permit him to be taken beyond the operation of process of the courts of California, pending final determination of the cause involving his custody, would be an act in excess of jurisdiction. It also seems to be an act in excess of jurisdiction to announce a decision and then withhold entry of judgment for the purpose of shifting the temporary custody of the child to the husband, thereby aborting the fruits of a successful appeal or the operation of a writ of supersedeas. See *Weintraub v. Superior Court*, 91 Cal. App. 763, 768, 267 P. 733. This observation is not intended in any wise to reflect upon the learned trial judge, who obviously is trying to discharge his duties conscientiously. He took proper action by making said order of December 14th extending the award of temporary custody of the child to petitioner but later practically nullified it.

Let the writ of prohibition issue restraining the superior court of the state of California in and for the county of Los Angeles, and the Honorable Lewis Howell Smith, as judge thereof, from making or ordering the execution of any judgment or decree which shall have the effect of placing said infant, Whitney Foster, beyond the operation of process of the court prior to the final determination of the action entitled, "Iva Gilbertson Foster, Petitioner, v. John Morrell Foster, Defendant," numbered D-124603, which involves his custody.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; THOMPSON, J.; LANGDON, J.

GENERAL PIPE LINE CO. OF CALIFORNIA v. STATE BOARD OF EQUALIZATION et al. *
S. F. 15415.

Supreme Court of California.

Aug. 2, 1935.

Rehearing Granted Aug. 30, 1935.

1. Taxation ☞317(2)

Constitutional amendment which provided that "all pipe lines, flumes, canals, ditches and aqueducts not entirely within limits of any one county" and all property, other than franchises, of public utilities should be assessed by State Board of Equalization held to make Board of Equalization assessor of two classes of property enumerated including pipe lines whether or not extensive which were used for private and not for public purposes, as against contention that provision applied only to property of public utilities (Const. art. 13, § 14, as amended (see St. 1933, p. 3074); Pol. Code, § 3663a).

2. Constitutional law ☞14

Where language of constitutional amendment is plain and unambiguous, there exists no room for construction.

3. Taxation ☞317(2)

Property of pipe line includes all appurtenances necessary or advisable for proper functioning of pipe line (Const. art. 13, § 14, as amended (see St. 1933, p. 3074); Pol. Code, § 3663a).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action for declaratory relief by the General Pipe Line Company of California against the State Board of Equalization, and others. Judgment for plaintiff, and defendants appeal.

Reversed.

U. S. Webb, Atty. Gen., H. H. Linney and John J. Dailey, Deputy Attys. Gen., Everett W. Mattoon, Co. Counsel, of Los Angeles, and S. B. Kaufman, Dist. Atty., of Santa Ana, for appellants.

Eugene D. Bennett, of San Francisco, W. L. Appleford, of Los Angeles and Harris F. Shaw and Martin J. Weil, both of San Francisco, for respondent.

☞For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 54 P.2d 18.

THOMPSON, Justice.

The plaintiff commenced this action for declaratory relief, and secured a judgment, from which the defendants prosecute this appeal.

[1,2] The appellants and respondents agree upon the question involved, which is as follows: "Is it the duty of the State Board of Equalization under the provisions of section 14 of article 13 of the Constitution and section 3663a of the Political Code, to assess the intercounty oil pipe line of plaintiff company, when such property is used for private and not public utility purposes, or should such property be assessed by local assessors?"

The pertinent language of the section referred to reads as follows: "All pipe lines, flumes, canals, ditches and aqueducts not entirely within the limits of any one county, and all property, other than franchises, owned or used by (1) railroad companies including street railways, herein defined to include interurban electric railways, whether operating in one or more counties, (2) sleeping car, dining car, drawingroom car, and palace car companies, refrigerator, oil, stock, fruit and other car-loaning and other car companies operating upon the railroads in the State, (3) companies doing express business on any railroad, steamboat, vessel or stage line in this State, (4) telegraph and telephone companies, (5) companies engaged in the transmission or sale of gas or electricity, shall be assessed annually by the State Board of Equalization, at the actual value of such property.

"All property so assessed by said board shall be subject to taxation to the same extent and in the same manner as other property."

Section 3663a of the Political Code requires the Board of Equalization to assess the property enumerated in section 14, article 13, of the Constitution (as amended, see St. 1933, p. 3074), giving them the authority to exact and require the information for that purpose.

In the instant case, the board required the respondent to report upon its pipe line, part of which is in Orange county and part in Los Angeles county, whereupon this action was commenced to determine the right of the board to assess.

The appellants insist that the plain, unambiguous language of the constitutional amendment places the responsibility upon

the Board of Equalization. While the respondent argues that the amendment was adopted for the sole purpose of returning the property of public utilities to the tax rolls of the counties and hence should be construed to refer only to property of public utilities.

It is to be observed that proposition 30, which was adopted by the people at the special election held in June, 1933, included not only the amendment now under scrutiny, but also a number of other constitutional changes dealing with such subjects as appropriations from the general fund, power of the Legislature to tax counties and cities, the limitation on expenditures by political subdivisions of the state, appropriations for the support of schools by the state, taxation of banks and several others. In fact, the tax structure of the state was to a large extent recast. When we read the language of section 14 of article 13, already quoted, we notice that the words "All pipe lines, flumes, canals, ditches and aqueducts not entirely within the limits of any one county, and" might have been omitted from the amendment had it been the intent to include within its scope only the property of public utilities. In other words, there are two classes of property enumerated in the section—first, pipe lines, flumes, etc., and, second, all property, other than franchises, of public utilities. We entertain no doubt that the clearly expressed intent of the amendment was to make the Board of Equalization, for the sake of uniformity and in order to avoid the temptation which might exist in one of the counties to assess at more than its just proportion, the assessor of the property described, whether the lines or ditches be extensive, as in the case of a water department of a municipality, which in legal parlance is more properly classified as a municipal utility than as a public utility, subject to the jurisdiction of the railroad commission (see 22 Cal. Jur. 9; *City of Pasadena v. Railroad Commission*, 183 Cal. 526, 192 P. 25, 10 A. L. R. 1425; *Water Users', etc., Ass'n v. Railroad Commission*, 188 Cal. 437, 205 P. 682; *Jochimsen v. City of Los Angeles*, 54 Cal. App. 715, 202 P. 902), or comparatively small as may be the case otherwise. One of the first rules of construction is that where the language is plain and unambiguous there exists no room for construction. We think such is the present case.

[3] The parties to this action requested the trial court to determine what constitutes an intercounty pipe line, i. e., what particular property is included in a pipe line. As we view the case, the question here involved relates to the duty of the Board of Equalization, and the litigation does not include a dispute over what constitutes a pipe line. The subject not having been presented as it might have been had there been a bona fide dispute over such a question, we are inclined not to attempt a limitation or definition other than to say it should include all appurtenances necessary or advisable for the proper functioning of the pipe line.

In view of the foregoing discussion, the judgment should be, and is, reversed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.



4 Cal.2d 196

RING v. STATE BAR OF CALIFORNIA.
L. A. 15140.

Supreme Court of California.

Aug. 1, 1935.

Rehearing Denied Aug. 29, 1935.

Attorney and client ☞58

Evidence that attorney employed in 1927 to administer estate received \$1,250 as advances for costs and fees, of which \$153.48 went for costs, although statutory fee for handling estate was \$735, that five years later another attorney was substituted in his place in order to close estate, and that attorney performed few services beyond preliminary steps of administration held to require attorney's suspension for one year.

In Bank.

Application by William C. Ring to review an order of the Board of Governors of the State Bar recommending that petitioner be disbarred from practice of law within the state.

Petitioner ordered suspended for one year from and after date of filing of order.

William C. Ring, in pro. per., and Irving B. Drachlis, both of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

This is a review of a recommendation of disbarment. Petitioner was charged with culpable negligence and misappropriation of funds in connection with the handling of the estate of the deceased wife of John Cowan. The evidence shows that he was employed in 1927, and received advances for costs and fees in the sum of \$1,250, of which \$153.48 went for costs. About five years later, in February, 1932, another attorney was substituted in his place, in order to close the estate. The record discloses very few services performed by petitioner beyond the preliminary steps of administration. Thus, no inventory and appraisal was ever filed by him. It also appears that a bond premium in the sum of \$100 was paid yearly by petitioner's client, as executor of the estate, during all of the years that administration was delayed. The statutory fee to which petitioner would have been entitled for handling the estate was \$735. The rest of the money advanced to him he claimed for extraordinary services.

The proceedings against petitioner were commenced by an order to show cause. Petitioner did not appear at the hearing before the local administrative committee or before the board of governors. He claims that he never received notice of these various hearings, although the record shows due service of the original order to show cause. However, he contends that by reason of his absence from these hearings, his defense was never presented, and that had he been in a position to do so, he could have shown performance of services sufficient to justify the fees collected.

At the time these proceedings were brought against petitioner, he was already under a suspension for two and one-half years, by order of this court, for several acts of misconduct. *Ring v. State Bar*, 218 Cal. 747, 24 P.(2d) 821. The misconduct charged in the present proceeding took place during approximately the same period as the acts for which he is already being disciplined. It is further stated that

for several years past petitioner has been gravely ill, and for a large part of the time was confined to the Veterans' Hospital.

The period of petitioner's present suspension will not be completed until the end of January, 1936. Upon consideration of all of the circumstances, we are of the opinion that a further suspension, rather than the extreme penalty of disbarment, should be imposed.

It is therefore ordered that the petitioner be suspended from practice as an attorney at law of this state for the period of one year from and after the filing of this order.



4 Cal.2d 209

BYERS et al. v. SMITH, Personnel Director.
S. F. 15445.

Supreme Court of California.

Aug. 2, 1935.

1. Officers ⚡94

If upon appeal a conviction of a public official who has been removed from office because of such conviction is reversed, the political subdivision must pay the remuneration for the entire period.

2. Officers ⚡64

Where a public official, not a constitutional officer, is guilty of an offense which is a felony, his conviction after indictment returned or information filed operates as a removal from office.

3. Officers ⚡74

Where grand jury cannot or does not return indictment but returns only accusation against official, official has right to appeal from judgment against him causing his removal under statute providing that where jurisdiction is conferred on court all means necessary to carry it into effect are also given (Code Civ. Proc. § 187).

4. Courts ⚡78

Where jurisdiction is conferred on court by Constitution, power is conferred to adopt such rules as will render the constitutional grant effective.

5. Constitutional law ⚡55

Legislature has no power, either through direct enactment or indirect device, to de-

stroy or abridge the right of an appeal constitutionally granted.

6. Municipal corporations ⚡159(6)

Where city attorney appealed from judgment removing him for misconduct in office, and trial court determined that there was probable cause for the appeal and appellate court granted stay of execution of judgment, attorney held entitled to remain in office and receive compensation therefor pending appeal, since such procedure best served public interests, though statute setting out such procedure had been declared unconstitutional (Code Civ. Proc. § 187; Pen. Code, § 770; Pol. Code, § 996; Const. art. 6, § 4b, adopted in 1928).

7. Mandamus ⚡76

Mandate held to lie to compel personnel director of city to indorse upon city pay roll that city attorney was duly elected to perform services and did perform them during certain period at rate of salary fixed, though salary of city attorney was not yet due.

In Bank.

Mandamus proceeding by Clinton L. Byers and others against R. H. Smith, personnel director of the city of San Diego.

Peremptory writ issued.

Clinton L. Byers, Gilmore Tillman, H. B. Daniel, James J. Breckenridge, and Harry S. Clark, all of San Diego, pro. per.

Gray, Cary, Ames & Driscoll, of San Diego, for respondent.

PER CURIAM.

The petitioners in this case seek the issuance of the writ of mandate compelling respondent to indorse upon the pay roll of the city of San Diego that petitioners have been elected and appointed to perform services and did perform services for the city during the period from May 3 to May 15, 1935, and that their salary for such services is at the rate claimed in their petition.

The controversy arises out of the following facts: Byers was elected city attorney in 1932. The other petitioners are his assistant and deputies. On February 25, 1935, an accusation by the grand jury was filed charging the city attorney with misconduct in office. The accused entered his denial, and on April 24, 1935, a jury returned its verdict against him. There fol-

lowed a motion for a new trial, a denial thereof, and on May 3, 1935, an appeal to the District Court of Appeal from the judgment removing him from office, entered upon and pursuant to the jury's verdict. On May 4th the trial judge signed a writ of probable cause, and thereafter and on May 23, 1935, the District Court of Appeal issued its order staying the execution of the judgment and all proceedings thereunder until the further order of the court.

In order that we may fully understand the contentions of respondent, it is well at this time to set forth section 770 of the Penal Code, which reads as follows: "Appeal, how taken. Defendant to be suspended and vacancy filled. From a judgment or decree of removal from office under any provision of this chapter, an appeal may be taken to the supreme court in the same manner as from a judgment in a civil action but until such judgment is reversed, the defendant is suspended from office after thirty days from the entry of the judgment, unless within such thirty days there shall be filed in the office of the clerk of the court in which the conviction was had, a certificate of a judge of the superior court that in his opinion there is probable cause for the appeal. If a bill of exceptions is not settled in time to be used upon an application for such a certificate or within twenty days after such judgment is entered, the error relied upon may be presented to such judge in any manner satisfactory to such judge. If no such certificate be filed within thirty days the office must pending the appeal be filled as in case of a vacancy. Appeals taken under this section shall be entitled in the appellate court to priority in hearing over all cases except such as have been advanced upon its calendar by special order of such appellate court."

The section just quoted was held to be unconstitutional in the case of *People v. McKamy*, 168 Cal. 531, 143 P. 752, upon the ground that it constituted an attempt to vary the constitutional grant of jurisdiction to the court. In 1928, however, section 4b of article 6 of the Constitution was amended so as to confer upon the District Court of Appeal appellate jurisdiction "in proceedings of * * * removal from office." Section 996 of the Political Code provides, in part, that "an office becomes vacant" upon "the removal from office" of the officer.

In brief, it is the contention of respondent that the superior court could not stay the execution of the judgment by the issuance of the certificate of probable cause for the reason that the section providing therefor has been declared unconstitutional, and under settled principles of law was not restored to vitality by the subsequent removal of the constitutional inhibition. He also asserts that the office of city attorney became vacant when judgment was rendered. The further contention is advanced that the petitioners other than Byers lost their positions with the former's removal from office, and he says that the order staying execution issued by the District Court of Appeal is subject to being vacated.

Petitioners' arguments are obvious. They assert that the judgment is stayed, and further assuming that such is not the case the deputies are retained under the general civil service provisions of the charter of the city.

[1] As not infrequently occurs, the problem presents an instance where different public policies conflict. In the first place, we are confronted with the fact that the public is entitled to be speedily protected against the unfaithful public servant. Such is the effect of *McKannay v. Horton*, 151 Cal. 711, 91 P. 598, 13 L. R. A. (N. S.) 661, 121 Am. St. Rep. 146, wherein it was held that conviction of a felony constituted a removal from office of a mayor regardless of the outcome of the appeal. In the second place, the people have seen fit to grant the accused an appeal before it be finally determined that he has been unfaithful. In other words, they have declared a policy to the effect that a duly elected official shall not be deprived of his office by removal proceedings until his unworthiness is established by a final judgment. No doubt this later policy is somewhat affected by the fact that if upon appeal the judgment should be reversed the political subdivision would be under the necessity of paying the remuneration for the entire period under the authority of *Ward v. Marshall*, 96 Cal. 155, 30 P. 1113, 31 Am. St. Rep. 198, which case was decided under the assumption that section 770 of the Penal Code made valid provisions for an appeal. The fact, however, remains as is said in *Commonwealth of Pa. v. Reid*, 265 Pa. 328, 108 A. 829, 831: "[T]he people are entitled to the services of the officer during the entire term for

which they elected him (Lloyd v. Smith, 176 Pa. 213, 35 A. 199), unless he be removed in the way prescribed by the Constitution, if the officer is a constitutional officer (Bowman's Case, 225 Pa. 364, 74 A. 203), or by the Legislature or under its authority in the manner provided by Constitution or statute, if the officer is not a constitutional officer (Commonwealth v. Weir, 165 Pa. 284, 288, 30 A. 835)."

[2,3] With respect to the right of the public to be speedily protected against the official who is guilty of wrongdoing, it is to be noted that where the offense constitutes a felony his conviction after indictment returned or information filed operates as a removal from office (see McKannay v. Horton, supra) of one who is not a constitutional officer. But where the grand jury cannot or does not return an indictment, but only an accusation, in what manner may the constitutional right of the official to an appeal be protected if upon judgment he must be immediately removed? The answer is found, we think, in section 187 of the Code of Civil Procedure, which expresses a well-known rule of law (see 15 C. J., § 446) in these words: "When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code."

[4,5] It must be true that where jurisdiction is conferred by the Constitution, the power is conferred to adopt such measures and rules as will render the constitutional grant effective and operative, otherwise the Legislature might by mere inaction defeat the will of the people expressed in the fundamental law. But the Legislature has not the power, either through direct enactment or indirect device, to destroy or abridge the right of an appeal constitutionally granted. In re

Sutter-Butte By-Pass Assessment, 190 Cal. 532, 213 P. 974.

[6] It remains for us to determine whether the procedure adopted in the present case is reasonably adapted to make effective and operative the constitutional grant, bearing in mind the right of the public to be protected. We have already observed that upon conviction of a felony the official is removed. We have no doubt that in the exercise of a sound discretion the trial judge would, where the public interest required it, refuse to issue a writ of probable cause and that the appellate court in which the appeal was pending would likewise decline to issue a stay. But we can conceive of no better solution than to say that the procedure which was followed here and which was outlined in section 770, Penal Code, before it was declared void, subject to the right of the court in which the appeal is pending to intervene, for the complete exercise of its appellate jurisdiction is reasonably adapted to protect the interests of the public and the constitutional right of the official. Our conclusion is that the judgment is stayed and that no steps to compel petitioners to vacate may be taken, and that during the continuance of the stay the petitioner Byers is entitled to exercise all the privileges of his office and be compensated therefor.

[7] The respondent in his return to the alternative writ sets up that the petitioner Byers is entitled to be paid monthly, and not semimonthly. We think this can make no difference to the issuance of the writ for the reason that petitioners seek only to compel respondent to indorse upon the pay roll the fact that petitioners have been the duly elected or appointed officers and performing services for the city from May 3d to May 15th, in accordance with the charter of the city, and at the rate of salaries fixed. If it be a fact that Byers' salary is not yet due, we do not understand that the peremptory writ will compel it to be paid until the time for payment arrives.

The peremptory writ will issue.

4 Cal.2d 206

**GINDRAUX et ux. v. MAURICE
MERCANTILE CO.**

S. F. 15323.

Supreme Court of California.

Aug. 1, 1935.

Rehearing Denied Aug. 29, 1935.

1. Food ☞25

In action for damages suffered as alleged result of eating salami which was purchased from defendant and which was claimed to have been infected with trichina, evidence held insufficient to establish negligence of defendant.

2. Sales ☞274

Where sale of salami was made in ordinary course of trade by dealer in foodstuffs to buyer for human consumption, dealer knew by implication particular purpose for which salami was required and from that fact there arose implied warranty that commodity was fit for such purpose (Civ. Code, § 1775, and § 1735, subd. 1).

3. Sales ☞274

Sale for human consumption in ordinary course of trade by dealer in foodstuffs held within rule of warranty of fitness and merchantability, although sold from "sealed package" (Civ. Code, § 1775, and § 1735, subd. 1).

4. Sales ☞445(4)

In action for damages suffered as alleged result of eating poisoned salami, inference of fact arising from plaintiffs' evidence that they were infected with disease caused by presence of trichina germs in meat purchased from defendant held for jury.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action for damages alleged to have resulted from eating poisoned meat by Jules Gindraux and another against the Maurice Mercantile Company. From judgment for defendant notwithstanding the verdict, plaintiffs appeal.

Reversed.

Prior opinions, 36 P.(2d) 844, 37 P.(2d) 747.

Glensor, Clewe, Schofield & Van Dine, of San Francisco, for appellants.

Joseph E. Bien and Werner Olds, both of San Francisco, for respondent.

WASTE, Chief Justice.

The plaintiffs brought this action for damages suffered as the alleged result of eating salami purchased from the defendant which it was claimed was infected with trichina. The defendant's motion for judgment notwithstanding the verdict was granted on the ground that the verdict was contrary to the evidence, and that there was no law in this state to sustain the verdict. Motion of plaintiffs for a new trial was denied.

[1] The undisputed evidence is that the salami was bought by defendant from Armour & Co., the producer, in a sealed package, and was sold to plaintiffs by the slicing of a portion off the end of this sealed package. The defendant's place of business was kept in sanitary condition. A report made by government inspectors immediately prior to the sale showed full compliance with all sanitary rules and requirements. There is no direct testimony which shows that the salami was actually infected. There is evidence which shows that the product, as manufactured and received by the defendant, was accompanied by a certificate of inspection by the United States government. As we read the record, we find no evidence tending to show that the defendant was guilty of any negligence. Its liability, therefore, if any, rests upon an implied warranty. *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 286, 84 N. E. 481, 15 L. R. A. (N. S.) 884, 126 Am. St. Rep. 436, 15 Ann. Cas. 1076.

[2] The sale of the salami was made in the ordinary course of trade and business by a dealer in foodstuffs to the plaintiff for human consumption. The defendant therefore knew by implication the particular purpose for which the salami was required. From that fact there arose an implied warranty that the commodity was reasonably fit for such purpose. Civ. Code, § 1735, subd. 1; *Consolidated Pipe Co. v. Gunn*, 140 Cal. App. 412, 415, 35 P.(2d) 350. The law is the same in other states. See *Ryan v. Progressive Grocery Stores*, 255 N. Y. 388, 175 N. E. 105, 74 A. L. R. 339; *Ireland v. Liggett Co.*, 243 Mass. 243, 137 N. E. 371. The rule has been held applicable to sales of canned goods. *Griffin v. Butler Grocery Co.*, 108 N. J. Law, 92, 156 A. 636. Of like import was section 1775 of the Civil Code, in effect when the sale was made. It provided that one who made a

business of selling provisions for domestic use warranted, by a sale thereof, to one who bought for actual consumption, that the provisions were good and wholesome.

[3] For two reasons we are not impressed with the suggestion that this is a "sealed package" case. Neither the facts nor the law render the contention applicable here. The particular sale to plaintiffs was of a piece of the salami sliced off the end of the whole. If it were a "sealed package" case, it would still be within the rule of warranty of fitness and merchantability. The opinion by Mr. Justice Cardozo in the Ryan Case, *supra*, and the other authorities here cited, sufficiently establish that as the law. In a New York case the court said: "We think that the mere purchase by a customer from a retail dealer in foods of an article ordinarily used for human consumption does by implication make known to the vendor the purpose for which the article is required. Such a transaction standing by itself permits no contrary inferences." *Rinaldi v. Mohican Co.*, 225 N. Y. 70, 73, 121 N. E. 471, 472. For supplemental authorities, see 1 Williston on Sales (2d Ed.) p. 482, par. 242a, and 1 Uniform Laws Ann. (Sales Act) p. 118. The right of the plaintiffs to sue the defendant is clearly established by the rules of implied liability fixed by the Code and the decisions cited.

[4] There remains the question of the correctness of the action of the trial judge in granting the motion for judgment non obstante veredicto. It is the accepted doctrine in this jurisdiction that "the right of a court to direct a verdict is, touching the condition of the evidence, absolutely the same as the right of the court to grant a nonsuit." *Newson v. Hawley*, 205 Cal. 188, 190, 270 P. 364; *Hunt v. United Bank & Trust Co.*, 210 Cal. 108, 120, 291 P. 184. There is evidence from which it appears that the salami was properly manufactured and processed according to federal regulations. When so treated, the evidence shows that live trichina germs are destroyed, and cannot again appear in the prepared product. In this case the salami was duly inspected and certified by governmental authorities. The premises where the product was sold were clean and in all respects sanitary, meeting all requirements in that regard. But against the rather persuasive force of this evidence, the testimony of the

plaintiffs must be considered. The evidence in support of plaintiffs' case puts in the record the fact that plaintiffs became infected with trichinosis within ten days after purchasing the salami; that they had eaten no pork for a considerable time prior thereto; and the testimony of Dr. Monteith and Dr. Alexander that the symptoms of infection from that disease usually appear in from six to ten days, and that the only possible source of the disease is infected pork. This evidence gives rise to an inference of fact. In countless cases such inference has been deemed sufficient to go to the jury.

The judgment must therefore be, and is, reversed.

We concur: LANGDON, J.; PRESTON, J.; SEAWELL, J.



4 Cal.2d 111

PAULSEN v. McDUFFIE.

S. F. 15366.

Supreme Court of California.

July 29, 1935.

Rehearing Denied Aug. 26, 1935.

1. Seamen ⇐29(5)

In action by seaman to recover for injuries sustained while assisting in bringing on board one of ship's mooring lines, evidence held to support implied finding of jury that ship operator was negligent in that line was defective, that it was being improperly rigged, and that only three men were engaged in task where four were customarily used.

2. Seamen ⇐29(4)

In action by employee against employer for injuries sustained by reason of negligence of employer or employer's agents or employees, federal statute removing employee from effect of doctrine of assumption of risk in some instances must be read with statute which expressly makes employer liable for any injury sustained by employee from negligence of employer, its officers or agents (Federal Employers' Liability Act §§ 1, 4, 45 USCA §§ 51, 54).

3. Seamen ⇐29(4)

Seaman does not assume risk of injury from negligence of officer or from other mem-

ber of crew, even though danger may have been obvious to him (Jones Act § 33, 46 USCA § 688; Federal Employers' Liability Act § 1, 45 USCA § 51).

4. Master and servant ⇨204(1)

Under federal act, employee assumes risk of injury arising from negligence of employer or his servants which are so obvious that an ordinarily careful person would observe them (Federal Employers' Liability Act, 45 USCA §§ 51-59).

5. Master and servant ⇨204(1)

Where employee is injured while acting under orders of his employer, or some authorized agent acting for employer, he does not assume risk out of which injury arose (Federal Employers' Liability Act, 45 USCA §§ 51-59).

6. Seamen ⇨29(4)

Seaman injured while assisting in bringing on board one of ship's mooring lines could assume that line was properly placed before being drawn in.

7. Seamen ⇨29(4)

Doctrine of assumption of risk held inapplicable to seaman whose injury, received while assisting in bringing mooring line on board ship, was due to negligence of fellow seamen in rigging line (Jones Act § 33, 46 USCA § 688; Federal Employers' Liability Act §§ 1, 3, 4, 45 USCA §§ 51, 53, 54).

8. Seamen ⇨29(4)

Seaman who received injury while assisting in bringing mooring line on board ship, because of negligence of fellow seamen, held entitled to recover from ship operator, although contributorily negligent (Jones Act § 33, 46 USCA § 688; Federal Employers' Liability Act §§ 1, 3, 4, 45 USCA §§ 51, 53, 54).

9. Appeal and error ⇨1068(3)

In action by seaman to recover for injuries received in course of employment, instruction that plaintiff should be presumed to have exercised ordinary care until rebutted by other evidence held harmless error, where plaintiff was entitled to recover even though negligent (Jones Act § 33, 46 USCA § 688; Federal Employers' Liability Act § 3, 45 USCA § 53).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Axel Paulsen against William C. McDuffie, receiver of the Richfield Oil

Company of California. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, 38 P.(2d) 465.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellant.

Ford & Johnson and George K. Ford, all of San Francisco, for respondent.

CURTIS, Justice.

An action to recover damages for personal injuries.

Plaintiff was a seaman employed by defendant in operating the ship Kehoskee, which was moored at a wharf in San Francisco. At the time of his injury he was acting as boatswain and assisting in heaving in or bringing on board from the dock one of the ship's mooring lines. This line was a manila rope from six to eight inches in circumference. The work was being done by means of a steam winch, which consisted of a revolving drum, which was referred to by the different witnesses as the "gypsy head," "nigger head," or "spool." While engaged in this work plaintiff's blouse, a loosely fitting shirt, caught either between the strands of the line or between the line and the drum, and he was injured. He claims that this was due to defendant's negligent method of rigging the line, the defect in the line itself; namely, that its strands were frayed and loose, and this with the manner in which it was rigged caused it to slip or, as he described it, surge on the revolving drum. He was attempting to correct the latter difficulty when the accident occurred. He also claims defendant was negligent in not having the required number of men on the line.

A jury returned a verdict in his favor.

The defendant, who has appealed from the judgment entered thereon, contends that no negligence on his part was shown; that plaintiff assumed the risk of injury, and, further, that the trial court erred in certain of its instructions to the jury.

[1] We will first consider the question of the defendant's negligence. Plaintiff claims that defendant was negligent in the rigging of the line, in the use of a worn and frayed line, and in having only three men assigned to the heaving in of said line when he should have had four. There is evidence to support each of these contentions. Paulsen, the plaintiff, sustained his

injury on January 24, 1931, as the ship Kehoskee was leaving the pier at the foot of Sixteenth street, San Francisco. At about 10 o'clock of the evening of that day certain of the seamen on board the ship were called out to haul in the mooring line. The chief officer, G. F. Lindholm, the plaintiff, and a seaman by the name of N. K. Neilsen responded to the call. Neilsen, at the direction of the chief officer, put the line around the "bitt" and then took his place in front of the winch. Plaintiff took a position just behind the winch and only a few feet to the left of the throttle. The chief officer turned on steam by operating the throttle and then went to the side of the boat where he could see the line as it had been released from the dock. He then gave orders to heave in the line. The winch was revolving, but at such slow speed that it failed to draw in the line. Paulsen stepped to the throttle and turned on more steam. This caused the winch to revolve more rapidly. The increased speed of the winch drew in the line, but while being thus drawn in the line slipped or surged. The plaintiff, after turning on the additional steam, resumed his position back of the winch and attempted to remedy the surging or slipping of the line and in so doing was injured. He received no orders from Lindholm to increase the speed of the winch, but testified that as boatswain it was his duty to attend to the throttle, and that when the winch failed to draw in the line, the proper thing to do was to turn on more steam. The evidence further shows that the line as it was brought onto the ship through an opening in the side of the ship called a chock, was taken around a bitt, an upright stationary metal cylinder, and then onto the winch, instead of around the fair-lead. The fair-lead was equipped with a revolving cylinder and it was in direct line with the winch, so that the mooring line, when carried from the fair-lead to the winch, formed a right angle with the face of the winch. As thus rigged, it required less power when hauling in the line to operate the winch than if it were around the stationary or nonrevolving bitt. Furthermore, as the bitt was not in a direct line with the winch, the line, when brought around the bitt and then to the winch, formed an oblique angle with the winch. As thus rigged it not only required more power to operate the winch but the line when it reached the winch would be much more liable to surge and slip than it would have done if carried around the fair-lead. There is ample evidence to show that the

line was rigged around the bitt and that that method was not proper. The evidence also shows that in heaving in the line it is customary to have four men; the first officer, two seamen, and the boatswain. Even a witness for defendant, the captain of the ship, testified to that fact. Another witness testified to the same effect, and it would appear that when there were four men on the job the first officer stood by the rail and directed the men in their work, the boatswain attended the throttle controlling the steam, one seaman stood in front of the winch pulling in the line as it came over the winch and the other stood back of the winch directing the line as it reached the winch. According to this evidence it was plaintiff's duty, he being the boatswain, to attend the throttle, but on account of there being only three men engaged in hauling in the line on the night of his injury, it seems he was required to divide his time between the throttle and the line as it reached the winch. It was while he was attempting to perform this double duty that he sustained his injury. There is a sharp conflict in the evidence as to the condition of the mooring line in use on the ship at the time of plaintiff's injury. The captain of the ship and others testified that the line was in fair condition and that it had been in use for some months prior to the accident and that after the accident it was used without further trouble. On the other hand, plaintiff and his witnesses testified that the line was old, worn, and chafed, that many of its strands were broken and that the loose pieces hung down, "some one inch, some three, some four inches, depending on the place they go." One witness went so far as to state that he spoke to the first officer several times before the accident regarding the condition of the line and told him that the line was just a piece of junk and ought to be changed. There is evidence that a line or rope in the condition described by plaintiff and his witnesses is much more apt to slip or surge than a rope in good condition, and also that seamen working near a winch with a defective line with broken strands hanging down three and four inches in length are much more liable to have their clothes caught and drawn in between the line and the winch in the manner in which the evidence shows the plaintiff's blouse or shirt was caught at the time of his injury. From this review of the evidence, it is apparent that there is no merit in defendant's contention that no negligence on defendant's part was shown. On the other hand,

we find the evidence is ample in every respect to support the implied finding of the jury that the defendant was negligent in each of the three particulars specified above.

[2] Having determined that the evidence established the negligence of the defendant, the question arises as to whether the plaintiff assumed the risk out of which his injury arose.

This action was brought and is being prosecuted in pursuance of an act of Congress, commonly known as the Jones Act, section 33 (46 USCA § 688), which in part provides as follows: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. * * *

By the terms of said act a seaman is entitled to all the right and remedies granted to railway employees under the Federal Employers' Liability Act (45 USCA, §§ 51-59). Section 51 of said act, so far as it is material to our purpose, provides as follows: "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars * * * or other equipment."

By section 53 of said act, it is expressly provided that contributory negligence on the part of the injured employee "shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

By section 54 of said act, in an action to recover damages sustained by an injured employee, "such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury * * * of such employee." It is contended by defendant that by virtue of this section of the act the common-law rule of assumption of risk applies to all cases brought in pursuance of said act, ex-

cept as modified by section 54. This section, however, must be read in connection with section 51 of the act, which expressly makes the employer liable for any injury sustained by the employee from the negligence of the employer, its officers, or agents. When the two sections of the act are so read, it is clear that the intent of the act was to provide that the employee does not assume the risk of danger attributable to the employer's negligence or to the negligence of the employer's agents or employees.

[3] It was so held in the case of *Anderson v. Matson Navigation Co.*, 125 Cal. App. 447, 454, 13 P.(2d) 1041, 1044, where the court, quoting from 56 Corpus Juris, 1100, enunciated the rule as follows: "The doctrine of assumption of risk is inapplicable where the damage was proximately caused by the negligence of a fellow servant. The seaman does not assume the risk of injury from the negligence of an officer, or from other member of the crew."

[4,5] In support of the doctrine there announced the court cites the case of *Reed v. Director General of Railroads*, 258 U. S. 92, 95, 42 S. Ct. 191, 192, 66 L. Ed. 480, where that court states the law as follows: "In actions under the federal act the doctrine of assumption of risk certainly has no application when the negligence of a fellow servant which the injured party could not have foreseen or expected, is the sole, direct, and immediate cause of the injury. To hold otherwise would conflict with the declaration of Congress that every common carrier by railroad while engaging in interstate commerce shall be liable to the personal representative of any employee killed while employed therein when death results from the negligence of any of the officers, agents or employees of such carriers." While this rule would not apply in a case where the want of care or negligence on the part of any employer, or his servants or agents, and the danger arising therefrom, are so obvious that an ordinarily careful person under the circumstances would observe and appreciate them (*Gila Valley R. Co. v. Hall*, 232 U. S. 94, 34 S. Ct. 229, 58 L. Ed. 521; *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475), yet when the employee is injured while acting under orders of his employer, or some authorized agent acting for the employer, he does not assume the risk out of which the injury arose. *McGeorge v. Charles Nelson Co.*, 107 Cal.

App. 148, 151, 290 P. 75, 76. This rule is applied more liberally in favor of seamen than employees upon land. *Lejeune v. General Petroleum Corp.*, 128 Cal. App. 404, 414, 18 P.(2d) 429, 434; *Anderson v. Matson Navigation Co.*, supra, and *McGeorge v. Charles Nelson Co.*, supra. In the *Lejeune Case* the court said: "A seaman in the performance of tasks connected with his employment, does not assume the risk of negligent acts of those in charge of his ship, or their failure to take reasonable precautions. *States S. S. Co. v. Berglann* (C. C. A.) 41 F.(2d) 456. The relationship of master and seaman is intimate and peculiar. *Masjulis v. United States, etc., Corp.* (C. C. A.) 31 F.(2d) 284, 285. He is bound to obey, and there is no assumption of risk, even though the danger may have been obvious to him. *United States v. Boykin* (C. C. A.) 49 F.(2d) 762; *Panama R. Co. v. Johnson* (C. C. A.) 289 F. 964; *Wychgel v. States S. S. Co.*, 135 Or. 475, 296 P. 863."

The reason of this rule is stated in apt language in the *McGeorge Case* as follows: "It cannot be that Congress intended to make applicable to seamen the entire doctrine of assumption of risk, as the same has been developed under the law of railway carriage. This necessarily results from the difference in the terms of the two employments. The servant or employee on shore is free to quit at will his employment, if there appear to him dangers in it; this the seaman cannot do."

[6-8] Applying these rules to the facts in this case, we do not think that it can be held that the plaintiff assumed the risk out of which his injury arose. As we view the evidence as a whole, the proximate cause of the plaintiff's injury was the negligence of the defendant's employees in placing the mooring line around the bitt instead of the fair-lead, aided, no doubt, by the worn condition of the mooring line, and the failure to have four men assigned to the heaving in of the line. Placing the line around the bitt caused it to slip or surge on the winch, and also necessitated more power in order to draw in the line. Plaintiff had nothing to do with rigging the line around the bitt, and the evidence shows that he did not know it was not placed around the fair-lead. He had the right to assume that the line was properly placed. *Chesapeake & Ohio R. Co. v. De Atley*, 241 U. S. 310, 36 S. Ct. 564, 60 L. Ed. 1016. With *Neilsen* he was ordered to heave in the line. He was endeavoring to carry out this order when he was injured.

The evidence shows conclusively, we think, that had the line been properly placed around the fair-lead it would not have slipped or surged on the winch, and there would not have been any trouble in bringing it in. It was the negligence of defendant's agents or employees that produced the condition on the winch and it was while plaintiff was endeavoring to right or overcome this condition that he sustained his injuries. Plaintiff might have exercised greater care in working near the winch, and thus have avoided injury. Even assuming that he did not act with due care in his endeavor to overcome the slipping of the line, yet, as we have seen under the federal statutes, contributory negligence is not a defense in an action such as the present one. He was therefore entitled to recover for the injuries sustained.

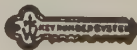
Defendant complains of a number of instructions given by the trial court at the request of the plaintiff. Two of these criticized instructions relate to the rule of assumption of risk, and we think the objections made to them have been adequately answered by what we have said upon that subject. A further instruction, or a combination of instructions, related to the duty of the defendant to furnish a reasonably safe place for plaintiff to work. The principal criticism of defendant to this line of instructions seems to be directed to the frequent repetition of the term "unsafe place," or its equivalent in meaning, in said instruction to such an extent that the jurors were unduly impressed with the importance of that phase of the case. We are not able to perceive how the defendant was materially injured by any of these instructions, or by all of them, taken as a whole.

[9] Finally, defendant complains of the giving of the following instructions: "Under the law it is presumed, until the contrary appears from the evidence, that the plaintiff at the time and place in question was exercising ordinary care and acting as a reasonable, prudent person would act. This presumption is in itself evidence in this case, to which the plaintiff is entitled unless it is rebutted by other evidence." Plaintiff justified the giving of this instruction, and relies on the case of *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529. In that case, however, the party whose conduct was in question was dead. In the absence of his testimony as to how he met his death, the court indulged in the presumption that the deceased took ordinary

care of his own concerns. Section 1963, subd. 4, Code Civ. Proc. In the present action, plaintiff was not only alive but was called as a witness and testified fully as to all of his actions just prior to and at the time of his injury. Other witnesses observed plaintiff and gave in detail a complete account of the whole affair which resulted in plaintiff's injury. It is difficult to see how there was any place for a presumption as to the plaintiff's conduct. What he did on that occasion was entirely covered by the evidence in the case, and there was neither necessity nor reason for indulging in any presumption upon that subject. That instruction had no place in this case and should not have been given. Had this been a case where the contributory negligence of the plaintiff would have defeated his claim for damages, the consequences following the giving of that instruction might have been most serious, and possibly might have required a reversal of the judgment. In the present action, however, we have, as shown in the discussion herein, been much more concerned with the action of defendant's employees, and with the question of their negligence, than we have in the conduct of the plaintiff. Admitting that the plaintiff was negligent, still he is, as stated above, entitled to recover in this action. We are therefore of the opinion that the giving of this instruction worked no serious prejudice to the defendant. On the whole, the instructions were full and fair and were just, both to the plaintiff and the defendant.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; LANGDON, J.; PRESTON, J.; THOMPSON, J.



4 Cal.2d 177

In re SOBOSLAY'S ESTATE.

PROTESTANT ORPHAN ASYLUM et al. v.
FANKHAUSER et al.

No. 15024.

Supreme Court of California.

July 31, 1935.

1. Executors and administrators §315(4)

Where executors failed to deduct from sum available for distribution two claims

which had been allowed, action of probate court setting aside decree of distribution and filing amended decree on day motion to vacate former decree was made held unobjectionable although statutory notice had not been given, since all parties concerned concurred in seeking amendment, and since correction of error in decree of distribution was not judicial act (Code Civ. Proc. § 473).

2. Judgment §316

Court may correct clerical errors on its own motion.

3. Executors and administrators §509(5)

Where claims against estate were filed, allowed, and account settled February 17 and no exceptions were filed until June 10 court acted within its discretion in refusing to permit reconsideration of claim originally allowed without objection, since time for appeal had expired and account had become final, even though amended on May 5 to correct inadvertent omission (Probate Code, § 931).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Proceeding in the matter of the estate of Julius Soboslay, deceased, by Protestant Orphan Asylum and Protestant College, legatees, against Albert J. Fankhauser and others, executors. From an order overruling legatees' objections to the final account of executors and an order settling the final account and decreeing distribution of the estate, the legatees appeal.

Orders affirmed.

For prior opinion, see 39 P.(2d) 871.

Hubbard & Hubbard, of San Francisco, for appellants.

John R. Tyrrell and W. L. A. Calder, both of San Francisco, for respondents.

LANGDON, Justice.

This is an appeal from an order overruling appellants' objections to the final account of respondents, executors of the last will of the decedent Julius Soboslay; and from an order settling the final account and decreeing distribution of the estate.

The decedent died testate, a resident of the city and county of San Francisco, April 22, 1930, leaving estate in California. His will provided for legacies in the sum of \$21,000, devised a tract of land to respondents, and left the residue to the appellants,

Protestant Orphan Asylum and Protestant College, in Hungary.

Respondents received letters testamentary May 15, 1930. They filed their final account and petition for distribution February 5, 1932, showing a cash balance of \$60,846.54 in the estate. On February 17, 1932, the account was settled without objection, and the decree of distribution entered on the same day. Respondents, however, refused to make distribution in accordance with the terms of the decree. It appeared that two of said respondents, Albert Fankhauser and Clara Baldizzone, had previously filed claims against the estate in the aggregate sum of \$30,000, which claims had been allowed and paid. But the executors had inadvertently failed to deduct this sum from the amount set forth in their account as available for distribution.

Accordingly, on May 5, 1932, appellants filed notice of motion to vacate the judgment under section 473 of the Code of Civil Procedure, on the ground that it was incomplete, erroneous, and inadvertently entered. An affidavit of appellants' attorney in fact accompanied the notice of motion. On the same day respondents likewise filed an affidavit setting forth the above facts. Without waiting for a hearing on the day specified in appellants' motion, the court on said date of May 5, 1932, made an order setting aside the decree of distribution, and filed an amended decree. Respondents thereafter, on June 3, 1932, filed an amendment to their account, including therein the allowance of the two claims. It then appeared that after payment of inheritance taxes, the balance in the estate was \$20,717.20, less than the amount of the cash legacies provided for in the will. As a result, no residue was left for appellants.

On June 10, 1932, appellants filed exceptions to certain items in the original account and to the items set forth in the amendment thereto, that is, the claims of the two respondents. These were overruled, the account settled, and distribution ordered.

[1,2] Appellants contend that the proceedings by which the amended account and decree of distribution were made were not in compliance with statutory requirements, and in consequence were void. The record shows that appellants on May 5, 1932, gave the original notice of motion to set aside the decree. The court, instead of hearing the motion on the date specified, made its order on the same day

on which appellants' motion and affidavit, and respondents' affidavit, were filed. Appellants suggest that the original motion lapsed, and that the ex parte order of the court, without notice to them, was void under section 473, Code of Civil Procedure. There can be no doubt that in the ordinary case, a motion under this section must be made upon notice, and the setting aside of a judgment, without such notice, is an unwarranted act. *Brownell v. Superior Court*, 157 Cal. 703, 109 P. 91. There are, however, two reasons why this order was not objectionable. In the first place, appellants, who now complain of it, originally requested it by motion and affidavit; and the concurrence of both appellants and respondents in seeking the very relief which was granted makes any formal omission of notice wholly immaterial. Secondly, the amendment was not a judicial act; the court merely corrected an error of omission in the account and decree of distribution, by reference to the record in the case. The power of the court to correct such clerical errors on its own motion is well recognized. See *Estate of Langan*, 74 Cal. 353, 16 P. 188; *Carpenter v. Superior Court*, 75 Cal. 596, 598, 19 P. 174; *Wiggin v. Superior Court*, 68 Cal. 398, 9 P. 646.

On the merits, appellants' objections arise as follows: Elizabeth Soboslay, wife of the decedent, died March 9, 1928, about two years prior to his death. She left a writing entitled "My Last Will," asking that her husband make certain gifts to respondents, and stipulating that her husband was to have five years to do so. Respondent Fankhauser became administrator of her estate, the probate court having held the writing not testamentary. Subsequently, however, Robert T. Iberson was granted letters of administration with the will annexed, on the theory that this writing, admitted to probate as the will of Elizabeth Soboslay, made gifts of \$15,000 each to the two respondents above mentioned.

Julius Soboslay, in 1928, shortly after his wife's death, sent letters to said respondents, inclosing his promissory notes, payable in four years, for the said sum, declaring that he was carrying out his wife's wishes. Appellants contend that the amount of community property acquired by the parties since 1923 (of which one-half would be subject to the testamentary disposition of the wife under section 201 of the Probate Code) was, under

the evidence, much less than the amount of these gifts. The testimony on this point is in conflict. The probate court in the present proceeding allowed the above claim of respondents, and found that the notes of decedent were based upon a valuable consideration. The theory of this finding is, it would appear, that Mrs. Soboslay, by her will, sought to leave certain community property to these respondents; that her husband took over all of the property, and in lieu of immediate payment to respondents, executed these promissory notes. It would seem that under these facts, the court could conclude that the notes were not merely unenforceable future promises of a donor, but were supported by consideration.

[3] But it is unnecessary to enter into the details of this dispute. The claims were filed, allowed, and the account was settled February 17, 1932. No exceptions were filed until June 10, 1932, 114 days later. By that date, the time for appeal had expired, and the account became final. See Probate Code, § 931; *Kowalsky v. Superior Court*, 13 Cal. App. 218, 109 P. 158; *Estate of Grant*, 131 Cal. 426, 63 P. 731. The court's order setting aside the decree of distribution and final account was obviously for the purpose of correcting an inadvertent omission, and the court acted within its discretion in refusing at that time to permit the reopening of consideration of a claim originally allowed without objection.

The orders appealed from are, and each is, affirmed.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.; PRESTON, J.



4 Cal.2d 120

ROSEFIELD PACKING CO. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 15355.

Supreme Court of California.

July 30, 1935.

Rehearing Denied Aug. 29, 1935.

1. Constitutional law ☞199

Retrospective application of a statute may be unconstitutional if it is *ex post facto*,

applying to criminal matters, or if it deprives person of vested right or impairs obligation of contract, but statute which merely effects change in civil procedure may have valid retrospective application.

2. Constitutional law ☞191

Where a statute operates immediately to cut off an existing remedy, or within so short a time as to give the party no reasonable opportunity to exercise his remedy, retroactive application of the statute is unconstitutional as to such party.

3. Constitutional law ☞191

Retroactive amendment to statute changing requirement that action must be brought to trial within five years after filing of "answer" to requirement that it be brought to trial within five years after filing of the "action" held not to violate constitutional right of plaintiff to reasonable opportunity to exercise his remedy after enactment of such statute, where plaintiff had year in which to bring his action to trial after the amendment was enacted (Code Civ. Proc. § 583, as amended by St. 1933, p. 853).

4. Constitutional law ☞191

Where retroactive statute changing existing remedy applies to pending case, question is one of constitutionality of statute, and if it appears there was reasonable time for exercise of remedy before statutory bar became fixed lower court cannot consider individual hardship or other circumstance, but must give effect to express provisions of the law.

5. Trial ☞5

Statute requiring action to be brought to trial within five years after the plaintiff has filed his action held to bar trial of action after five years from time complaint was filed and not within five years of an amended complaint filed by stipulation of parties, since action was commenced when original complaint was filed and amended complaint did not prolong period in which the action might be brought to trial (Code Civ. Proc. §§ 350, 405, and § 583, as amended by St. 1933, p. 853).

6. Trial ☞5

Filing of amended complaint by stipulation of the parties held not a substitute for stipulation to prolong statutory period in which action must be brought to trial (Code Civ. Proc. § 583, as amended by St. 1933, p. 853).

In Bank.

Prohibition proceeding by the Rosefield Packing Company against the Superior Court of the State of California, in and for the City and County of San Francisco,

and Walter Perry Johnson, as Presiding Judge thereof.

Writ of prohibition issued.

Rehearing Denied; WASTE, C. J., and SHENK and PRESTON, JJ., dissent.

McEnerney, Morris, Gillen & McEnerney, of San Francisco, for petitioner.

Brobeck, Phleger & Harrison, of San Francisco, for respondents.

LANGDON, Justice.

This is a petition for a writ of prohibition to restrain respondent Superior Court from proceeding with the trial of a cause.

Planters Nut & Chocolate Company brought an action against Rosefield Packing Company by filing a complaint on August 17, 1929. Defendant answered on or about September 27, 1929. Prior to the 1933 amendment of section 583 of the Code of Civil Procedure an action not brought to trial within five years after filing of the answer was subject to mandatory dismissal. The amendment, effective August 21, 1933, made it compulsory to dismiss an action not brought to trial within five years after filing of the "action." On October 11, 1934, the defendant moved to dismiss the action for lack of prosecution. This date was more than five years after filing of the complaint, and it is the contention of defendant, petitioner herein, that the action was subject to dismissal under the provisions of the statute as amended. The lower court denied the motion and set the case for trial. Petitioner then sought a writ of prohibition to restrain the court from proceeding further in the matter. Respondent has demurred to the petition for writ of prohibition, and the question presented is one of law alone.

The amendment to section 583 (St. 1933, p. 853) by its terms makes the statute retroactive, for it applies to "any action heretofore or hereafter commenced." No room for construction is permitted, and the law as amended undoubtedly applies to the present proceeding.

[1,2] The question of constitutionality may be determined upon settled principles. The retrospective application of a statute may be unconstitutional if it is *ex post facto*, that is, applying to criminal matters; or if it deprives a person of a vested right; or if it impairs the obligation of a contract. But a statute which merely effects a change in civil procedure may have a valid retrospective application. See *Los Angeles v.*

Oliver, 102 Cal. App. 299, 283 P. 298; *San Bernardino County v. Ind. Acc. Com.*, 217 Cal. 618, 20 P.(2d) 673. In accordance with this principle it has been specifically held that the Legislature may shorten or extend the period of the statute of limitations, or similar time statutes relating to procedure, and that the changed period may be made applicable to pending proceedings. *Davis & McMillan v. Ind. Acc. Com.*, 198 Cal. 631, 246 P. 1046, 46 A. L. R. 1095; *Steinbauer v. Bondesen*, 125 Cal. App. 419, 14 P.(2d) 106; *Kozisek v. Brigham*, 169 Minn. 57, 210 N. W. 622, 49 A. L. R. 1260. There is, of course, one important qualification to the rule; where the change in remedy, as, for example, the shortening of a time limit provision, is made retroactive, there must be a reasonable time permitted for the party affected to avail himself of his remedy before the statute takes effect. If the statute operates immediately to cut off the existing remedy, or within so short a time as to give the party no reasonable opportunity to exercise his remedy, then the retroactive application of it is unconstitutional as to such party. *Coleman v. Superior Court*, 135 Cal. App. 74, 26 P.(2d) 673.

[3] In the instant case, the statute went into effect on August 21, 1933. The 5-year period from the filing of the complaint ended August 17, 1934. The plaintiff, therefore, had practically an entire year to bring his case to trial, after the enactment of the amendment. There can be no doubt but that this was a reasonable time, and that consequently the amended statute may be applied to the action without violating any constitutional right of the plaintiff. Much shorter periods have been upheld. See *Kozisek v. Brigham*, *supra*; note, 49 A. L. R. 1263; *Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead*, 85 Cal. 80, 24 P. 648.

Respondents contend, however, that several recent decisions of the District Court of Appeal sustain the refusal to dismiss the cause. The first is *Coleman v. Superior Court*, *supra*, in which the court fully discussed and approved the general principles hereinabove stated, but concluded that to apply the statute retroactively would be to deny the party a reasonable time for the exercise of his right. Accordingly, a writ of prohibition was denied. But in that case, the action had been commenced in 1920, and though time for answer had been several times extended,

the 5-year period from the filing of the complaint had elapsed long before the amendment to the law became effective. The amendment immediately cut off the plaintiff's right to proceed in the cause, and was consequently held inapplicable. Such is not, of course, the situation presented in the instant case, where nearly a year elapsed from the effective date of the amendment to the time when the 5-year period ended. The second case is *Masonic Mines Ass'n v. Superior Court*, 136 Cal. App. 298, 28 P.(2d) 691, 692, which deals with a similar statute, and follows the *Coleman Case* in stating the proposition that "an amendment will not be held applicable to a pending case where the amendment will, if operative, require the taking of some action prior to the effective date of the amendment." This case is likewise dissimilar to the instant case. The other decision is *Shoemaker v. Superior Court* (Cal. App.) 41 P.(2d) 343. There the action was commenced October 21, 1929. The 5-year period was concluded October 21, 1934. The amendment became effective in August, 1933, so that the plaintiffs had over a year in which to bring the action to trial. In this respect, therefore, the case is substantially similar to the instant case. The motion to dismiss the cause was made in November, 1934, and the lower court refused to dismiss. Upon petitions for mandate and prohibition, the District Court of Appeal held that, under the rule laid down in the *Coleman Case*, the time for bringing the action to trial after the effective date of the amendment must be reasonable under all of the circumstances; that the lower court in the exercise of a sound discretion had power to determine whether the time was reasonable or not; and that neither mandate nor prohibition would therefore lie to determine the correctness of such discretionary ruling.

[4] It is clear that the *Shoemaker Case* proceeds upon an erroneous interpretation of the principle considered in the *Coleman Case*. Whether there was a reasonable time in these cases is not a matter committed to the discretion of the trial court. The question is one of constitutionality of the statute which in terms applies to the pending case; and if it appears that there was a reasonable time for exercise of the remedy before the statutory bar became

fixed, the lower court cannot consider individual hardship or other circumstances, but must give effect to the express provisions of the law. On this point the case of *Shoemaker v. Superior Court*, supra, must be disapproved.

[5,6] Respondents advance the further argument that by stipulation of the parties, an amended complaint was filed March 16, 1933, which extended the time of mandatory dismissal to five years after its filing. The case of *Mercantile Investment Co. v. Superior Court*, 218 Cal. 770, 25 P.(2d) 12, is cited in this connection. That case arose under the former statute, the period dating from the filing of the defendant's answer. The plaintiff filed an amended complaint, and it was stipulated that the answers already on file should be deemed answers to the amended complaint. We held that the period began to run on that date, which was considered to be the date of defendants' last answers. This interpretation of the old statute, making the period run from the last pleading of the defendant, was permissible under the language of the section, namely, "within five years after the defendant has filed his answer." But the present law (Code Civ. Proc. § 583, as amended by St. 1933, p. 853) reads: "Within five years after the plaintiff has filed his action." The action is commenced when the complaint is filed. Code Civ. Proc. §§ 350, 405. To sustain respondents' view, we should have to restate the section so as to substitute for the word "action" the words "last amended complaint." This would not be a construction of the statute, but a revision thereof, in direct conflict with its present meaning. Whatever may be the considerations of policy, in its legal effect the new statute cannot be held to mean what respondents urge in this connection. If it is desired to prolong the period in which the action must be brought to trial, it is necessary to stipulate to that effect, and we cannot hold that the filing of the amended complaint is a substitute for such a stipulation.

Let a writ of prohibition issue as prayed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.

4 Cal.2d 89

BANKERS INDEMNITY INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION

et al.

S. F. 15346.

Supreme Court of California.

July 23, 1935.

Rehearing Denied Aug. 22, 1935.

1. Insurance ⇨143(4)

Where employer owning company formerly a copartnership applied for compensation insurance through agent of insurance broker and broker, due to mutual mistake of applicant and agent, issued policy in name of company as copartnership, employer held entitled to reformation of policy so as to effectuate insurance of company, notwithstanding agent had no authority to write compensation insurance for broker, since acts of agent were acts of broker (St. 1917, p. 831, as amended).

2. Master and servant ⇨397

Industrial Accident Commission in matters within its jurisdiction acts as a judicial body and exercises judicial functions, and in legal sense is a "court" (St. 1917, p. 831, as amended; p. 868, § 55; Const. art. 20, § 21).

[Ed. Note.—For other definitions of "Court (Of Justice)," see Words & Phrases.]

3. Master and servant ⇨397

Where employer owning company formerly a copartnership applied for compensation insurance through agent of insurance broker and broker, due to mutual mistake of applicant and agent, issued policy in name of company as copartnership and policy excluded partners from coverage thereunder, Industrial Accident Commission held to have jurisdiction to reform policy so as to effectuate insurance of company, and to enable former partner to recover compensation under policy for injuries sustained while working for company (St. 1917, p. 831, as amended; p. 868, § 55; Const. art. 20, § 21).

In Bank.

Proceeding by the Bankers Indemnity Insurance Company against Industrial Accident Commission of the state of California and Aram Merzoian, to annul an award of compensation under the Workmen's Compensation Law. Judgment for respondents, and petitioner brings writ of review.

Affirmed.

McEnerney, Morris, Gillen & McEnerney and Charles B. Morris, all of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

CURTIS, Justice.

This proceeding was instituted before the District Court of Appeal for the purpose of annulling an award of the Industrial Accident Commission in favor of respondent Aram Merzoian, and against petitioner, Bankers Indemnity Insurance Company. The petition was denied by the District Court of Appeal, and an order was subsequently made transferring the proceedings to this court after the decision by the appellate court.

The question involved in this proceeding is whether the policy of insurance issued by petitioner in which the name of the employer is stated as "S. A. Merzoian Company, a copartnership composed of Sam Merzoian and Aram Merzoian," covered the liability of Sam Merzoian for an injury sustained by Aram Merzoian in the course of his employment by Sam Merzoian. The award of the commission in favor of Aram Merzoian was predicated upon the following proven facts: Aram Merzoian is the father of S. A. Merzoian, frequently referred to as Sam Merzoian. The father had been in business for some years in the city of Fresno prior to selling out said business to his son some time previous to the year 1931. Since said sale, S. A. Merzoian has been the exclusive owner of said business, which was carried on by him under the fictitious name of S. A. Merzoian Company. Some time in 1932 he took out a policy of insurance with the petitioner covering his liability under the Workmen's Compensation Act (St. 1917, p. 831, as amended). At the expiration of a year it was renewed for another year, and shortly after the renewal policy was issued the injury to Aram Merzoian involved in this proceeding was sustained. The original policy, and the subsequent one, were made out in the name of S. A. Merzoian Company, a copartnership composed of Sam and Aram Merzoian. By express provision in each policy the partners were excluded from all coverage thereunder. Just prior to the issuance of the earlier of said policies, S. A. Merzoian called upon a Mr. Knapp of the firm of Shepherd & Knapp, insurance brokers, and

applied to him for compensation insurance. This firm of brokers represented the Bankers Indemnity Insurance Company, the petitioner, but had no authority to write compensation insurance. Shepherd & Knapp communicated with petitioner in San Francisco regarding S. A. Merzoian's request for compensation insurance, with the result that petitioner issued its policy of insurance as stated above, and at the expiration thereof issued a second or renewal policy. At the time S. A. Merzoian made application for said insurance he told Knapp to make the policy out in the name of S. A. Merzoian Company. Knapp assumed that the business was carried on by the father and son as a copartnership composed of S. A. Merzoian and Aram Merzoian, and so informed the petitioner, with the result that the policy was made out in the partnership name. The same course was followed when the second policy was issued. The policies were delivered to S. A. Merzoian soon after the dates of their respective issuance, but he did not discover that they were made out in the name of the partnership until after Aram Merzoian sustained his injury. On this evidence the commission found that "by reason of mutual mistake of the parties at the time of its execution, the said policy did not correctly express the intention of the parties respecting the identity of the assured, which intention was that the policy should insure Samuel A. Merzoian, transacting business under the name of the Samuel A. Merzoian Company, and in the judgment of the Commission the said defendant is entitled to a reformation of the said policy so that it shall effectuate the insurance of the defendant Samuel A. Merzoian, transacting business under the name of the S. A. Merzoian Company." The commission accordingly reformed the policy and awarded compensation in favor of Aram Merzoian and against petitioner.

Petitioner now contends that the evidence before the commission was insufficient to show a mutual mistake between the parties to the insurance policy, and, furthermore, that the commission is not clothed with equity powers and therefore it was without jurisdiction to adjudicate a reformation of the policy of insurance.

Petitioner takes the position in support of its contention that there is an insufficiency of the evidence to support the findings of the commission that there was a mutual mistake of the parties in the execution and delivery of the policy of insur-

ance, that it had no dealings directly with the insured, but that the insured in negotiating for the policy dealt solely with Shepherd & Knapp, insurance brokers, who had no authority from petitioner to write compensation insurance, and therefore the acts of these brokers cannot in any sense be regarded or held to be the acts of the petitioner insurance company. The evidence clearly shows that Shepherd & Knapp represented petitioner as its agent with full authority to write all kinds of insurance except compensation insurance, and as to compensation insurance these agents were merely soliciting agents of petitioner, and when they secured any application for compensation insurance, they reported that fact to petitioner, and the latter, if it approved of the business, wrote the policy and sent the same to their agents for delivery to the insured. This plan of action was followed by petitioner and its agents in the procuring and execution of the policy of insurance under which the award herein was made against petitioner and in favor of Aram Merzoian.

This subject is discussed in Cooley's Briefs on the Law of Insurance, and the rule governing the liability of an insurance company for the acts of its soliciting agents stated as follows:

"From an examination of the cases the following propositions may be regarded as established by the weight of authority: Where the insured, in good faith, makes truthful answers to the questions contained in the application, but his answers, owing to the fraud, mistake, or negligence of the agent filling out the application, are incorrectly transcribed, the company is estopped to assert their falsity as a defense to the policy. The acts of the agent, whether he is a general agent with power to issue policies, a soliciting agent, or merely medical examiner for the company, are in this respect the acts of the company, and he cannot be regarded as the agent of the insured, though it is so stipulated in the application or policy."

The foregoing statement is quoted in full in *Lyon v. United Moderns*, 148 Cal. 470, 475 and 476, 83 P. 804, 806, 4 L. R. A. (N. S.) 247, 113 Am. St. Rep. 291, 7 Ann. Cas. 672, and the rule enunciated therein is expressly approved in the following language:

"An examination of many of the authorities satisfies us that, while there is some conflict in the cases on some of the mat-

ters included in this statement, the great weight of authority is with the statement, as a whole, where the insured acts in good faith, and is himself without fault. This court has already indicated its support of the rule enunciated," citing authorities. The commission, at least impliedly upon sufficient and competent evidence, found that the insured under the present policy of insurance acted in perfect good faith in his application for said policy for himself, doing business under the fictitious name of S. A. Merzoian Company. By the mistake or misunderstanding of the insured and the agents, the latter gained the erroneous impression that the policy was to be made out in the name of the partnership, and the agents so informed the petitioner, with the result that the policy was not made out in the name of the insured, but in the name of a partnership which was nonexistent.

[1] Under the authorities cited above it must be held that the acts of Shepherd & Knapp, as such soliciting agents, in so far as said acts were instrumental in effecting said insurance, were the acts of petitioner, and the mistake made by them and acted upon by petitioner, which resulted in the error in said policy of insurance, was the act of the petitioner. As we have seen, S. A. Merzoian, in perfect good faith, applied for and thought he had secured a policy covering his own individual liability.

The evidence, we think, clearly shows a mutual mistake on the part of S. A. Merzoian, on the one hand, and said insurance agents on the other. S. A. Merzoian desired insurance for himself, doing business under the fictitious name of S. A. Merzoian Company. It would be idle to say that he desired insurance for the partnership when there was no such partnership in existence. It is equally clear that Shepherd & Knapp desired to secure for Merzoian the precise kind of insurance which the latter desired. In the confusion of the name in which Merzoian was doing business, the policy was made out by the petitioner upon information furnished it by Shepherd & Knapp, in the name of Merzoian & Co., as a partnership, when it should have been in the fictitious name in which S. A. Merzoian was individually doing business. S. A. Merzoian, believing the policy had been made out to him individually and without observing the error, accepted the policy, paid the premium required, and the same was in his possession in full force and effect at the time of the injury to Aram

Merzoian. We have treated this case as if there were but one policy issued for the entire period of time involved, instead of the two policies covering said period of two years. It is evident that the mistake under which the first policy was issued was carried into the issuance of the second policy, as the latter was simply a renewal of the first policy. The evidence clearly shows that both policies were issued under a mutual mistake of the parties.

As we view the proceedings, by far the more important question involved herein relates to the power of the commission to exercise equitable jurisdiction in this matter and to adjudicate a reformation of said policy of insurance.

The commission derives its powers from, and its jurisdiction is fixed by, section 21 of article 20 of the Constitution and the Workmen's Compensation Act (Stats. 1917, c. 586, p. 831), and amendments thereto, enacted by the Legislature in pursuance of said section of the Constitution. So much of said section as is applicable to our present purpose reads as follows: "The legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability, and their dependents for death incurred or sustained by the said workmen in the course of their employment, irrespective of the fault of any party. A complete system of workmen's compensation includes * * * full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character. * * *" Under this grant of power the Legislature created the Industrial Accident Commission and vested it with the exclusive jurisdiction over "all proceedings for the recovery of compensation, or concerning any right or liability arising out of or incidental thereto, or for the enforcement against the employer or an insurance carrier of any liability for compensation imposed upon him by this act in favor of the injured employee, his dependents or any

third person, * * * or for obtaining any order which by this act the commission is authorized to make, or for the determination of any other matter, jurisdiction over which is vested by this act in the commission. * * *” Section 55, Workmen’s Compensation Act (St. 1917, p. 868).

This section further provides, “and the commission is hereby vested with full power, authority and jurisdiction to try and finally determine all such matters. * * *”

It is petitioner’s contention that the commission is not invested with equitable powers, and that accordingly it has no jurisdiction over a proceeding to reform a policy of insurance on the ground of the mutual mistake of the parties, or for that matter, on any ground whatever. Petitioner takes the position that courts of equity, and they alone, have exclusive jurisdiction of such matters, and that in order to reform such policy of insurance it is necessary for the party seeking such reformation to invoke the powers of a court of equity, as no such power has been vested in the Industrial Accident Commission.

In construing the section of the Constitution above referred to, and the legislative enactment adopted in pursuance thereof, this court has held that in determining the liability of an insurance carrier for compensation to an injured employee the commission had the power to determine all questions of law and fact upon which the liability of the insurance carrier depended. *Employers’ L. A. Corp. v. I. A. C.*, 177 Cal. 771, 775, 171 P. 935, 937. In that case the court had under review an award of the Industrial Accident Commission, given in a proceeding in which the insurance carrier set up as a defense that there had been a breach on the part of the employer of certain warranties contained in the policy of insurance and that upon learning of such breach the carrier had canceled the policy. In that case it was argued that the issues involved in that defense were such as could be determined only by a court of law in an action upon the policy, and that the commission was without jurisdiction to pass upon them. This court disagreed with that contention and held in favor of the commission’s jurisdiction. Its conclusion in that respect was stated as follows: “If the commission may, in any case, make an award against one who has agreed to stand in the employer’s place and protect him against claims by his employees, it must have the power to determine all questions

of law and fact upon which the liability of the alleged insurance carrier depends. To hold that the mere denial of the binding force of a policy deprives the commission of jurisdiction would introduce endless and unnecessary complications and difficulties into the administration of the law.”

In the case of *General Accident, etc., Corp. v. I. A. C.*, 196 Cal. 179, 190, 237 P. 33, 37, the insurance carrier interposed as a defense to the application of an injured employee that the policy of insurance was procured by the fraud of the employer, and the question arose whether in determining the issues involving such defense, which were equitable rather than legal, the commission was vested with the power to hear and determine such issue. Again this court sustained the jurisdiction of the commission. The language of the court in that instance was as follows: “There can be no doubt but that the commission is vested by constitutional and legislative power to hear and determine every issue raised by the parties to this controversy, including the validity of the policy and the question of fraud alleged in its procurement, and that the parties are not required to invoke either a court of law or equity in the determination of said questions.”

This express holding to the effect that the commission has been invested with the power and authority to hear and determine equitable issues is controlling in the matter before us, and is determinative of the power of the commission in proceedings before it to reform policies of insurance, or other writing, so that the same will state the true intent of the parties thereto. Petitioner has cited the following authorities as holding that the Industrial Accident Commission has no such power: *Allied Mutuals Liability Ins. Co. v. Interstate Cork Co.*, 134 Misc. 504, 235 N. Y. S. 541, 543, *Kelley v. Tomahawk Motor Co.*, 206 Wis. 568, 240 N. W. 141, 143, and *Continental Casualty Co. v. Industrial Commission*, 61 Utah, 16, 210 P. 127.

[2] In the first two of these cases it appears that the powers of the industrial board in one instance and the Industrial Accident Commission in the other were conferred by legislative enactment without proper constitutional warrant or authority, and it was held, in the words of the Supreme Court of Wisconsin: “Any attempt by the Legislature to confer such purely judicial powers upon the commission would no doubt meet with insurmountable con-

stitutional objections." These two cases have no controlling influence in this jurisdiction, where the legislative enactment conferring judicial powers upon the commission is expressly authorized by the Constitution. In the case from the Supreme Court of Utah it was held that the Industrial Accident Commission of that state "is in no sense a judicial body," but is an administrative body. It does not clearly appear from that decision nor from the two cases from that court cited in the opinion, the basis upon which that decision rests, but it is apparent that the decision of the Supreme Court of Utah is not in harmony with the decisions of this court, which hold that the commission in matters within its jurisdiction acts as a judicial body and exercises judicial functions and in legal effect is a court. 27 Cal. Jur. 449; Carstens v. Pillsbury, 172 Cal. 572, 576, 158 P. 218; Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 322, 153 P. 24, and Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 411, 156 P. 491, Ann. Cas. 1917E, 390.

The question of the power of the state industrial board of the state of New York, which corresponds to the Industrial Accident Commission of this state, to reform a policy of insurance on the ground of the mutual mistake of the parties was recently before the Court of Appeals of that state. The court reviewed the section of the Constitution and the act of the Legislature of that state providing for the industrial board in that state, and also certain decisions of that court. It reached the conclusion that the industrial board had equitable jurisdiction to hear and determine the defense of the insurance carrier which involved the reformation of said policy of insurance. In reaching such conclusion the court said: "Where and how has the jurisdiction to consider equitable defenses been withheld from the board? It is difficult to put one's finger on any constitutional or statutory provision or judicial decision which thus limits its jurisdiction. The difference, once regarded as basic, between the method of trying legal defenses and equitable defenses, no longer exists. Independent suits are no longer necessary to establish equitable rights. The question was elaborately discussed by Cardozo, J., in *Susquehanna S. S. Co. v. A. O. Andersen & Co.*, 239 N. Y. 285, 146 N. E. 381,

and the conclusion was reached that equitable defenses are triable in the same way as defenses that are legal. The jurisdiction to hear and determine equitable defenses is incidental to the general jurisdiction of the Board to enforce policies under the Workmen's Compensation Law. Without such jurisdiction the old rule is revived without reason." *Royal Indemnity Co. v. Heller*, 256 N. Y. 322, 176 N. E. 410, 411.

[3] There is slight, if any, material difference in principle between the Constitution and statute of New York and those of this state relating to the creation of an independent tribunal for the recovery of compensation by injured employees. We are satisfied that the prior decisions of this court, cited above, admit of but one conclusion in this matter and that is that the Industrial Accident Commission of this state has been invested with the power and authority to hear and determine equitable issues, including those arising in a controversy involving the reformation of a written instrument. We are confirmed in this conclusion by the decision of the Court of Appeals of the state of New York, where the precise question was squarely presented, and a decision rendered upholding the power and jurisdiction of such tribunal to hear and determine questions of that character. We are further in accord with the policy of the law which invests in one tribunal the power to dispose of the whole controversy involving the right of the injured employee to secure just compensation for the injury sustained by him. This policy is aptly expressed in the closing paragraph of the opinion of the court in *Royal Indemnity Co. v. Heller*, supra, as follows: "Such matter should be disposed of summarily before one tribunal so that prompt adjustment of liability for industrial accidents may be obtained without unnecessary litigation and expense. Here we have an accident which happened more than three years ago with the question of liability still unsettled. Such delays are inconsistent with the purpose of the remedies provided by the Compensation Law."

The award is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; THOMPSON, J.; SHENK, J.; SEAWELL, J.

4 Cal.2d 195

ANDERSON v. BAUMGARTNER.

Sac. 4893.

Supreme Court of California.

Aug. 1, 1935.

Waters and water courses Ⓒ137

Where right which was claimed by plaintiff to divert water from creek on defendant's land was based upon original appropriation by settlor on plaintiff's land, while such land was in government ownership, which original appropriation was never abandoned although point and method of appropriation were changed, plaintiff was entitled to prior appropriative right to amount of water which evidence showed had been continuously used by plaintiff and her predecessors.

In Bank.

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Action by Lavinia I. Anderson, also known as Irene Lavinia Anderson, Lovine I. Anderson, Irene Anderson, and Lovine Irene Anderson, against Lulu V. Baumgartner. Judgment for plaintiff, and defendant appeals.

Affirmed.

Rehearing Denied Aug. 29, 1935.

Chickering & Gregory, of San Francisco, Herbert V. Keeling, of Lakeport, and Walter C. Fox, Jr., of San Francisco, for appellant.

Lavinia I. Anderson, and W. H. Hazell, of Lakeport, for respondent.

PER CURIAM.

This is an action to quiet title to water rights in the waters of Nutmeg creek in Lake county. The lower court gave judgment in favor of plaintiff, holding her entitled to a prior appropriative right to 11 miner's inches of water measured under a 4-inch pressure. No adjudication was made as to riparian rights.

In 1858, one Staniford settled on the land now owned by plaintiff, built a sawmill, and took water from Nutmeg creek by means of a ditch (identified as ditch No. 9 at the trial). Staniford sold his sawmill to William Gordon in 1866. William Gordon eventually secured title to the land by patent, and through various transfers the same finally came to plaintiff in fee.

Defendant is the owner of adjoining land. Nutmeg creek originates in springs,

runs through defendant's land, and through a very small portion of the lower part of plaintiff's land. The appropriative right claimed by plaintiff is a right to divert water from the creek on defendant's land; and the theory on which the right is asserted is that the original appropriation by Staniford, on government land, was, by the federal acts of 1866 and 1870, made a vested right superior to any subsequent riparian or appropriative rights after the land passed into private ownership. San Joaquin Canal, etc., *Co. v. Worswick*, 187 Cal. 674, 203 P. 999.

The evidence sufficiently shows that the original appropriation by Staniford was never abandoned, although the point and method of diversion was changed. The present diversion is through a ditch called ditch No. 2. The capacity of this ditch is 11 miner's inches under a 4-inch pressure, as established by the testimony of several qualified witnesses; and there is evidence in the record that this amount, up to the time of the trial, was put to a continuous beneficial use by plaintiff and her predecessors.

The judgment is affirmed.



4 Cal.2d 136

**PEOPLE v. SUPERIOR COURT OF
CONTRA COSTA COUNTY.**

S. F. 15311.

Supreme Court of California.

July 30, 1935.

1. Insane persons Ⓒ86

Action of superintendent of hospital for insane in making official record and in reporting to sheriff that defendant, in murder prosecution, who had been committed to hospital for insanity but who was never considered insane by superintendent, was not insane, constituted sufficient certification of defendant's sanity to justify the proper officials in proceeding with criminal prosecution, although superintendent did not certify that defendant had recovered his sanity (Pol. Code, § 2189, subd. 4; Pen. Code, §§ 1368-1370, 1372).

2. Habeas corpus Ⓒ17

Insane or incompetent person held in custody is entitled to writ of habeas corpus, since

order of commitment is not final (Pol. Code, § 2188).

3. Criminal law ☞322

Presumption existed that district attorney, who set murder prosecution in motion after superintendent of hospital for insane had reported that defendant was not insane and that trial judge who presided at insanity proceeding and also in proceeding subsequent to superintendent's report, acted in compliance with statutory requirements (Pol. Code, § 2189, subd. 4; Pen. Code, §§ 1368-1370, 1372; Code Civ. Proc. § 1963, subds. 15, 16).

4. Insane persons ☞86

Presumption existed that certification of superintendent of hospital for insane as to sanity of defendant in murder prosecution met with court's approval, especially where same judge presided at insanity proceeding, and in proceedings subsequent to time of superintendent's certification (Pol. Code, § 2189, subd. 4; Pen. Code, §§ 1368-1370, 1372).

5. Criminal law ☞997

Where judgment of conviction on plea of guilty had been rendered against defendant in murder prosecution subsequent to his being declared sane and released from insane hospital, judgment could not be annulled 25 years later under writ of error coram nobis proceedings for alleged insufficiency of insane hospital superintendent's certificate of sanity, where defendant, his counsel, and court had full knowledge of all facts.

6. Criminal law ☞1007

Where trial court nullified judgment of conviction rendered 25 years previously on writ of error coram nobis proceedings, certiorari rather than appeal held proper remedy in attacking trial court's order, since such order was in excess of court's jurisdiction (Pen. Code, § 1237).

In Bank.

Proceeding by the People of the State of California against the Superior Court of Contra Costa County to annul proceedings nullifying judgment of conviction of James McFarland entered May 12, 1910. Order vacating and setting aside plea of guilty of James McFarland to the crime of murder in the second degree made in the superior court of the county of Contra Costa, and the order purporting to annul the judgment of conviction of James McFarland made and entered thereon May 12, 1910, annulled and set aside.

U. S. Webb, Atty. Gen., Lionel Browne, Deputy Atty. Gen., and James F. Hoey, Dist. Atty., and Warren Cunningham, Deputy Dist. Atty., both of Martinez, for petitioner.

George Carmody and W. L. Wollitz, both of Martinez, for respondent.

SEAWELL, Justice.

On September 8, 1909, an information was filed in the superior court of the county of Contra Costa by the district attorney, charging the defendant with the crime of murder. On September 10, 1909, defendant, with his consent, was arraigned. On September 20, 1909, defendant entered his plea of "not guilty" to the crime charged in the information and the cause was set for trial to begin on September 23, 1909. Several postponements followed. On December 13, 1909, two physicians, appointed by the court upon suggestion that the defendant was then insane, certified to the court that in their opinion he was then insane. On December 21, 1909, defendant, accompanied by his counsel, was brought into court for trial, and the court having entertained a doubt as to his sanity ordered that that question be submitted to a jury, and that his trial be suspended until the issue of his sanity should be determined by jury trial. A jury trial was had forthwith. The only witnesses called in the matter were three physicians. The case was submitted to the jury upon the court's instructions and without argument by counsel. The jury on the same day returned a verdict finding the defendant to be then insane. The court thereupon ordered that the defendant be committed by the sheriff of Contra Costa county to the Stockton state hospital. The court further ordered that the trial of the defendant be suspended and upon his becoming sane that "he shall be delivered to the sheriff of the County of Contra Costa * * * to be placed and held by him in proper custody until he is brought to trial or is legally discharged." On May 2, 1910, accompanied by his attorneys, the defendant was returned into court by the sheriff and the court ordered the cause set for May 4, 1910, for trial, and remanded the defendant into the custody of the sheriff. On said trial day the defendant was brought into court and A. B. McKenzie, Esq., was by formal order associated with C. C. Brown, Esq., in his defense. The defendant consented that the cause be set for trial beginning May 17,

1910. Before said trial day, to wit, May 9, 1910, the defendant in open court asked permission to withdraw his plea of not guilty, which had been entered prior to the institution of the insanity proceeding.

The district attorney gave his consent to the withdrawal of said plea of not guilty to the information, which charged murder in the first degree. Thereupon the defendant, by permission of the court, withdrew said plea and entered a plea of guilty of murder in the second degree. This plea removed from the case the possibility of imposing upon the defendant the death penalty. He was asked if he had any legal cause to show why judgment should not be pronounced against him, and replied in person that he had not. The court thereupon fixed his punishment at fifty years' imprisonment in the state prison at San Quentin. All of the proceedings thus far taken were held approximately twenty-five years prior to the proceedings herein instituted, before the Honorable R. H. Latimer, long since deceased, who at all of said times mentioned was the only judge of the superior court of Contra Costa county.

No attack of any kind whatever was made upon the judgment entered on said plea of guilty during the quarter of a century that had passed since its pronouncement until the defendant filed on April 13, 1934, with the county clerk of the county of Contra Costa, this belated application for the issuance of the ancient writ of error coram nobis, which is seldom invoked or granted as the remedial provisions of modern statutes and procedure provide every relief that could be granted under the ancient writ. The defendant based his right to the writ on the ground that when he entered his plea of guilty to murder in the second degree he was under commitment of a judgment pronouncing him insane and no order of restoration to sanity had been made as provided by law, and therefore his plea was taken while he was under adjudication of insanity and the judgment pronounced on it was null and void. It is not contended, and such contention could not be sustained, that he was in fact insane when he entered said plea of guilty. Defendant does not ask for an outright discharge from custody but makes the more modest requests that the judgment be set aside and that "he be brought before this Honorable Court (Superior Court) and allowed to withdraw his former plea of guilty and

enter a plea of not guilty and be given a trial on the merits of his case." It is probable that after the flight of approximately twenty-five years the defendant is the only person alive who has intimate knowledge of the facts bearing on the homicide. There can be no doubt that death, and memories dimmed by the flight of years and the dispersing of witnesses, if any remain alive, would make it altogether unlikely that the case could be heard and determined at this late day "on its merits." Such a request, if made years ago, could have been complied with at a time when conditions were much more favorable to a full and fair disclosure of the facts of the homicide. We may take judicial notice that the judge who tried the case and who had to do with the insanity proceedings, and the district attorney, H. V. Alvarado, afterwards judge of the superior court, and the clerk of the court, custodian of the court records, and who, as well as the other officials named, might have been a witness as to the existence and contents of certain papers and documents touching the insanity proceedings which were not required by law to be filed but which might have thrown some light on controverted matters, are all dead. There is also a strong probability as to the demise of others whose testimony cannot now be obtained. That the adjudication of the defendant's insanity, which was invoked in the first instance to the advantage of the defendant, and which is now attempted to be turned to his further advantage as a means of annulling a judgment of imprisonment imposed with the personal connivance of the defendant, was obtained by the practice of fraud and imposition upon the court will clearly appear from a statement of the proceedings and the facts, both current and subsequent to the order made postponing the trial on the ground that the defendant was presently insane. It was not claimed that the defendant was insane at the time he committed the murder, but that he became insane after he entered his plea of not guilty and after an order had been made setting the case for trial. Within less than five months later the defendant was delivered by the superintendent of the state hospital as a person not insane to the sheriff of the county of Contra Costa and by him returned to the same court which had made the order of commitment. Being present with his counsel, the defendant personally requested that he be permitted to withdraw his for-

mer plea of not guilty, which was entered at a time when no question was raised, nor has since been raised, as to his sanity at the time he pleaded not guilty of the crime charged. Counsel made no suggestion that the defendant was still insane at the time he was brought into court and requested, and was permitted, to change his plea of not guilty to guilty of a lesser degree of murder included within the charge. In fact, to have done so would have endangered his chances of eliminating the death penalty as a possibility from the case. The district attorney, on the other hand, had a commitment of insanity of the defendant to combat. While it did not go to his sanity at the time the murder was committed, it would have been admissible should the defendant have elected to plead insanity as a defense to the homicide. *People v. Farrell*, 31 Cal. 576. Doubtless it was because of the record which he would have been compelled to combat that the district attorney consented to a plea of guilty of murder in the second degree. The court must have been impressed with the atrocity of the crime and the entire responsibility of the defendant, as it imposed a penalty of fifty years' imprisonment upon him. No objection was made to the proceedings which were in fact joined in, if not set in motion by the defendant, and no appeal was noticed or taken by the defendant until some twenty-five years thereafter. It was not claimed or suggested that he was laboring under any form of insanity. His position is that he was sane at a specific date for the purpose of gaining an immediate advantage, but insane at said time for the purpose of invalidating the proceedings which he invoked to reduce the penalty of his crime and in which he personally participated as a sane person. The law is not so impotent as to give its sanction to this sort of duplicity and double dealing when it becomes so clearly developed as it is in the instant case.

The proceeding by which the judgment of the superior court was annulled upon the issuance of the writ of error coram nobis was presented to the court by the defendant in propria persona. His attorneys thereafter appeared of record.

[1] The defendant's objection to the proceedings had on the issue of insanity is based upon noncompliance with the general provisions of the Political Code, which are entirely distinct from the proceedings authorized by the Penal Code providing

for inquiry to be made of the defendant's sanity before trial or after conviction, as provided by part 2, title 10, chapter 6, of the Penal Code (section 1367 et seq.). Sections 1368, 1369, and 1370 provide the procedure in case a doubt arises as to the sanity of a defendant during the pendency of a criminal action against him, and for the suspension of trial or judgment until his sanity be determined. If the jury trying the issue find him insane, the trial is suspended until he becomes sane and the court must order "that he be in the meantime committed by the sheriff to a state hospital for the care and treatment of the insane, and that upon his becoming sane he be redelivered to the sheriff." Section 1370, Pen. Code. Section 1372 of said chapter provides: "When he becomes sane, the superintendent must certify that fact to the sheriff and district attorney of the county. The sheriff must thereupon, without delay, bring the defendant from the state hospital, and place him in proper custody until he is brought to trial or judgment, as the case may be, or is legally discharged." The procedure regulating the determination of the sanity of persons placed on trial for the commission of crime is substantially as it was when enacted in 1851. It is fully set forth under the identical heading it bears in our present Penal Code, under chapter 3, pages 277-278, Statutes, Second Session, 1851. At that time the defendant was committed to the custody of the sheriff, who in turn was authorized to commit him to the custody of some proper person to be redelivered to the sheriff upon his becoming sane. Upon his becoming sane the person having his custody was required to give notice to the sheriff and district attorney of the county in which the trial was pending. The sheriff thereupon placed him in proper custody until he was brought to trial or judgment or was otherwise legally discharged. The custody of the defendant, if found by the jury to be insane, is, under our present law, given to the state hospital, an institution which had no existence in our more primitive statehood, in place of a person delegated by the sheriff. The procedure as defined by our Penal Code in determining the defendant's insanity has remained unchanged, with the one exception noted in part 3, title 5, chapter 1 (section 2136 et seq.) "State Commission in Lunacy," etc., section 2189, subd. 4, Political Code, which is expressly applicable to the criminal procedure in words as follows: "Pa-

tients charged with crime. A patient committed to a hospital under the provisions of chapter 6, title X, part II, of the Penal Code, must, upon the certificate of the superintendent that such person has recovered, approved by the superior judge of the county from which the patient was committed, be redelivered to the sheriff of such county, and dealt with as provided for by said chapter 6 of the Penal Code." This is the only section of the general law governing the conduct and management of public institutions which purports to add to or change any rule of procedure providing for the trial of persons whose sanity is questioned. That section in no way affects the validity of the proceedings of the instant case. It merely is a command to all who have any part in the prosecution of such cases to proceed to do their duty as defined by the penal statutes referred to. It makes the redelivery of such persons to the sheriff and placing them on trial mandatory. The word "must" relates to the redelivery of such persons to the sheriff for the purpose of proceeding against them as by the Penal Code provided. The provisions of the act were substantially complied with, however, in the instant case, as will be shown from the records of the state hospital, so far as the superintendent of the state hospital was involved. The judge who signed the order was the same judge who pronounced judgment on defendant's plea. The sole object of the act is to give notice to those charged with the duty of bringing the defendant to trial that he has recovered, or that in fact he was not insane, notwithstanding the verdict of the jury. The superintendent of the state hospital did not believe the defendant was insane at any time, as shown by his correspondence with the sheriff. Therefore he could not make a certificate that he had "recovered." He did make a record and reported to the sheriff, and doubtless to the court, that the defendant was "not insane." He repeatedly informed the sheriff that he was malingering and was not insane when committed. It was not important whether he had *recovered* his sanity or whether his mental condition had *never been impaired*. In either case he was in a proper mental condition to be returned by the sheriff to court for trial.

Before reviewing the proceedings as presented by a scant record purporting to record events which transpired many years ago, it is important to keep in mind the fact that the procedure prescribed by the Penal

Code is entirely distinct from that prescribed by the Code of Civil Procedure and the general and more comprehensive law relating to insane and incompetent persons and their commitment to, confinement in and discharge from state hospitals. A clear distinction is made with respect to proceedings authorized by the Code of Civil Procedure and those had under the provisions of the Political Code in *Kellogg v. Cochran*, 87 Cal. 192, 25 P. 677, 678, 12 L. R. A. 104. It is there said:

"It seems clear that the proceeding against insane and other mentally incompetent persons, authorized by the Code of Civil Procedure, is entirely distinct from the proceedings authorized by the Political Code for the commitment of insane persons to the state insane asylum.

"The provision in section 1766 of the Code of Civil Procedure authorizing the court to restore the person adjudged insane or incompetent to capacity is only applicable to persons adjudged insane or incompetent, and for whom guardians have been appointed under section 1764 of the same Code. The application of it to persons committed to the asylums would be utterly inconsistent with the government of those institutions according to the requirements and regulations of the Political Code. After a person has been committed to either of the insane asylums on a charge of insanity, and received into the asylum, no court in this state is authorized to discharge him therefrom, or to restore him to the capacity of a sane person, under any circumstances, except upon writ of habeas corpus. The power to discharge him otherwise than upon habeas corpus is vested exclusively in the officers of the asylum."

The subject is more nearly related in said two Codes than it is to the exclusive Penal Code procedure. In the former, restoration to capacity is considered with respect to competency to contract, affecting guardianships, custody of minor children, protection of the estates of incompetents, capacity to sue, and the enjoyment of civil rights generally. The Penal Code does not undertake to deal with such subjects. It prescribes a summary procedure for the determination of the question as to whether the defendant is so far mentally affected as to prevent him from defending himself against the crime with which he is charged. The procedure merely defines the duty of the judge, district attorney, and

the sheriff and superintendent of the state hospital, all of whom are officers who either have the custody of the defendant or who are charged with the performance of judicial or executive duties in the prosecution of persons charged with the commission of crime. The Penal Code undoubtedly prescribes the exclusive manner by which the proceedings shall be set in motion when the defendant is restored to sanity or is not insane.

[2] Any person held in custody as an insane or incompetent person, under the laws of this state, has always been entitled to the writ of habeas corpus. *Kellogg v. Cochran*, supra; section 2188, Pol. Code. The order of commitment "is not final, or conclusive as to the resident physician of the asylum, whose duty it is to disregard it, if, in his opinion, it was not properly made. Indeed, the final determination, as to whether the person committed is insane or not, is to be made and announced by the resident physician of the asylum. The proceeding before the judge is only preliminary, and is analogous to the preliminary examination of a criminal charge by a magistrate." *Kellogg v. Cochran*, supra. The medical superintendent of the Stockton state hospital at the time defendant was ordered placed and detained in said institution until his discharge was Dr. Fred P. Clark, a psychiatrist of high repute in this state, long since deceased, and that he believed from the first that the defendant was simulating insanity is shown by the following communications with Sheriff R. R. Veale of Contra Costa county, the first of which he addressed but two weeks after the defendant was delivered to said institution:

"January 5, 1910.

"Your letter received. I am much obliged for the information contained in it.

"I do not think your man McFarland is insane but would prefer to have him with us for a while longer in order that I may be positive of that fact. He eats as heartily as any of the patients, talks very well, and I think his mental condition is a mere sham.

"Yours truly,

"Medical Superintendent."

On January 21, 1910, he wrote as follows: "Your friend McFarland is doing very well. As I wrote you before, I do not think he is insane. I expect to have a clinic on him next week, and will then

decide whether to return him to you or not."

On April 6, 1910, he wrote his final conclusion as to the insanity of the defendant, requesting the sheriff to take him into custody for the purposes of trial: "Enclosed you will find a copy of letter received from the Chief of Police of Morristown, Pa., which shows that our man McFarland has been trying to impose upon us in regard to his sanity. I think he has been feigning insanity all along so I wish you would send some one after him in order that he may be returned for trial as I do not think he is insane."

At the hearing of the petition herein George A. Brown, Jr., secretary of the Stockton state hospital since June 1, 1913, produced the "Register of Discharges, Insane Asylum Office," a book officially kept in which entries were duly made by the secretary in the performance of official duty, giving names of the inmates, where sent, date of discharge, reasons therefor and the names of the persons, if any, to whom the custody of said discharged persons was awarded. In said record in separate columns there appears the following under date of April 26, 1910: "Name. James McFarland. Where sent: With the Sheriff to Contra Costa County. Not insane."

Here we have absolute proof that the medical superintendent, both by his several letters to the sheriff, which constitute notice as fully as if he had used the word "certify," and by the entry upon the official records of the state hospital concluded that the defendant was not insane and he was accordingly discharged therefrom. The medical superintendent, whose qualifications to occupy this position are prescribed by the Code, is the final arbiter of that question. The statute does not require the certification to be in any particular form. It is, at most, merely a formal statement made to the sheriff and district attorney that the defendant is not insane, and there is in fact no specific requirement that it be filed, nor does there appear to be great reason why it should be.

[3,4] It appears by affirmative proof that the superintendent of hospitals not only caused official record to be made as to defendant's sanity, but made written report to that effect to the sheriff and requested him to take the defendant into his custody. The district attorney who participated in the proceeding, now deceased, is

presumed to have had knowledge of the law and to have acted in compliance with its requirements. It is a satisfactory presumption, "That official duty has been regularly performed." Section 1963, subd. 15, Code Civ. Proc. Similarly a presumption will be indulged with respect to the judge, since deceased, who presided at the insanity proceeding and who afterwards granted defendant's motion to withdraw his former plea of not guilty and enter a plea of guilty to murder in the second degree. The same judge pronounced final judgment. There is also the further presumption, "That a court or judge, acting as such * * * was acting in the lawful exercise of his jurisdiction." Section 1963, subd. 16, Code Civ. Proc. It will be presumed that the report or certification of the superintendent of state hospitals as to the sanity of the defendant met with the approval of the court. Especially is this true when the same judge presided at all of said proceedings. The sole object and purpose of the procedure as set forth in chapter 6, part 2, title 10 of the Penal Code, is to bring to trial a person whose trial has been suspended by reason of a verdict of insanity and an order of commitment to the state hospital, upon a finding being made by the superintendent of the state hospital to which he has been committed, together with the approval of the court in which the matter is pending, to the effect that the defendant has become sane, or that he is sane. A certification to the sheriff and district attorney is but a direction, ministerial in character, to said officers to take notice of the finding of sanity and act accordingly. When they have as a matter of fact acted the mandate of the statute has been complied with.

The judgment pronounced on the plea of guilty was clearly valid.

[5] The attack made on the judgment approximately a quarter of a century after it was procured to be entered through the active participation of the defendant himself and in the circumstances herein related was presented in *propria persona* to the superior court of the county of Contra Costa on April 13, 1934, and is denominated a writ of error *coram nobis*. It is in effect an attack upon the judgment, asking that it be set aside as void on the grounds and for the reasons already noticed, and that the defendant be allowed to enter a plea of not guilty. The petition for the writ sets out eleven instances or situations

in which the issuance of the writ was held proper in certain foreign jurisdictions. Of the eleven, none are germane to the situation before us. The first one makes the nearest approach to the issue. It is: "1. Where the defendant was insane at the time of the trial and this fact was unknown to the Court. (*Hydrick v. State*, 104 Ark. 43, 148 S. W. 541.)" This ground for granting the ancient and somewhat obsolete writ is disposed of by the fact that the defendant was neither in fact nor in law insane at the time of trial and his mental status could not have been unknown to the court who presided at the proceedings and had to determine the question of sanity and who afterward, upon defendant's return to court, permitted him upon his personal request to withdraw his former plea. If the court had entertained a doubt as to his sanity when he appeared even after his discharge from the state hospital, it could and would have again ordered the question submitted to a jury as provided by section 1368, Penal Code. The court *must* order this question submitted to a jury whenever he entertains a doubt as to the defendant's insanity at any stage of the proceedings.

No claim is made that the plea was procured by extrinsic fraud, or was extorted through fear of mob violence or was induced by any of the methods which afforded grounds for the issuance of the writ at common law.

In *People v. Reid*, 195 Cal. 249, 232 P. 457, 460, 36 A. L. R. 1435, the origin and office of the writ is treated at great length and the conclusions of this court are summed up by the following quotation from *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 29, with approval: "It is our opinion that the courts have the power to issue writs in the nature of the writ *coram nobis*, but that the writ cannot be so comprehensive as at common law, for remedies are given by our statute which did not exist at common law—the motion for a new trial and the right of appeal—and these very materially abridge the office and functions of the old writ. These afford an accused ample opportunity to present for review questions of fact, arising upon or prior to the trial, as well as questions of law; while at common law the writ of error allowed him to present to the appellate court only questions of law. Under our system all matters of fact reviewable by appeal, or upon motion, must be presented by motion for new trial, and cannot be made the

grounds of an application for the writ coram nobis. Within this rule must fall the defense of insanity as well as all other defenses existing at the time of the commission of the crime. Within this rule, too, must fall all cases of accident and surprise, of verdicts against evidence, of newly discovered evidence, and all like matters."

The writ may be available in cases where a plea of guilty has been obtained from a defendant by some character of duress, or the trial has been affected by some outside force, such as reported in *People v. Perez*, 9 Cal. App. 265, 98 P. 870; but clearly not in a case such as this, where both the defendant and his counsel, and the court, had full knowledge of all the facts and acted in the light of these facts. The defendant is not complaining because his request was *denied*, but because it was *granted*. At the time the petition was filed herein there was a valid subsisting judgment of conviction against the defendant and the court was without authority to annul it, so far as any right to do so is given by the so-called writ of error coram nobis proceedings.

At the conclusion of the hearing of the writ, the court being of the opinion that the plea of guilty of murder in the second degree given and entered May 9, 1910, was improperly made and entered, for the reason that the defendant had not been restored to sanity prior to making and entering said plea, vacated and set aside the judgment and the plea of guilty entered of record and, for the purposes of clearing the way and as grounds for further proceedings, ordered that, it appearing to the court that the defendant is still insane, he be examined by the sanity board of Contra Costa county on the following day. The formal proceedings as prescribed by section 2170, Political Code, were adopted and the medical examiners found him to be very healthy both physically and mentally. He stated that he had suffered no headaches, hallucinations, or delusions. When asked about his mental condition at the time his trial was suspended by the court and whether or not there was a probability of a recurrence of any mental trouble, his answer was emphatically no, and he attributed his prior mental condition to "a severe mental shock at that time."

There being not the slightest evidence of present or past insanity, the court, upon

the report and statement of the medical examiners, found the defendant sane. On the day appointed for arraignment and taking the defendant's plea an order to show cause was directed by this court to said superior court of Contra Costa county to certify fully a transcript of the record and proceedings taken and had in said proceedings nullifying said judgment of conviction of James McFarland, to the end that all of the proceedings taken and had therein be annulled and adjudged void and of no effect; and further, pending the action of this court, that said superior court be restrained from further proceedings in said case of *People of the State of California v. James McFarland*, and that it show cause why the action taken by said court annulling said judgment of conviction should not be canceled and said further proceedings in said case be terminated.

The objection is made by respondent superior court that petitioner's only remedy was by appeal from said coram nobis order.

It is true that the district attorney did state in open court at the time the court announced its order nullifying the judgment that he appealed from the order, but he did not prosecute the matter further, and adopted the method of certiorari. We are of the view that the order annulling the judgment is not the kind of order referred to in section 1237, Penal Code, which designates the cases in which an appeal may be taken. Under no fair construction can it be said (as in said section 1237 provided) that a proceeding such as instituted by the defendant herein can be regarded as an "order made after judgment, affecting the substantial rights of the party." It is not within the contemplation or intent of the section that such a proceeding, brought at the time and in the manner as shown herein, was to be classified with the orders made applicable "as an order made after judgment." This is a distinct proceeding and has no connection with any ruling made by the court during trial or any order since made by the court from which an appeal could have been taken. If an order from which an appeal could have been taken had as a matter of fact been made, the right to appeal therefrom has long since expired.

[6] The record in this case shows that the court acted in excess of its jurisdiction in annulling said judgment, which was valid upon its face and which was

not vulnerable to the collateral attack made upon it. This has already been clearly shown. In such circumstances certiorari will lie. *Stanton v. Superior Court*, 202 Cal. 478, 261 P. 1001, and cited cases. The coram nobis judgment or order annulling the judgment of conviction of the defendant is void. Such a judgment may be set aside by the court at any time, and it is immaterial how the invalidity is called to its attention. The court will look to the substance of the application and the kind of relief sought and its action will be responsive to whatever relief may appear to be just in the premises, disregarding, where necessary, the name which the pleader has given his petition.

We are of the view that the said superior court acted in excess of its jurisdiction in said matter and that its unauthorized assumption of jurisdiction will not be permitted to void judgments regularly and legally entered. If, in the circumstances of the instant case, the judgment may be nullified on the showing disclosed by the record of the proceedings herein, the stability of judgments generally in criminal cases will be reduced to a dangerous state of uncertainty.

The order vacating and setting aside the plea of guilty of the defendant to the crime of murder in the second degree, made in the superior court of the county of Contra Costa May 9, 1910, and the order purporting to annul the judgment of conviction of said defendant made and entered thereon May 12, 1910, are each annulled and set aside.

We concur: WASTE, C. J.; THOMPSON, J.; SHENK, J.; PRESTON, J.



4 Cal.2d 100

RATTERREE LAND CO., Inc., v. HUTTON.
L. A. 15273.

Supreme Court of California.
July 25, 1935.

Injunction ⇨22

Where realty company sought to enjoin attorney from representing party sued by company on ground that attorney possessed

confidential information obtained by him while acting as company's former attorney, company held not entitled to writ where attorney withdrew from case as attorney for defendant prior to trial thereof, since questions presented had become moot.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition for a writ of injunction by the Ratterree Land Company, Inc., to be directed to Frank S. Hutton. From an order denying the writ, plaintiff appeals. On defendant's motion to dismiss the appeal.

Appeal dismissed.

Walter Gould Lincoln, of Los Angeles, for appellant.

Winterer & Ritchie, of Los Angeles, for respondent.

PRESTON, Justice.

This cause is before us on motion of defendant to dismiss the appeal of plaintiff from order denying writ of injunction or to affirm said order. Plaintiff land company sought the injunction to restrain defendant, an attorney at law, from acting adversely to its interests, as his former client, and from using knowledge or confidential information gained by him from it through said former relationship.

From the complaint it appears that defendant represented plaintiff during the years 1929-1931 in various actions growing out of the subdivision and sale of a certain tract of land in Los Angeles county and charges of fraud and misrepresentation in connection therewith; that in 1934 defendant appeared in a similar action to represent and prosecute a counterclaim, involving similar charges of fraud and misrepresentation, on behalf of a disgruntled purchaser. Plaintiff alleged that to permit defendant to act as attorney for said purchaser would be to deprive it of a fair and impartial trial because defendant could take advantage of and use confidential knowledge and information as to plaintiff's affairs, gained during the period of their relationship. Plaintiff therefore prayed for a permanent injunction to restrain defendant from appearing as attorney for said purchaser or from acting di-

rectly or indirectly in any action involving any matter wherein he had formerly appeared for plaintiff, and particularly in relation to any fact, matter, or litigation growing out of any transaction relating to said tract of land. Defendant answered, alleging that he had been employed by plaintiff only to assist its chief counsel in trial of the several cases mentioned in the complaint and denying that he had ever had access to plaintiff's records or gained any confidential knowledge or information from it which could be used to its disadvantage in subsequent litigation involving said tract of land.

On December 13, 1934, the court below made its order refusing to grant an injunction and plaintiff appealed. Later, it filed an opening brief wherein is made the sole contention that the allegations of its complaint are more than sufficient to bring the cause within the rule which would require defendant to desist from acting adversely to its interests. Defendant now presents his motion to dismiss the appeal or affirm the order on two grounds: (1) That the questions on appeal are so unsubstantial as not to need further argument; and (2) that all of the questions on which the decision of the cause depends have become moot.

It is unnecessary to consider point (1), as the statement made in point (2) is correct. The motion to dismiss is supported by a certificate of the county clerk which shows that on December 12, 1934, in said action wherein defendant was charged with acting adversely to plaintiff as his former client, the superior court made its order permitting defendant to withdraw as attorney for said purchaser; that on December 29, 1934, a substitution of attorneys was filed; that said action is undetermined, under submission to the trial judge, but that trial thereof was had during April and May, 1935, and there is no record of any kind showing that defendant had any part in said trial or was present, except as a witness called by the plaintiff therein (also this plaintiff). It is obvious that all questions of substance presented by plaintiff's appeal are moot.

The appeal is dismissed.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; LANGDON, J.; SEAWELL, J.

4 Cal.2d 198

CARTER et al. v. J. W. SILVER TRUCK-
ING CO. et al.
S. F. 15327, 15328.

Supreme Court of California.
Aug. 1, 1935.

1. Appeal and error ⇨979(2)

Where evidence is in substantial conflict, discretion imposed in trial court to grant new trial on grounds of insufficiency of evidence is not subject to review upon appeal.

2. Appeal and error ⇨933(1)

All inferences and testimony reasonably construed to sustain court's action in granting new trial on grounds of insufficient evidence must be indulged in favor of court's order.

3. New trial ⇨71

In action for injuries sustained in collision of automobile with trailer of stalled truck, order of trial court granting motion for new trial because of insufficient evidence held not error, where evidence was in absolute conflict in regard to whether truck and trailer were lighted, whether truck driver attempted to warn other driver by waiving searchlights, and whether another automobile immediately preceding the accident barely missed colliding with the trailer.

4. Appeal and error ⇨440 Courts ⇨116(1)

Courts have inherent power to correct their records so they conform to facts and speak the truth, and that right is not suspended by an appeal from the incorrect order nor because record itself does not show the entry was incorrect.

5. Courts ⇨114

Where court omitted inadvertently, in an order granting motion for new trial, to state on what particular ground it was granted, a nunc pro tunc order correcting the record to show the ground was insufficiency of evidence, the only ground relied on, held proper, since order did not affect any substantial rights of opposing party and was not subject to contention that it was an attempt to correct judicial error and to make order that was never in fact made.

6. Motions ⇨62

There is no material difference in the force or effect of an order given by written memorandum and one given in open court.

In Bank.

Appeals from Superior Court, San Mateo County; Franklin Swart, Judge.

Separate actions by Melbourne Carter, by Frank E. Pinout, and by Henry Von Housebrock, against the J. W. Silver Trucking Company, a corporation, and others. From orders granting new trials after verdicts for defendants and denying motion to set aside nunc pro tunc order, the named defendant appeals. The actions were consolidated for purposes of appeal.

Orders affirmed.

Prior opinion, 36 P.(2d) 837.

Hadsell, Sweet, Ingalls & Lamb and Robert L. Lamb, all of San Francisco, Edmund Scott, of Redwood City, and George F. Wright, of San Francisco, for appellants.

Ford & Johnson, of San Francisco, Francis N. Foley, of San Mateo, and George K. Ford, of San Francisco, for respondents.

SEAWELL, Justice.

The three plaintiffs, Melbourne Carter, Frank E. Pinout, and Henry Von Housebrock, commenced three separate actions in the superior court of the county of San Mateo, this state, against the defendants, J. W. Silver Trucking Company, a corporation, owner of the truck and trailer herein, and William Harris, its driver, to recover damages for personal injuries sustained by them as the result of a collision between a Buick sedan operated by one Maurice Dioze and in which said plaintiffs were occupants, and a Kleiber truck to which was attached a four-wheeled trailer. The truck and trailer as loaded weighed approximately eighteen tons. Maurice Dioze, the operator of the Buick sedan, and his companions had visited San Francisco on the evening of March 18, 1932, and were returning together in said sedan to their respective homes, having left San Francisco at about 10:30 p. m. All but one were gardeners and residents of Menlo Park or the vicinity near by. The separate actions of the above-named plaintiffs were consolidated for the purposes of appeal, and will be so treated. Maurice Dioze is not a party plaintiff to this action. It appears that he filed an action for damages sustained by reason of said collision in the superior court of the city and county of San Francisco. The collision which inflicted serious injuries upon two of the occupants of the Buick sedan, and painful injuries upon the other two, occurred at approximately 11 o'clock p. m. on the Bayshore highway, about two and

one-half miles north of South San Francisco. Said highway contains four lanes; the westerly one being known as slow traffic lane. Defendant's truck had also left San Francisco during the evening and was on its way southerly en route to Salinas. When at a point near the top of a hill which is about two and one half miles distant north of South San Francisco, which point is approached by ascending a 6 or 7 per cent. grade, defendant's truck, which was traveling in the slow lane at the rate of three miles per hour, suddenly stopped; the water pump shaft having become frozen. According to the testimony of defendant's driver, the freezing rendered the motor immovable as the pump shaft is directly connected with and controls the ignition. The driver also claimed that the air brakes were rendered useless by said freezing and the only braking equipment that was operative was the emergency brake. The truck and trailer, thus stalled on the slow drive lane, remained there from 9:15 until they were towed off some two hours or more later. On each side of the paved highway there were good dirt shoulders 20 feet in width. The driver of the truck testified that it would have been unsafe to have undertaken to back the truck and trailer off the paved portion of the highway onto the shoulder as it was likely that the emergency brake alone was not sufficient to hold the truck and its load, and the air brakes could not be worked owing to the impaired state of the motor. A Spanish boy, whose name the driver was not able to give, was acting as a "lumper" or helper on the trip. This helper did not appear at the trial, and Mr. Harris testified that he was not then in the employ of the trucking company and he did not know of his whereabouts at the time of trial. Dioze, the driver of the sedan, and Housebrock, who sat by his side on the front seat, and who were the least injured, were the only occupants of the sedan able to give any account of the collision at the moment of the impact, or to recount the journey starting at the point where they entered the sedan in San Francisco on the return trip. Carter and Pinout were severely and painfully injured and were unconscious immediately after the impact. One of them did not regain consciousness for a period of 10 or 12 days, while the other regained consciousness in a much shorter period. Neither, however, was able to recall any part of the trip homeward, and

therefore could not assist the court or jury in placing liability upon the person responsible for the collision. The other two, who suffered severe cranial and bodily injuries and bruises, testified at the trial at considerable length. Their testimony was to the effect that they did not at any time travel at a greater speed than 33 miles per hour and drove practically the whole distance on the extreme westerly or slow lane; that upon a practically straight road for a distance of about one-half of a mile before the accident occurred they noticed a Chevrolet car ahead of them. They slowly encroached upon said car, traveling up grade, and when within 20 or 30 feet of it it suddenly slowed up and swerved to the left. At this juncture the occupants of the Buick sedan, who for the first time saw said truck and trailer parked immediately in the slow lane directly in their path, attempted to avoid a collision by swinging to the left, the right front corner of the sedan striking the left rear corner of the trailer in such a manner as to cause it to telescope with the trailer. The front portion of the sedan was badly demolished and all the occupants thereof received injuries such as have already been briefly adverted to. The Chevrolet car, which respondents had been following for some distance, barely missed the outer left side of the trailer.

[1,2] The testimony is absolutely conflicting in several material matters. It is the settled rule that where the evidence is in substantial conflict the discretion imposed in the trial court to make its order granting a new trial upon the grounds of the insufficiency of the evidence will not be made the subject of review upon appeal. *Lauchere v. Lambert*, 210 Cal. 274, 291 P. 412. Only reference to the evidence contained in the record which tends to support the action of the trial court, which had the further advantage of observing the witnesses and taking notice of various matters which occur during the trial of causes which cannot be reproduced upon appeal, will be given brief mention. It is for the reason above suggested that wide discretion is reposed in trial courts in granting new trials, which has been many times expressed in the decisions of courts generally. All inferences and testimony which may be reasonably construed to sustain the court's action must be indulged in favor of its order.

[3] There is nothing inherently improbable in the testimony of the driver of the sedan and his companion who sat by his side. All of the occupants of the sedan were men past middle life, and there is no intimation that their personal conduct was open to criticism. The testimony of the two who were able to recall the events leading up to the collision was that the night was a "little foggy and misty" and Mr. Dioze, the driver, had both of his windshield wipers in action; that a moment before the car preceding them turned out of the slow lane it slackened its speed and the sedan was then within 15 or 20 feet from the outturning car. They then realized their situation, but the driver was unable to swing his car entirely free of the trailer. Their testimony is to the effect that there were no lights on the trailer or truck, and there was no one at or near the truck or trailer to warn travelers in any way of the road obstruction. Some five minutes thereafter two young men riding in a passing Ford car came to the rescue and assisted in caring for the injured and conveyed them to the hospital. The testimony of said parties is that it was at least ten minutes from the time the collision occurred until the driver or any one else connected with the truck appeared on the scene. A witness called by the defense testified that no car preceded the sedan past the stalled truck. The driver of the company's truck testified that he and the Spanish boy were standing with searchlights on the highway north of the trailer, one at a distance of 30 feet from its rear and the other 50 feet distant therefrom, and that the driver of the sedan passed him and the Spanish boy, both of whom were waving searchlights as flares and shouting warnings at the driver as he sped by them at a rate of speed of 55 miles per hour. This, and the truth as to whether or not the Chevrolet car preceded the sedan a moment before the impact, were certainly material matters, and they can hardly be explained on the theory of honest mistake. The driver of the truck testified that shortly after the truck stalled he went to South San Francisco for mechanical aid and had not returned more than 15 minutes before the collision occurred. It is the claim of the respondents that neither he nor the Spanish boy were on the spot when the accident occurred. Several witnesses were called by appellants, including three traffic officers, who

testified that they observed the truck and trailer both before and after the accident and that the trailer bore a taillight and the truck and trailer carried each two clearance lights; also that the headlights were burning. There is evidence, however, to the contrary. One traffic officer who saw and observed the stalled truck said that he gave the driver and the helper flashlights with instructions to use them as warning signals to the public, and urged the necessity of so doing. The respondents contend, whatever may have been the fact as to what was told the driver and said helper, there is nevertheless positive testimony to the effect that neither were at their post when the accident occurred, and therefore no proper regard was given for the safety of the traveling public. The trial judge saw and observed the witnesses and weighed the credibility of each and considered whatever interest any one may have had in the result of the trial or what ulterior motive, if any, may have prompted the testimony of any witness, which are matters committed exclusively to the sound discretion of the trial court. That the action of the court in granting a new trial upon the record before us should not be set aside by this court is manifest.

[4, 5] It is strenuously contended by appellants that the court was without authority to grant the nunc pro tunc order. It is the contention of appellants that the nunc pro tunc order as entered was an attempt to correct a judicial error and to make an order that was never in fact made, citing *Freeman on Judgments*, Vol. 1, p. 248; *Egan v. Egan*, 90 Cal. 15, 27 P. 22; 42 C. J., p. 532. The making of said order came about in this way: In due time plaintiffs served notice of intention to move for new trials upon all the statutory grounds, including insufficiency of the evidence to justify the verdict. The motion was heard on June 5th and submitted. On July 3d the judge of the trial court wrote on a paper entitled "Submission Tag" the following words: "New trial before another court granted." On the same day the clerk of the court wrote out the usual formal entry which concluded in these words: "It is ordered that a new trial in the above entitled actions before another court be and the same is hereby granted." On July 10th, the appellants served and filed notice of appeal from the order granting new trials. They also took the other requisite steps to prepare the

record. On August 14th, without notice to appellants, the judge of the trial court signed a formal order, which, among other things, recited that the respective counsel had argued but only one ground of the motion, to wit: "The insufficiency of the evidence to justify the verdict and the court granted said motion on the ground argued by counsel, and it appearing to the court that the record made by the clerk of said court does not correctly show the order that was in fact intended to be made by the court and that said record discloses that the entry on the minutes does not correctly give what was the order of the court; it is hereby ordered that the order granting said motion be and the same is hereby amended nunc pro tunc, reading, 'New trial before another court granted on the ground of insufficiency of the evidence to justify the verdict.'" On August 17th defendants served a notice of motion to vacate the order last mentioned. At the hearing an affidavit made by Robert L. Lamb was presented, in which the points are stressed that the memorandum made on the submission slip and dated July 3d is shown to have been made and signed by the trial judge, and said judge stated that it did not include matters which it should have included and which were in the mind of the court when the memorandum was made. The motion to vacate the nunc pro tunc order was denied.

All courts have the inherent power to correct their records so they shall conform to the facts and speak the truth, and that right is not suspended by an appeal from the order nor because the record itself does not show that the entry was incorrect. In the instant case the question involved was whether or not a motion for a new trial assigning all the statutory grounds as its basis should be granted. The court was of the opinion that it should be granted and in passing upon the matter it inadvertently omitted to state the particular ground on which it was granted, which was in truth the only ground urged in the presentation of the motion. The facts and circumstances in which the order was made in the instant case are radically different in substance from the situation presented in *Drinkhouse v. Van Ness*, 202 Cal. 359, 260 P. 869. There a change was made as to the parties. A number of complications as to judgments existed which are not in the instant case. No case will be found in this state which

TIMBRELL et ux. v. SUBURBAN HOSPITAL, Inc., et al.
L. A. 15097.

Supreme Court of California.

July 1, 1935.

Rehearing Denied July 30, 1935.

1. Trial ⇨328

Verdict for special nurse joined with hospital as defendant in action for injuries to patient did not exonerate hospital where special nurse was not hospital employee, but was either independent agent or employee of patient, and instrumentalities causing injury were applied by regular hospital employee and not by special nurse.

2. Hospitals ⇨8

Res ipsa loquitur doctrine held applicable in action against hospital for injuries to patient where instrumentalities causing injury were applied by regular hospital employees in charge of patient when special nurse was absent.

3. Appeal and error ⇨1052(8)

In action against hospital for injuries to patient, rejecting hospital's offer to prove local custom of hospitals in respect to engagement of special nurses, if erroneous, was not prejudicial to hospital, where special nurse, who was absolved from negligence, was not hospital employee.

4. Hospitals ⇨8

In action against hospital for injuries to patient, whether attending physician had actual or ostensible authority to engage special nurse and whether patient's husband ratified such engagement was immaterial where special nurse, who was absolved from negligence, was not hospital employee.

5. Trial ⇨191(7)

In action against hospital for injuries to patient, instruction which assumed that injuries were burns held not error where evidence overwhelmingly showed injuries were burns.

6. Trial ⇨296(3)

Instructions in action against hospital for injuries to patient held not erroneous as advising that hospital was insurer regardless of negligence, where instructions were given which defined negligence, and advised that hospital was not responsible for any negligence of third parties and was responsible only if its agents were guilty of negligence proximately causing injury.

7. Trial ⇨296(3)

Instruction in action against hospital for injuries to patient that it was duty of hospi-

directly holds that a court may not under the circumstances of the instant case cause to be entered a nunc pro tunc order. No substantial reason can exist for the enforcement of a rule which has the effect of preventing a consideration of the sufficiency of the evidence to justify a verdict where it appears that an inadvertence has been committed and the opposing party would suffer no substantial injury from a relaxation of said rule. Such a holding would have the effect of stripping nunc pro tunc orders of much of their usefulness.

We are of the view that the rule which should govern the situation before us is well expressed in *King v. Emerson*, 110 Cal. App. 414, 288 P. 1099, 1101, 294 P. 768, in which the very question presented here was under consideration. It was said: "Independent of statutory provisions the court has power on its own motion to correct mistakes in its proceedings, and to annul within a reasonable time orders and judgments inadvertently made. *Robson v. Superior Court*, 171 Cal. 588, 154 P. 8; *People v. Curtis*, 113 Cal. 68, 45 P. 180. Rulings and even judgments inadvertently made are not the result of judgment, but of oversight, neglect, or accident, and are subject to correction by the court making them. *Wiggin v. Superior Court*, 68 Cal. 398, 9 P. 646; *Stewart v. Taylor*, 68 Cal. 5, 8 P. 605."

[6] The order in this case, as pointed out in many of the cases dealing with this precise question, did not affect any substantial rights of the appellants. Such orders are not hedged about with the same inflexible rigidity as are judgments which foreclose the final right of the parties litigant. There is no material difference in the force or effect of an order given by written memorandum and one given in open court. "Whether a nunc pro tunc order should be made depends on the circumstances of the particular case and it is to be granted or refused as justice may require." 42 C. J. p. 532, citing cases.

The orders are affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SHENK, J.; THOMPSON, J.

tal and its servants to exercise due and proper care in preparation and use of hot instrumentalities to patient's body so as not to cause her injury held not erroneous as advising that conduct of hospital must approximate perfection, in view of instructions which defined negligence and advised that hospital was not responsible for any negligence of third parties and was responsible only if its agents were guilty of negligence proximately causing injury.

8. Trial $\Rightarrow$ 260(8)

Refusal of instruction that *res ipsa loquitur* doctrine does not change burden of proof held not prejudicial where jury was not told that doctrine did shift burden.

In Bank.

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Action by Walter G. Timbrell and wife against the Suburban Hospital, Inc., and another. From the judgment, the defendants appeal.

Judgment affirmed.

Prior opinion, 36 P.(2d) 435.

Kidd, Schell & Delamer, of Los Angeles, for appellant Suburban Hospital, Inc.

Edwin C. Boehler, of Los Angeles, for appellant Agnes McGovern, erroneously sued as A. P. McGovern.

Arthur J. Speight and H. B. Cornell, both of Los Angeles, for respondents.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, amici curiæ.

PER CURIAM.

The plaintiffs, husband and wife, sued the defendant hospital and the defendant McGovern, a nurse, for injuries received by Mrs. Timbrell while she was a patient in the hospital following a Caesarean operation. Hot compresses and hot water bottles were applied to the body of the patient at a time when she was unconscious. Excessively hot applications resulted in serious third-degree burns and later required a skin grafting operation. The jury returned a verdict in favor of the nurse and against the hospital. From a judgment on the verdict, the hospital appeals.

[1] The appellant propounds the following as the first question involved: "A verdict is expressly in favor of an employee but is against the employer. Can it stand

when the only possible liability is based on the doctrine of respondeat superior?" In other words, it is contended that the verdict in favor of Mrs. McGovern necessarily exonerated the hospital. Reliance is placed on the case of *Bradley v. Rosenthal*, 154 Cal. 420, 97 P. 875, 129 Am. St. Rep. 171, and other cases to like effect.

The complaint charged the defendants specially named, and the agents, servants, and employees of the hospital, with negligence in the treatment of the plaintiff patient with the appliances and equipment of the hospital. It was also alleged that the defendant McGovern was an agent and employee of the hospital in the treatment of the patient. In its answer the hospital denied that such relationship existed between itself and its codefendant, and alleged that Mrs. McGovern was a graduate and registered special nurse employed by the plaintiffs and acting in their behalf in the exercise of an independent calling. In her answer Mrs. McGovern denied that in the care of her patient she was guilty of any negligent act. The parties presented their respective claims on the theories advanced by their pleadings.

The defendant hospital corporation is operated for profit. The plaintiff wife was received as a pay patient early on the morning of October 3d. Her physician advised the hospital staff that her condition was such as to require special nurses. From a list of registered graduate nurses in its possession, the hospital obtained the name of a Miss Lane and notified her that the case was at her disposal. She accepted and entered upon her duties as day nurse. Almost immediately thereafter the operation was performed and Miss Lane remained on duty until 7 o'clock p. m. of that day, except during two periods when she was relieved by nurses from the regular hospital staff. The first period was during the luncheon hour and the second about half past 5 during the dinner hour. During that day hot water bottles were applied to the body of the patient. At 7 p. m. Mrs. McGovern came on duty. Her services were obtained in substantially the same way as Miss Lane's. On the doctor's orders Mrs. McGovern applied hot compresses to the kidney area of the patient's back, but applied no hot water bottle treatments. The attending physician testified that the burns inflicted upon the patient could not be caused by the hot compresses

as applied, and that the burns could occur from excessively hot water bottles.

The question stated by the hospital assumes that the jury found that Mrs. McGovern was an employee of the hospital, also that as such employee she was guilty of the negligence that caused the injury. But in aid of the verdict the assumptions must be to the contrary. At least, it must be assumed that the jury found that Mrs. McGovern was not the nurse who applied the instrumentalities that caused the injury. In addition, the jury could have found from the evidence that Mrs. McGovern was not an employee of the hospital, but was either an independent agent or was the employee of the plaintiffs; and for the purposes of this appeal it may be assumed that the jury found in accordance with the defense of the hospital interposed on that theory.

[2] It must then be assumed that the jury concluded that the injury occurred at the instance of the regular employees of the hospital who had charge of the patient when Miss Lane was not present. This implied finding of the jury would be justified and supported under the authority of *Meyer v. McNutt Hospital*, 173 Cal. 156, 159 P. 436, and *McBride v. Clara Barton Hospital*, 75 Cal. App. 161, 241 P. 941. In this connection the defendant hospital charges error in the submission to the jury of a *res ipsa loquitur* instruction. On the theory of the case as tried by the plaintiff the doctrine is applicable. On the theory now advanced by the hospital the doctrine was likewise applicable. Under these circumstances the operation of the rule as approved in *Meyer v. McNutt Hospital*, supra, is justified. Its application therefore furnishes sufficient in the record for the finding of the jury in favor of the plaintiffs.

[3] Since the jury in any event absolved the nurse McGovern from negligence, the ruling of the court in sustaining an objection to the hospital's offer to prove the local custom of hospitals in the engagement of special nurses, even if erroneous (but see *McBride v. Clara Barton Hospital*, supra), could have resulted in no prejudice to the hospital.

[4] For the same reason, all questions of actual or ostensible authority of the attending physician to engage special nurses, and of ratification by the plaintiff husband of such engagements, are not pertinent to any question raised on this appeal.

[5] In its instructions the court assumed that the injuries were burns. An expert witness who had never seen the patient was permitted to testify that the condition of the patient as described to him might have been a "herpes condition." The evidence as a whole overwhelmingly shows that the injuries were burns, and the evidence referred to as indicating some other condition was insufficient upon which to declare the instruction erroneous.

[6, 7] The defendant hospital complains of certain instructions which it is claimed advised the jury that the hospital was an insurer regardless of negligence. Particular attention is called to an instruction that it was the duty of the hospital and its servants, agents, and employees to exercise "due and proper care" in the preparation and use of hot instrumentalities to the body of the patient so as not to cause her injury. It is insisted that this instruction enabled the jury to conclude that the conduct of the hospital must approximate perfection and was therefore erroneous under the authority of *Hesler v. California Hospital Co.*, 178 Cal. 764, 174 P. 654, wherein it was sought to hold the hospital for damages because of the alleged malpractice of one of the physicians employed by the hospital. The standard of conduct required of a physician was obviously not correctly stated to the jury in that case and the ruling therein does not justify a reversal in this case. Here the court, repeatedly and correctly in its lengthy instructions, advised the jury that the plaintiffs must prove their case by a preponderance of the evidence; that the defendant hospital was not responsible for the negligence, if any, of third parties, and was responsible only in the event that some one or more of its agents, servants, or employees was or were guilty of negligence proximately causing the injury to the plaintiff wife; and negligence was fully defined. Considered in the light of the court's entire charge, it cannot be said that the jury was misled or confused by any of the instructions complained of.

[8] The effect of the instructions given also answers the contention of the hospital that the court erred in refusing an instruction to the effect that the doctrine of *res ipsa loquitur* does not operate to shift the burden of proof. The jury was nowhere told that it did shift that burden. Assuming that the instruction might well have

been given, it is difficult to conclude how its refusal would have affected the result.

Other points need not be discussed.

The judgment is affirmed.



8 Cal.App.2d 429

ARMSTRONG et ux. v. WALLACE et ux.
Civ. 5170.

District Court of Appeal, Third District,
California.

July 22, 1935.

Rehearing Denied Aug. 21, 1935.

Hearing Denied by Supreme Court
Sept. 19, 1935.

1. Charities ☞45(2)

To determine whether private hospital conducted by corporation or society is charitable, it is necessary to look not only to articles of incorporation and by-laws, but also to method of conducting hospital.

2. Charities ☞45(2)

Hospital which paid no salaries and distributed no profits, received both pay and charity patients, and maintained nurses' training school, was "charitable institution," and was exempt from liability for negligence of its employees.

[Ed. Note.—For other definitions of "Charitable Institution," see Words & Phrases.]

3. Charities ☞45(2)

That patient suing charitable hospital for alleged negligence in leaving sponge in abdomen after operation paid regular rates charged paying patients did not take hospital out of class of charitable institutions, which are exempt from liability for negligence of their employees.

4. Appeal and error ☞854(6), 933(1)

On appeal from order granting in general terms motion for new trial, presumption is in favor of order and against verdict, and order will be affirmed if it can be sustained on any ground.

5. Trial ☞228(3)

In action against physician for failure to remove sponge from patient's abdomen during Caesarean operation, instruction that accident which results from things shown to be under management of defendant or his servants and which is such as in ordinary course of things does not happen if those who have management use proper care, affords reason-

able evidence, in absence of explanation by defendant, that accident arose from want of proper care *held* not improper because of use of words "proper care" instead of "ordinary care."

6. Physicians and surgeons ☞18(6)

In action in which it was alleged that physician during Caesarean operation negligently left sponge in patient's abdomen and closed and sutured incision without removing sponge, *res ipsa loquitur* doctrine *held* applicable as against objection that pleading of alleged negligence was not in general terms, and that specific acts of negligence were set forth on which allegations of negligence were based.

7. Physicians and surgeons ☞18(6)

That patient sued both hospital and physician for failure to remove sponge from abdomen during Caesarean operation did not preclude application of *res ipsa loquitur* doctrine against physician.

8. Physicians and surgeons ☞18(10)

In action against physician for failure to remove sponge from patient's abdomen during Caesarean operation, refusal to give instruction that accident which results from things shown to be under management of defendant or his servants and which is such as in ordinary course of things does not happen if those who have management use proper care, affords reasonable evidence, in absence of explanation by defendant, that accident arose from want of proper care *held* error.

9. Physicians and surgeons ☞15

Physician performing Caesarean operation has responsibility of seeing that sponges are removed from patient's abdomen, and he cannot relieve himself of liability for failure to remove sponge by custom or rule requiring nurses to count sponges used and removed.

10. Physicians and surgeons ☞18(8)

Expert testimony *held* not necessary to show that leaving gauze sponge fourteen inches square in patient's abdomen after Caesarean operation and permitting sponge to remain undiscovered for five weeks was not good medical practice.

Appeal from Superior Court, Humboldt County; C. A. Paulsen, Judge.

Action by MacDougall Armstrong and wife against Carl T. Wallace and the Sisters of St. Joseph of Orange. From an order granting a new trial after verdict for the defendants, the defendants appeal. On plaintiffs' motion to dismiss the appeal or affirm the order granting a new trial.

Motion denied in part, granted in part, and order granting new trial reversed in part. * * *

Prior opinion, 37 P.(2d) 467.

Hearing denied by Supreme Court; LANGDON, J., dissenting.

Nelson & Ricks, of Eureka, for appellant Carl T. Wallace.

Horace W. B. Smith and George A. Work, both of San Francisco, and Irwin T. Quinn, of Eureka, for appellant Sisters of St. Joseph of Orange.

M. H. Iversen, of Ukiah, John L. McNab, of San Francisco, and Frank M. Thompson, of Eureka, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This action was brought by plaintiffs, husband and wife, against Carl T. Wallace, a physician and surgeon, and Sisters of St. Joseph of Orange, a corporation, operating a hospital, for injuries alleged to have been sustained by Maxine Armstrong as the result of the alleged negligence of Dr. Wallace and Sisters of St. Joseph of Orange, a corporation, in the failure to remove a laparotomy sponge from the abdominal cavity of Mrs. Armstrong, upon the completion of a Caesarean operation.

After a trial before a jury, a verdict was returned in favor of both defendants and against plaintiffs. Plaintiffs moved for a new trial, which was granted as to defendant Wallace on the ground of errors of law occurring at the trial, and as to defendant Sisters of St. Joseph of Orange on the ground of errors of law, and that the evidence was insufficient to justify the verdict and was against the weight of the evidence. From this order granting a new trial, both defendants appeal, and the matter is now before us for consideration and determination upon those issues.

Let us first consider the appeal of the hospital; the record discloses the plaintiff Maxine Armstrong was under the care of Dr. Wallace and was sent by him to the hospital of her choice for an operation. The hospital was owned, operated, and conducted by defendant Sisters of St. Joseph of Orange, a corporation. The purposes for which the corporation was formed were and are, among others, for social, charitable, educational, and religious purposes and "to acquire and maintain suitable and permanent convents * * * orphanages, hospitals and other charitable institutions * * *, to purchase, take, hold, lease, hire

and own lands * * *, educational institutions, orphanages, and hospitals. * * *

No one in connection with the corporation received any salary or profits, nor did the officers of the corporation receive any salary nor participate in any of the profits. The hospital was acquired by Sisters of St. Joseph of Orange by gift from two of their sisterhood who had themselves received the property by inheritance. In order to repair and modernize the buildings, a public drive for funds was made among the citizens of Eureka. The order from time to time received bequests which were used in meeting the expenses of maintaining the hospital and a nurses' training course and carrying on educational work in Eureka. Those patients who were able to pay for their hospitalization were charged therefor, but others were admitted as charity patients without pay. There were at the times here in question from twenty-three to twenty-five sisters working at the hospital who received no salary but were furnished their room and incidentals. They performed most of the work about the hospital and did most of the nursing. If there was anything left after the operation of the hospital, it went toward the upkeep of the institution locally and then for the benefit of the order at large. The order also maintained a training school for young women who were educated as teachers and nurses, who, upon graduation, were sent to other communities to carry on their work.

[1,2] It is the contention of appellant Sisters of St. Joseph of Orange that it is a charitable institution and is therefore exempt from liability for the negligence of its employees.

To determine whether or not a private hospital conducted by a corporation or society is charitable, it is necessary to look not only to the articles of incorporation and by-laws, but also to the method of conducting the hospital. Estate of Dol, 182 Cal. 159, 187 P. 428; Stewart v. California Med., etc., Assn., 178 Cal. 418, 176 P. 46. We are convinced after an examination of the undisputed evidence before us, both documentary and oral, that appellant hospital was a charitable agency. Burdell v. St. Luke's Hospital, 37 Cal. App. 310, 173 P. 1008; Dingwell v. Seymour, 91 Cal. App. 483, 267 P. 327; Stonaker v. Big Sisters Hospital, 116 Cal. App. 375, 2 P. (2d) 520, 522; Ritchie v. Long Beach Community Hospital Association, 139 Cal. App. 688, 34 P.(2d) 771.

As was said in the case of *Stonaker v. Big Sisters Hospital*, supra, where the action was brought against the surgeon, two nurses, and the hospital for injuries alleged to have been sustained by the administration of an excessive amount of ether: "It appears without contradiction that the hospital paid no compensation to its constituents for services, and that it paid no dividends; that it was conducted for the good of the community, by a charitable organization known as the Big Sisters League, with the intent and purpose that if there was a surplus over and above the expense of carrying it, such surplus would go to the said league. There is no evidence of a relaxation of reasonable diligence in the selection of attendants. As we have observed, the respondent physician employed by appellant was not employed by the corporation, and was not charged with supervision of its mechanical apparatus. We think the case is governed by rules announced in *Burdell v. St. Luke's Hospital*, 37 Cal. App. 310, 173 P. 1008, that: 'Upon this showing the court was clearly correct in directing a verdict for defendant under the rule laid down in *Thomas v. German Gen. Benevolent Soc.*, 168 Cal. 183, 141 P. 1186, where it is said that: "where one accepts the benefit of a public or of a private charity he exempts by implied contract the benefactor from liability for the negligence of the servants in administering the charity, if the benefactor has used due care in the selection of those servants." The fact that plaintiff paid the regular rates charged by the hospital * * * does not take the case out of the operation of this rule, for it is apparent that the rates were not charged with a view of making a profit from her, and the moneys received from paying patients were not in fact sufficient to meet even the ordinary operating expenses of the hospital, without considering any interest upon the amount invested in the buildings.'"

[3] So the fact that Mrs. Armstrong paid the regular rates charged by the hospital for paying patients did not take it out of the class of charitable institutions, as the amount paid was not received to build up a profit, but to assist in the carrying on of the general charitable purposes of the order. Nor is there anything in the evidence to show that the corporation failed to use due care in the selection of its nurses; in fact, it is admitted that the nurses were entirely competent and able.

No right of action appearing to exist against the hospital, as to it, the order granting the new trial is reversed.

Let us now consider the appeal of the defendant Wallace: The doctor, at the request of plaintiffs, performed a Caesarean operation and was assisted in the operation by the regularly employed nurses of the hospital, whose duties at the time of the performance of the operation were to have charge of the operating room, and were then and there under the direction and control of, and obeyed the orders of, Dr. Wallace.

In the course of the operation it became necessary to use many laparotomy tapes or surgical sponges. These sponges, or tapes, as they were also called, were of various sizes, some as large as fourteen inches square, made of a double thickness of cotton gauze. To each sponge was attached a narrow strip of flat cloth approximately ten or twelve inches in length, also called a tape. This tape is attached to the sponge or pad in order that a ring or other object could be attached and left outside the surgical cavity, to prevent the sponge being lost or overlooked.

The doctor described the operation, which occupied approximately an hour to perform, in considerable detail. During the operation the patient lost a large amount of blood and it was necessary to operate very rapidly. Neither the nurses nor the doctor made any count of the sponges after the operation, and no such count was requested of the nurses by the doctor.

A day or two after the operation the patient began to show signs of infection, which increased decidedly as time went on. Defendant continued to treat plaintiff for approximately five weeks when Dr. Falk was called in the case. Shortly after accepting the case, he operated, removing from the abdominal cavity of plaintiff a laparotomy sponge about fourteen inches square. One of the nurses who assisted at the second operation testified there was a strip of tape attached to the sponge but no ring or hemostat.

The order granting the new trial, being heard upon errors of law occurring at the trial, we need only to examine the rulings of the court upon the admission and rejection of evidence and the instructions given and refused by the court. The rulings during the progress of the trial have been gathered by counsel for appellant Wallace

in their brief, and after an examination thereof we find no errors therein. The trial court adopted the theory of defendant, which was reflected in the instructions to the jury, that the surgeon was not responsible for the negligence of the nurses in the operating room; that it was not negligence on the part of the surgeon to fail to direct the nurse to make a count of the sponges used in the operation, nor to fail to make a thorough search for all sponges himself; that the rule of *res ipsa loquitur* did not apply; and that what constituted correct practice among physicians and surgeons in that particular community could be established only by expert witnesses.

[4] Inasmuch as on an appeal from an order granting in general terms a motion for a new trial, the presumption is in favor of the order and against the verdict, and the order will be affirmed if it may be sustained on any ground (*Weaver v. Shell Oil Co.*, 129 Cal. App. 232, 18 P.(2d) 736), it will not be necessary to pass upon all of the alleged errors pointed out by plaintiff. The point to which counsel devoted the major portion of their argument has to do with the application of the rule of *res ipsa loquitur*. The court refused an instruction submitted by plaintiff as follows:

"I charge you that where a thing is shown to be under the management of the defendant, or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care."

[5] The use of the words "proper care" instead of "ordinary care" contained in the instruction is criticized, and the case of *Hesler v. California Hospital Co.*, 178 Cal. 764, 174 P. 654, cited in support thereof. However, the recent case of *Timbrell v. Suburban Hospital et al.* (Cal. Sup.) 47 P.(2d) 737, upholds an instruction requiring "due and proper care." Here, also, as in the *Timbrell Case*, supra, the court correctly and at length advised the jury the plaintiffs must prove their case by a preponderance of the evidence. This objection is further answered also by the Supreme Court in the case of *Michener v. Hutton*, 203 Cal. 604, 265 P. 238, 59 A. L. R. 480, when an instruction containing similar language was approved, and cited many cases in support

thereof. The objection of appellant here, however, is not so much as to the form of the instruction as to the applicability of the doctrine of *res ipsa loquitur*.

Appellant first objected to the rule being applied here because it is claimed the pleading of the alleged negligence was not in general terms and that specific acts were set forth upon which the pleader based his allegations of negligence. In *Lippert v. Pacific Sugar Corp.*, 33 Cal. App. 198, 164 P. 810, 815, the court there quotes with approval from *Cassady v. Old Colony Street Railway Co.*, 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 285, where it is said: "The defendant also contends that even if originally the doctrine would have been applicable, the plaintiff had lost or waived her rights under that doctrine (*res ipsa loquitur*) because, instead of resting her case solely upon it, she undertook to go further and show particularly the cause of the accident. This position is not tenable. It is true that where the evidence shows the precise cause of the accident, as in *Winship v. New York, N. H. & H. R. Co.*, 170 Mass. 464, 49 N. E. 647, and similar cases, there is, of course, no room for the application of the doctrine of presumption. The real cause being shown, there is no occasion to inquire as to what the presumption would have been if it had not been shown. But if at the close of the evidence the cause does not clearly appear, or if there is a dispute as to what it is, then it is open to the plaintiff to argue upon the whole evidence and the jury are justified in relying upon a presumption, unless they are satisfied that the cause has been shown to be inconsistent with it. An unsuccessful attempt to prove by direct evidence the precise cause does not estop the plaintiff from relying upon the presumptions applicable to it."

In *Atkinson v. United Railroads*, 71 Cal. App. 82, 234 P. 863, 866, after a study of the rule in various states, it was found that in some the rule is absolute that where specific acts of negligence are pleaded, the right to rely upon the presumption resulting from the doctrine of *res ipsa loquitur* is totally lost. In other states the rule has been adopted that plaintiff is not deprived of the benefit of such doctrine merely because he has made allegations of specific omissions of duty; and in other jurisdictions, and the court places California among them, a qualified rule has

been adopted to the effect "that, where plaintiff makes specific allegations of negligence, he must rely for his recovery upon, and he is limited to, such specific acts of negligence, and cannot recover for any other negligent act, but he is not deprived of the benefit of the doctrine of *res ipsa loquitur* so far as those specific acts of negligence are concerned. In other words, it is held in substance that the allegation of specific acts of negligence, while not depriving plaintiff of the benefit of said doctrine, relieves the carrier from the burden of disproving or meeting any other negligent acts than those alleged, for the reason that, having specified the acts of negligence, plaintiff will be confined to them and not allowed to prove or to recover upon other causes than those alleged." Citing cases from other states and quoting from Thompson on Evidence, volume 6, § 7643, and as a basis for such a conclusion the court found support in the following California cases: *Connor v. Atchison*, etc., 189 Cal. 1, 207 P. 378, 26 A. L. R. 1462; *Marovich v. Central California Traction Co.*, 191 Cal. 295, 216 P. 595; *McKeon v. Lissner*, 193 Cal. 297, 223 P. 965; *Soto v. Spring Valley Water Co.*, 39 Cal. App. 187, 178 P. 305; *Strock v. Pickwick*, etc., 107 Cal. App. 298, 290 P. 482.

[6] The negligence charged in the complaint against Dr. Wallace is in the following language:

"That the defendant Carl T. Wallace then and there and during the said operation, negligently and carelessly deposited and left an abdominal sponge or gauze pad within the abdomen of said Maxine Armstrong. That the said Carl T. Wallace negligently and carelessly closed said incision and sutured the same without first removing said abdominal sponge or gauze pad which he had theretofore deposited and left within the abdomen of said plaintiff Maxine Armstrong."

We are also of the opinion these allegations did not in effect allege specific acts of negligence, but at most merely charge that appellant negligently left a sponge in the abdomen of plaintiff. No attempt was made to describe the negligence in detail, nor charge why or under what circumstances it occurred. Such an allegation is analogous to a complaint of an injury by a guest in an automobile who alleges that the operator so negligently and carelessly drove and operated the car as to strike an

obstruction, causing the injury complained of, or of a brick falling from a building upon a passerby below, inflicting damage.

We are of the opinion therefore that the form of the complaint is not such as to prevent the application of the doctrine.

[7] The second objection urged by plaintiff to the applicability of *res ipsa loquitur* is that the rule does not apply because there are two defendants here involved. In *St. Clair v. McAlister*, 216 Cal. 95, 13 P.(2d) 924, a passenger injured by a collision between two automobiles was given the benefit of the doctrine as against the driver of the one in which he rode and the employer, and not against the other driver. To the same effect is the recent case of *Godfrey v. Brown*, decided by the Supreme Court upon hearing, in 220 Cal. 57, 29 P.(2d) 165, 93 A. L. R. 1092, where many authorities are cited and analyzed supporting the rule that the fact there are two defendants does not preclude the application of the doctrine in question.

In the instant case Maxine Armstrong was, during the operation, under an anaesthetic; Dr. Wallace was in charge; the sponge was not discovered until some five weeks thereafter; as to why it was left there or how it happened to be left, she has no information or means of information; such facts were peculiarly within the knowledge of her physician.

[8] We are of the opinion, therefore that the court erred in refusing to give the instruction heretofore quoted.

Whether or not the surgeon was responsible for the acts of the nurse is not necessary here to consider, but it does appear that a definite responsibility rests upon a surgeon in regard to knowledge upon his part as to whether or not the sponges used in the operation are all accounted for.

The following testimony was given by Dr. John N. Chain, called by defendant Wallace:

"During the operative procedure the instrument nurse and her assistant * * * are both diligent in seeing that no sponge, instrument, or other things are missing from what they started in with. So, that at about the time the surgeon is ready to close up, either by intimation or direct words, the surgeon is informed that every thing is accounted for. * * * Other

times the nurse will say, 'Doctor, the sponge count is correct.'

"Q. Now, doctor, if there is a sponge missing, what is done with reference to advising the surgeon of that fact? A. He is told that a sponge is missing, and holds up closure until it is accounted for, or he has searched the operative field and has proven that it is not present. * * * They (the operative nurse and her assistant) should know at that time whether any sponges or anything else which has been used are missing which might be inclosed in the field. * * *"

The practice is that he (the surgeon) should assure himself with the co-operation of the surgical nurse that all sponges are out.

Dr. B. M. Marshall testified as follows: "There is a burden upon both the physician and the nurses in this matter in determining whether or not the sponges are all accounted for."

It is conceded by Dr. Wallace that he did not count the sponges or require a sponge count and he conceded that the employees of the hospital did not make a special count, which seems an admission that he did not affirmatively satisfy himself either by having a count made or making one himself, to determine whether or not all sponges were accounted for.

The rule as stated in 21 Ruling Case Law 388 is to the effect that "surgeons cannot relieve themselves from liability for injury to a patient caused by leaving sponges in a wound after an operation, by the adoption of a rule requiring the attendant nurse to count the sponges used and removed, and relying on that rule as conclusive that all sponges have been accounted for."

[9] The surgeon had the power and therefore the duty to direct the nurse to count the sponges as part of his work in the opening and closing of plaintiff's abdomen and the putting in and taking out of sponges, and it was his responsibility to see that such work was done. He cannot relieve himself of reliability by any custom or rule requiring the nurses to count the sponges used and removed. The refusal of the court, therefore, to give an instruction based upon the principle as outlined by plaintiff, constituted error.

[10] Appellant strongly urges that what constitutes proper practice can be established only by expert testimony. With this

general rule we have no complaint, but it does not require the testimony of an expert to convince even a court or jury of laymen that the leaving of a gauze sponge fourteen inches square in an abdominal cavity, upon the completion of an operation, and the permitting of the same to remain undiscovered for five weeks, does not constitute good medical practice.

We believe sufficient has been said to justify the ruling of the trial court in granting a new trial as against defendant Wallace.

The order, therefore, granting a new trial as to Sisters of St. Joseph of Orange, a corporation, is reversed, and the order granting a new trial as to defendant C. T. Wallace is affirmed.

I concur: PLUMMER, J.



8 Cal.App.2d 363
In re BURNETT'S ESTATE. *
Civ. 1379.

District Court of Appeal, Fourth District,
California.
July 10, 1935.

Appeal and error — 1218

Where Court of Appeal reversed decree of distribution of decedent's estate without making provision for costs, motion to recall remittitur erroneously giving appellant costs on appeal was granted, and corrected remittitur ordered issued (Probate Code, § 1232).

In the matter of the estate of W. I. Burnett, deceased. A decree of distribution was reversed [44 P.(2d) 435]. On motion to recall and correct the remittitur.

Remittitur recalled and corrected remittitur to be issued.

Robert B. Gaylord, of San Francisco, and W. R. Bailey, of Visalia, for appellant.

Russell & Heid, of Tulare, for respondents.

MARKS, Justice.

This is a motion to recall a remittitur and to order a corrected remittitur to be issued nunc pro tunc.

On April 11, 1935, this court filed its decision in the matter of the Estate of W. I. Burnett, deceased, and reversed a decree of distribution without making any provision for the payment of costs. Estate of Burnett (Cal. App.) 44 P.(2d) 435. On June 11, 1935, a remittitur was issued in which the following erroneously appeared: "Appellant to recover costs on appeal." Section 1232, Probate Code.

In Re Estate of Erickson (Cal. App.) 41 P.(2d) 939, where a similar question was before the court, a similar motion was granted. See Estate of Johnson, 200 Cal. 307, 252 P. 1052.

It is ordered that the remittitur issued by the clerk of this court on June 11, 1935, in the matter of the Estate of W. I. Burnett, deceased, be recalled and that a corrected remittitur be issued in its place, nunc pro tunc, omitting the words, "Appellant to recover costs on appeal."

We concur: BARNARD, P. J.; JENNINGS, J.



8 Cal.App.2d 684

IN RE MULLEN'S ESTATE.

WIBLE v. JOHNSON.

Civ. 5393.

District Court of Appeal, Third District,
California.

Aug. 7, 1935.

Hearing Denied by Supreme Court
Oct. 4, 1935.

1. Wills ⇐ 163(2)

Presumption of undue influence in execution of will arises from proof of existence of confidential relation between testator and beneficiary coupled with activity of beneficiary in preparation of will.

2. Wills ⇐ 55(1), 166(1)

In suit to contest will, evidence held to sustain findings of testator's unsoundness of mind and undue influence in execution of will, justifying refusal to admit will to probate.

3. Wills ⇐ 165(5)

In suit to contest will, evidence of execution of prior will by same testator held admissible being material and relevant.

4. Wills ⇐ 165(5)

Previously executed testamentary writing, conflicting with propounded instrument, executed voluntarily and while decedent had recognized mental capacity, is evidentiary fact from which undue influence or unsoundness of mind at time of later writing might be inferred, there being no explanatory facts.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Proceeding in the matter of the estate of Edward Mullen, deceased, by Charles Johnson against Walter P. Wible, contesting validity of will of Edward Mullen. Judgment for contestant, and proponent appeals.

Affirmed.

A. L. Wessels, of Ukiah, and L. D. Mooney, of Fort Bragg, for appellant.

Thomas & Thomas, of Ukiah, and Norman Johnson, of Fort Bragg, for respondent.

Mr. Justice pro tem. ROSS delivered the opinion of the court.

On September 28, 1932, Edward Mullen, the decedent, signed a will drawn by an attorney of his own choice, with the attorney and the cashier of the bank with which he did business as subscribing witnesses, by which respondent, a neighborhood friend, was sole beneficiary. The decedent was seventy-six years of age and had no known relatives. He died November 18, 1932, and, after proper proceedings, this will was admitted to probate on December 9, 1932. On December 18, 1932, appellant, another neighborhood friend of decedent, filed a will dated November 7, 1932, asking that it be admitted to probate, and that the admission of the will of September 28, 1932, be revoked. By the purported later will appellant was sole beneficiary. This will was admittedly written with pen and ink by appellant's wife, and at his home. Two neighbors of appellant and decedent were subscribing witnesses. Respondent contested this will on grounds of lack of execution, undue influence, and lack of testamentary capacity of decedent on the date of its pur-

ported execution. After trial before the court without a jury, judgment was given in favor of contestant, and the will was refused admission to probate on the grounds of undue influence on the part of appellant and unsoundness of mind of the decedent on November 7, 1932. From this judgment, this appeal is taken.

Appellant's grounds of appeal are stated substantially as follows: "May the court disregard the positive, uncontradicted and unimpeached testimony of the subscribing witnesses, the other witnesses present when the will was executed, and other witnesses who testified to facts showing that deceased was mentally competent, and that he made the will freely and voluntarily and without any undue influence?"

An examination of the voluminous transcript, however, shows that the testimony referred to, although positive, perhaps, is certainly not entirely uncontradicted and unimpeached. Appellant and his wife testified positively that the will was written on the same day, and with the same pen. Milton Carlson, handwriting expert, contradicted this, which could be considered very material impeachment of all the testimony of appellant and his wife.

[1] The subscribing witnesses both testified that deceased was of sound mind when they executed the will. However, a man who delivered bread at decedent's home a few hours later testified that the latter's mind seemed blank when he called. He said decedent had apparently been losing control of his mental processes for several days previous. Four days later decedent was taken to a hospital, his mind practically blank, and the physician said that this condition must have been coming on gradually; that "it would take at least a week to develop such mental confusion." The subscribing witnesses were present for just a few minutes at the time of the execution of the will, and their testimony on the issue of undue influence is of small effect. The testimony of appellant and his wife, besides being impeached as above shown, must also be

weighed against the presumption of undue influence, which arises from proof of the existence of a confidential relation between a testator and a beneficiary, coupled with activity of latter in the preparation of a will. In re Estate of Baird, 176 Cal. 381, 168 P. 561; In re Estate of Nutt, 181 Cal. 522, 185 P. 393. In the instant case decedent requested appellant to prepare a will, and the latter had his own wife pen it at his direction.

[2] The evidence is sufficient to justify the trial court's findings on both the issue of unsoundness of mind and that of undue influence.

[3] Appellant complains of the "immateriality of the evidence as to the execution of the will of September 28, 1932, and the circumstances." No objection was ever registered in the trial court. However, the evidence was material and relevant.

[4] A previously executed testamentary writing, conflicting with the propounded instrument, executed voluntarily and while decedent had recognized mental capacity, is an evidentiary fact from which undue influence or unsoundness of mind at the time of the later writing might be inferred, there being no explanatory facts. In re Estate of Arnold, 147 Cal. 583, 82 P. 252; In re Estate of Everts, 163 Cal. 449, 125 P. 1058.

The various statements of the law as to undue influence and testamentary incapacity made by appellant in his brief are correct. There is nothing to show that the trial court was not governed by these principles of law in making its findings. In fact, under these principles, the trial court was amply justified in finding as it did.

The judgment is affirmed. The purported appeals from the order denying the motion for a new trial, and from the order denying the motion to vacate and set aside the findings are dismissed.

We concur: THOMPSON, J.; PLUMMER, Acting P. J.

8 Cal.App.2d 545

WOTKYNs et al. v. WM. R. STAATS CO.

Civ. 9065.

District Court of Appeal, Second District,
Division 1, California.

July 31, 1935.

Brokers ☞29

Broker who received orders to sell client's securities in high market, who gave client continual assurance that he would sell so as to obtain highest prices, but who did not sell until one year later in greatly depreciated market, *held* liable to client for resulting damage.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by Alfred W. Wotkyns and another against the Wm. R. Staats Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

O'Melveny, Tuller & Myers, B. E. Ahlport, and Frank S. Balthis, Jr., all of Los Angeles, for appellant.

Haight, Trippet & Syvertson, of Los Angeles, for respondents.

YORK, Justice.

A judgment was rendered on a complaint which alleged that the plaintiffs became customers of defendant on or about February 1, 1930, and placed numerous orders for the purchase of corporate stocks and bonds and numerous orders for the sale of same; that all of said orders were given orally by plaintiffs and accepted orally by defendant and were executed by said defendant, as set forth in the said complaint; that all of the corporate stocks and bonds so purchased by plaintiffs through the defendant as broker of plaintiffs were paid for in cash, and plaintiffs during said period of time never had any margin account with said defendant.

The complaint specifically alleged that on or about February 15, 1931, plaintiffs orally instructed and requested defendant to sell for their account 200 shares of Massachusetts Investors Trust at \$35 per share and 50 shares of the corporate stock of Texas Gulf & Sulphur Company, at \$52.50 per share; that the defendant orally promised and agreed at said time to sell said shares, and each of them, at said prices if the market equalled or exceeded

said prices at which plaintiffs directed said shares to be sold; that the plaintiffs agreed with defendant that defendant should charge and plaintiffs should pay defendant's regular commission for the sale of said shares of stock in said transactions. It is further alleged that thereafter, during the two months following the giving of such instructions, the market prices of said shares on many days during which the New York Stock Exchange was open and during which the said defendant was engaged in the business of selling said stocks, exceeded the respective prices at which plaintiffs instructed and directed said shares to be sold, but notwithstanding said fact, defendant failed to sell said shares pursuant to its agreement, which was set forth in said complaint.

It is further alleged that during the period of time from April, 1931, immediately following the above-mentioned transactions, and down to and including the month of April, 1932, the market prices of said stocks fell far below the prices at which defendant agreed to sell the same, and during said period of time the defendant constantly advised plaintiffs not to sell, upon the representation by defendant that the losses sustained in the foregoing transactions would be retrieved in a rising market. However, on or about a year and a month after said original instructions were given, the defendant sold 25 shares of Texas Gulf & Sulphur Company for the sum of \$419.81, and some weeks later defendant sold a further 25 shares of said Texas stock for the sum of \$448.50 and 200 shares of Massachusetts Investors Trust for the sum of \$2,517, making the net proceeds to the plaintiffs for the sale of said stocks \$3,385.31; and that by reason thereof plaintiffs allege they have suffered a loss, as a direct and proximate consequence of defendant's failure to perform its promises, in the sum of the difference between the prices at which said stocks should have been sold, to wit, \$9,625, and the prices at which said stocks were finally sold; the said difference being \$6,239.69.

Defendant answered generally and filed a separate defense alleging that the plaintiffs were guilty of laches in that they could have prevented a large portion of the loss by selling the securities before they were sold, and for a third separate defense alleged that if said defendant had been

instructed by plaintiffs to sell the securities on or about February 15, 1931, and if during the months of February and March, 1931, defendant failed to sell said securities at the prices required by plaintiffs, then and in that event, by the retention of said securities for a year thereafter and subsequent instructions given to the defendant to sell said securities in April, 1932, the plaintiffs waived the defendant's failure to sell said securities when and as instructed.

Defendant filed an amendment to this answer setting up a fourth separate defense which alleged estoppel and acquiescence on the part of the plaintiffs in the acts of the defendant which caused the damage to the plaintiffs.

Thereafter judgment was rendered by the jury in favor of plaintiffs, assessing damages against the defendant in the sum of \$3,250. Thereafter, upon a motion for a new trial, the trial judge ordered that the judgment be modified by deducting \$808.75 from the judgment, leaving a judgment standing of \$2,441.25, and that upon acceptance of this reduction by the plaintiffs the defendant's motion for new trial was denied.

Defendant appeals to this court from the judgment as modified and from a denial of its motion for judgment notwithstanding the verdict.

In its opening brief appellant makes the following statement of question involved: "Where a stockbroker fails to execute an order to sell securities in a fluctuating market, may the customer, after knowledge thereof, wait for over one year in a declining market and then hold the broker liable in damages, particularly where (a) at the time the customer acquired knowledge of the breach and subsequent thereto the greater part of the securities were in the possession of the customer; and (b) subsequent to the customer's knowledge of said breach, the customer engaged in other transactions with the broker, used a portion of said securities as collateral for his margin account, withdrew sums therefrom, and finally closed the account by selling the securities in question, among others, and by accepting the cash balance in his favor?"

Respondents reply with a counterstatement of question involved in criticism of appellant's statement in the following words:

"The appellant has stated its view of the question of law involved. We disagree with its statement, and therefore

submit the following statement of the question involved:

"Where a stock broker agrees to sell securities at a definite price but fails to do so, and where, after the customer learns of the broker's failure to perform his promise, the broker for a period of about seventy days gives assurance to the customer that he (the broker) will perform his promise, is not the customer justified in relying upon the broker's assurances of performance, and is not the measure of damage for such breach of contract the difference between the market prices of the securities at the date when the broker promised to sell them and the market prices at the time, later, when the customer, as a reasonable person should have taken affirmative steps to mitigate his own loss?"

Appellant in turn in its reply brief criticizes this statement. An examination of the evidence discloses the fact that there were a great many conversations between the parties at different times during the course of the entire transaction as to exactly what the defendant was to do, and certain promises were made by the defendant's employee in charge of the transaction dealing with what the company would do for the respondents, admissions that the company had not done as said employee stated it would do on several occasions, and later the statement that it would then be impossible to comply with the request of the respondents, for the reason that the market by that time had fallen to such an extent that the stock, which respondents had requested appellant to sell, could not be disposed of. The transactions were spread over quite a period of time, but there was sufficient evidence in the record from which the jury could render the verdict which it rendered, if it believed the evidence that was introduced in support of respondents' contentions and disbelieved the conflicting evidence. The only contention of appellant, that is not disposed of by the foregoing statement as to the sufficiency of the evidence, is the one question, as stated in appellant's reply brief, as to whether the doctrine of ratification can be applied to any wrongful conduct on the part of the broker, whether the same is an unauthorized affirmative act or an omission to act when under a duty to act, and whether or not if the doctrine of ratification is not applicable for technical reasons, the rule

of waiver and equitable estoppel should apply in the instant case. This is met by sufficient evidence which justified the jury in determining that there was no ratification intended by any act that was done by either of the respondents. There was sufficient evidence to offset the question of estoppel, as raised by appellant, in that respondents at all times were requesting certain action by the appellant, which action they did not succeed in getting. There is evidence in the record which might have caused a jury to come to this conclusion, in that there was evidence that the orders to sell certain stocks were given in conjunction with an order to purchase certain other stocks. The stocks that were to be purchased, were purchased, but the stock which was to be sold to pay therefor was never sold by appellant, although defendant was repeatedly requested to make such a sale after respondents had ascertained that the orders of respondents had not been strictly complied with.

The objection of appellant to the use of the word "advised" in instruction No. 1, as listed in the appendix to appellant's opening brief, is not well taken for the reason that the entire transaction has to be read all together, and when the instruction is so read, although it may not be a model form of instruction, we can find no prejudicial error in the phraseology used. This instruction, it will be noted, required the jury in considering the law as stated in the instruction, to find whether or not the appellant through its agents or employees advised *and* persuaded the plaintiffs, and the instruction is so framed that until the jury so found that they had been both advised *and* persuaded, the instruction had no force.

The objection to the instruction that there was no evidence that would justify the giving of the instruction has no merit, as there was evidence which justified its being given.

The judgment as modified by the trial court is affirmed and, the order denying motion for judgment notwithstanding the verdict is affirmed.

CONREY, Presiding Justice (concurring).

I concur in the judgment. The fact that there was a contract between the plaintiffs and the defendant, and a breach of contract by the defendant, is thoroughly

established by the evidence. The surviving part of the controversy relates only to the amount of damages to which the plaintiffs are entitled. The amount awarded by the jury is justified by the evidence, unless we can say that the instructions of the court to the jury permitted and presumably caused the jury to take into consideration elements of damage to which the plaintiffs were not entitled, and even so, such error in the instructions need not cause a reversal of the judgment if the consequences of the error have been neutralized by the action of the trial judge in reducing the amount of the judgment.

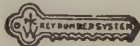
The court in its instructions to the jury, in connection with a statement of the issues of fact presented for decision, stated to them that: "If you find that the order was given and accepted and was not executed, then you must determine whether the plaintiffs suffered any damage as a result of such failure, and if so, how much, and * * *. If you find that the order was given and accepted, and was not executed, and that the plaintiffs were damaged, then you must determine the question of whether or not the plaintiffs acted unreasonably in waiting until April of 1932 to sell said shares and whether or not, by so doing, the plaintiffs waived their right to complain about the defendant's failure to execute the order."

Appellant makes no objection to the foregoing instruction. The exceptions taken are directed against further instructions which in further detail announced the rules of law which should guide the jury in determining whether there was any breach of contract, and in ascertaining the amount of damages, if the plaintiffs were entitled to any such compensation. These instructions were conditioned upon the finding of stated facts by the jury, if from the evidence the jury found that those facts existed. Substantially I think that the law was correctly stated by the court, although in some particulars the words chosen to express the thought of the court may not be entirely accurate. But I cannot see wherein the jury was really misinformed upon the law of the case. And in so far as they could have affected the amount of damages awarded it is not at all probable in any event that the damages would have been less than the amount stated in the judgment. In other words,

it has not been shown that in the rendition of the judgment there has been any miscarriage of justice.

HOUSER, Justice.

I concur in the judgment and in both the foregoing opinions.



8 Cal.App.2d 620

**ADKINS v. CITY AND COUNTY OF SAN
FRANCISCO et al.**
Civ. 9651.

District Court of Appeal, First District,
Division 2, California.
Aug. 5, 1935.

1. Pleading ⇨246(3)

Denial to plaintiff seeking recovery for injuries sustained during school demonstration, of leave to amend complaint, *held* error, where it appeared from complaint that plaintiff was attempting in good faith to state a cause of action and it did not appear that plaintiff by amendment could not have obviated objections raised by demurrer.

2. Pleading ⇨246(1)

Fact that plaintiff could not have amended complaint so as to state cause of action against all defendants *held* not to justify denial of leave to amend, where complaint could have been amended so as to state cause of action against one or more defendants.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Anita Adkins, a minor, by Ruth Adkins, her guardian ad litem, against the City and County of San Francisco and others. From judgment in favor of defendants, plaintiff appeals.

Reversed.

Charles J. Janigan and Joseph Kaplan, both of San Francisco, for appellant.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for respondents.

SPENCE, Justice.

This is an appeal by plaintiff from a judgment entered in favor of defendants after the trial court had sustained defendants' demurrer to plaintiff's original complaint without leave to amend.

[1,2] Plaintiff, a pupil in the public schools, alleged in substance that she was taken by defendants with other school children to participate in a National Recovery Act demonstration at Seals stadium; that defendants so negligently conducted and supervised said demonstration that plaintiff was caused to be violently thrown to the ground and trampled upon by other children, thereby causing her injuries. We deem it unnecessary to set forth the allegations in detail or to set forth the substance of the general and special demurrer. In the trial court it was conceded by counsel for plaintiff that "the complaint is perhaps not a model of good pleading," but counsel requested leave to amend in the event that the trial court was of the opinion that the complaint was insufficient. Leave to amend was denied to plaintiff, and the question presented is whether the trial court erred in denying such leave.

From a reading of the complaint in question, it appears that plaintiff was attempting in good faith to state a cause of action. It is not at all clear that plaintiff could not have amended and obviated the objections raised by the demurrer. While defendants may be correct in their contention that plaintiff could not have amended so as to state a cause of action as to certain defendants, it cannot be said that plaintiff could not have amended so as to state a cause of action as to one or more of said defendants. We therefore believe that the trial court erred in refusing to grant plaintiff at least one opportunity for that purpose. As was said in *Metzger v. Vestal*, 76 Cal. App. 409, at page 418, 244 P. 942, 945: "The complaint in question was the original complaint, it never having been amended. While the demurrers were properly sustained, at least upon some of the special grounds urged, the plaintiffs ought to be permitted to amend in order that the case may be decided upon the merits rather than upon technical rules of pleading. 'Unless it be clear to a trial court that a defective complaint cannot be amended so as to obviate the objections made thereto, a plaintiff desiring it should be allowed reasonable opportunity to so

amend.' *Payne v. Baehr*, 153 Cal. 441, 447, 95 P. 895, 897."

The judgment is reversed, with directions to the trial court to grant plaintiff leave to file an amended complaint.

We concur: **NOURSE, P. J.;**
STURTEVANT, J.



8 Cal.App.2d 642

COWAN v. MARKET ST. RY. CO.

Civ. 9548.

District Court of Appeal, First District,
Division 2, California.

Aug. 6, 1935.

Hearing Denied by Supreme Court

Oct. 4, 1935.

1. Appeal and error ⇨930(1)

In reviewing conflicting evidence on appeal all conflicts must be resolved in favor of verdict.

2. Street railroads ⇨114(6, 14)

In action for injuries caused by collision of plaintiff's automobile with street car at intersection, evidence *held* to support verdict for plaintiff on issues of negligence of defendant and contributory negligence of plaintiff.

3. Street railroads ⇨85(1)

Street car proceeding on street which was designated as arterial had right of way.

4. Street railroads ⇨81(3)

All speed regulations are referable to primary demand that all vehicles shall be operated at a careful and prudent speed not greater than is reasonable and proper, and that they shall not be operated in such way as to endanger life, limb, or property of any person (Gen. Laws 1931, Act 5128, § 113).

5. Street railroads ⇨81(3)

Statutory speed limits are merely directory, and though speed in excess of such limits may be made *prima facie* evidence of negligence, it is not conclusive evidence (Gen. Laws 1931, Act 5128, § 113).

6. Street railroads ⇨85(1)

"Right of way" merely means a preference to one of two vehicles asserting right of passage at same place and at approximately the same time.

[Ed. Note.—For other definitions of "Right of Way," see Words & Phrases.]

7. Street railroads ⇨85(4)

Street car 270 feet from intersection did not have right of way over automobile entering intersection.

8. Street railroads ⇨117(28)

In action for injuries caused by collision of plaintiff's automobile with street car at intersection, where plaintiff entered intersection while street car was 270 feet distant, and plaintiff was unable to tell whether street car was moving, question of plaintiff's contributory negligence in crossing intersection *held* for jury.

9. Trial ⇨241

In action for injuries caused by collision of plaintiff's automobile with street car at street intersection, instruction which followed language of local ordinance which had been received in evidence without objection and part of which relating to speed of street cars had been read to jury without objection, that operation of street car in excess of lawful speed of 15 miles an hour when traversing intersection was *prima facie* but not conclusive evidence of speed greater than was reasonable *held* proper.

10. Street railroads ⇨118(1)

In action for injuries caused by collision of plaintiff's automobile with street car at street intersection, instruction that operator of street car should anticipate presence on public street of other persons exercising ordinary care *held* proper.

11. Street railroads ⇨114(19)

In action for injuries caused by collision of plaintiff's automobile with street car at intersection, testimony of street car motorman that he saw plaintiff approach intersection and that plaintiff did not stop at arterial sign *held* to establish negligence of defendant since only conclusion which could follow was that after motorman saw plaintiff would be in extreme danger he deliberately operated street car at such excessive and reckless speed that he could not avoid injury.

Appeal from Superior Court, City and County of San Francisco; **C. J. Goodell**, Judge.

Action by Madeline Cowan against the Market Street Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. M. Abbott, Walter H. Linforth, and Wm. M. Cannon, all of San Francisco, for appellant.

M. Mitchell Bourquin, of San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an action to recover damages for injuries alleged to have been received in a collision between plaintiff's automobile and a street car operated by defendant. The jury returned a verdict for plaintiff in the sum of \$18,000. On the hearing of the motion for a new trial the court, with plaintiff's consent, reduced the judgment to \$7,000 and denied the motion. Defendant appeals from the judgment.

[1] Much of the evidence is conflicting, but as we must resolve every conflict in favor of the verdict our statement of facts will recite the evidence in the light most favorable to the plaintiff. Plaintiff was driving south on Forty-third avenue in the city and county of San Francisco, and the street car was going west on Fulton street, which is an arterial. The plaintiff and other witnesses testified that she stopped at the arterial; there was other testimony that she was going fast on Forty-third avenue and merely slowed at the intersection. She first saw the street car when she came to the intersection and the car had then not reached Forty-second avenue. She testified that as she started up again the street car was at Forty-second avenue and she did not know whether it was moving or standing. She proceeded at the rate of about 6 miles per hour and did not see the car again until her front wheels were on the northerly track and the car was almost upon her. Her automobile was struck on the left front side, shoved off the tracks but not overturned, and the street car went from three-quarters of a block to a block before it stopped. Various witnesses estimated the speed of the street car at between 12 and 15 miles per hour and between 40 and 45, depending upon their interest in the litigation. In all cases the speeds mentioned were said to be the usual speed of street cars at this particular place. Plaintiff drove over this intersection almost daily on her way to work, knew that the cars went fast, and testified that when she first saw the car it seemed to be going at a normal rate of speed. The intersection was an "obstructed" one on a closely built-up street in a residential district. The street car approached the intersection without giving any warning by bell or other signal.

[2] Upon this evidence respondent argues that the jury was justified in finding

that appellant was negligent and that she used reasonable care and that, though the alleged excessive speed of the street car was not noticed, she had the right to assume, after looking once, that appellant would act within the law and approach the intersection in a prudent manner. We are satisfied, without further repetition of the evidence, that it is sufficient to support the verdict on these two issues. This controls the appeal as to these issues under the settled rule recently followed in *Crawford v. Southern P. Co.* (Cal. Sup.) 45 P.(2d) 183, 184, where the court said: "In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."

[3-5] In compliance with the rules of court appellant's brief contains a statement of six questions as those involved on the appeal. Three of these are merely restatements of the same issue—the right of way on an arterial or boulevard; two are restatements of a related issue—the application of speed limits on arterials; the sixth presents the question of respondent's asserted contributory negligence. The questions relating to the right of way and to the speed limits on arterials are argued under assignments of error to instructions given and to instructions proposed by the appellant and refused. It would serve no good purpose to quote at length either the instructions complained of or those refused. They all relate to the one theory advanced by the appellant—that, because Fulton street was designated as an arterial, the appellant had the "right of way." This may be granted but, in doing so, we do not concede the result which appellant insists should follow. The decisions are uniform that all speed regulations are referable to the primary demand that all vehicles shall be operated at "a careful and prudent speed not greater than is reasonable and

proper" and that they shall not be operated in such a way "as to endanger the life, limb or property of any person." California Vehicle Act, Deering's Gen. Laws, 1931, No. 5128, § 113. Thus the so-called statutory speed limits are merely directory and, though a speed in excess of such limits may be made prima facie evidence of negligence, it is not conclusive evidence and that is as far as these instructions went.

[6] But appellant's theory that it had an absolute and uncontrolled right of way over all vehicles approaching the arterial is not supported by any authority cited. "Right of way" merely means a preference to one of two vehicles asserting the right of passage at the same place and at approximately the same time. It was never intended that a vehicle should be charged with negligence "per se" if it attempted to cross an arterial when any other vehicle was approaching on the arterial at any distance whatever. Again emphasizing that negligence is the subject-matter of the inquiry, the question reverts to the simple matter of what is negligence, or what would a reasonable person do under the circumstances. If the jury determines that a reasonable person might cross an arterial when a street car is seen approaching a block distant, then all the niceties of court instructions become purely academic. We had the same question before us in *Keyes v. Hawley*, 100 Cal. App. 53, 279 P. 674, and there held that the "right of way" rules of the road only applied when two vehicles approached the point of intersection at approximately the same time so that, if both continued on at a lawful speed and in a prudent manner, a collision would occur. On page 60 of 100 Cal. App., 279 P. 674, 677, we said, "* * * When one car has actually entered an intersection before the other approaches it, the driver of the first car may assume that he will be given the right of way and permitted to pass through the intersection without danger of collision. He has the right to assume that the driver of the other car will obey the law, slow down, and yield the right of way if slowing down is necessary to prevent a collision. *Harris v. Johnson*, 174 Cal. 55, 58, 161 P. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560; *Wixon v. Raisch Improvement Co.*, 91 Cal. App. 129, 266 P. 964." Later authorities to the same effect are *Couchman v. Snelling*, 111 Cal. App. 192, 195,

295 P. 845; *Page v. Mazzei*, 213 Cal. 644, 645, 3 P.(2d) 11; *Leblanc v. Coverdale*, 213 Cal. 654, 658, 3 P.(2d) 312.

[7,8] Under the facts proved respondent entered the intersection when appellant's street car was a block distant (270 feet)—so far away that she was unable to say whether it was moving or standing still. The authorities cited effectively dispose of the argument that, under such conditions, the street car had the right of way and as effectively compel the conclusion that the question of respondent's contributory negligence was one of fact to be left to the jury.

[9] In the matter of the limits of speed the trial court instructed the jury that, under the municipal traffic ordinance, it was lawful to operate the street car at a speed not in excess of 15 miles an hour when traversing the intersection and that speed in excess of this was "prima facie but not conclusive evidence of a speed greater than is reasonable and proper." The ordinance was received in evidence without objection and the particular sections relating to speed of street cars were read to the jury without objection. In the instructions complained of the trial court strictly followed the terms of the ordinance. But the appellant argues that these instructions should not have been given because these provisions of the ordinance are inapplicable to traffic on an arterial. *Gritsch v. Pickwick Stages System*, 131 Cal. App. 774, 22 P.(2d) 554, is cited as authority for this position, but we do not so understand that decision. The rates of speed found in the California Vehicle Act were there considered in relation to the provisions relating to boulevards and arterials and it was held that the rates of speed were directory and must give way to specific provisions covering the boulevards and arterials. It was not held, however, that none of these speed regulations were applicable to travel on a boulevard, but it was said in clear language, 131 Cal. App. 774, at page 781, 22 P.(2d) 554, 557, that "any person driving a vehicle on an established through highway or boulevard which is appropriately marked with stop-signs at intersections is not necessarily required to reduce his speed at those intersections to fifteen miles an hour under the provisions of subdivision (b) of section 113, but that his rate of speed (unless governed by local regulations) is con-

trolled by subdivision (a) of that section—that which is ‘not greater than is reasonable and proper.’ Thus, when one who is driving on such a highway is involved in a collision at an intersection, and the question of his negligence relates to the rate of speed at which he was driving, the jury should be properly instructed to determine whether such rate of speed was greater than was reasonable and proper under the circumstances, and also whether the speed maintained was a proximate cause of the accident.” Here the matter of speed was expressly “governed by local regulations” and the trial court fully instructed the jury with the care suggested in the quotation.

[10] Appellant uses the same authority in support of his criticism of an instruction that the operator of the street car should “anticipate the presence on the public street of other persons exercising ordinary care.” This is far different from the instruction criticized in the *Gritsch Case*, which advised the jury that the operator of the stage should anticipate that other vehicles would enter the boulevard “in violation of law.” Without further elaboration we are satisfied from our examination that the jury was fully and fairly instructed on all these issues and that the able trial judge did not err in the refusal to give any of those proposed by the appellant.

[11] We have covered all the questions stated by appellant to be involved on this appeal, but appellant’s brief discusses other questions which will require brief comment. The elementary principle that a street car traveling on fixed rails must have the right of way over other movable traffic may be conceded, but it has no application to the facts of this case. The repetition of the arguments on the issues of negligence and contributory negligence is answered by what we said in the beginning. Respondent’s witnesses placed her at the intersection of Forty-third avenue when the street car was at Forty-second. Appellant’s motorman testified that he saw the respondent approach the intersection and that “she did not stop at the arterial sign.” If the jury believed respondent’s witnesses, the charge of contributory negligence falls; if the jury believed the motorman, then his negligence is established, because the only conclusion which could follow is that, after he

saw that respondent would be in a place of extreme danger, he deliberately operated the street car at such an excessive and reckless speed that he could not avoid the injury.

The criticism of the evidence and the instruction relating to respondent’s loss of profits from her business is answered by *Hollander v. Wilson Estate Co.*, 214 Cal. 582, 587, 7 P.(2d) 177.

The criticism of the instruction relating to damages for aggravation of a pre-existing disease is without merit. The evidence was conclusive that respondent was suffering from an infection of the colon at the time of the accident and developed chronic ulcerative colitis as a result of the injury. No claim is made that the verdict, as reduced by the trial court, is an excessive award for the permanent injuries alone suffered by the respondent.

No other point discussed in the briefs requires consideration.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



8 Cal.App.2d 588

PEOPLE v. FORTUNE.

Cr. 2703.

District Court of Appeal, Second District,
Division 1, California.

Aug. 2, 1935.

Criminal law ⇨913(3)

Refusing new trial of robbery prosecution on basis of affidavit of alibi witness held not abuse of discretion, notwithstanding defendant was represented by a deputy public defender who had been assigned to case only a few days before trial, where public defender’s office had represented defendant for more than two months prior to trial, and defendant, notwithstanding he must have known what evidence against him probably would be since it was second trial of case, had made no application for continuance or suggested need of testimony of alibi witness.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Arthur Lee Fortune was convicted of robbery in the first degree, and he appeals.

Affirmed.

Thomas W. Cochran, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

PER CURIAM.

By the verdict of a jury the defendant was found guilty of the crime of robbery in the first degree. There is no assignment of errors occurring during the trial of the case, and it is conceded that there is in the record sufficient evidence to sustain the conviction. The grounds of appeal are confined to the single contention that the court was guilty of an abuse of discretion in denying defendant's motion for a new trial.

The robbery occurred on the 12th day of July, 1932. The defendant was not arrested until about two years later. The information was filed September 12, 1934, and the case was tried the following November. The robbery occurred in the city of Los Angeles. The defendant testified that he left the city of Los Angeles on or about the 7th day of July, 1932, and went to San Francisco, and that on the day of the robbery he was not in the city of Los Angeles. He testified that together with one Buster Rowland he left Los Angeles to go to San Francisco, but they separated at Santa Barbara. Rowland was not produced as a witness at the trial, but it was stated at that time that he had been heard of in Chicago. The man who was robbed identified the defendant very clearly and definitely as the man who had committed the robbery. In support of the motion for a new trial the defendant presented three affidavits, of which only one need concern us. This is an affidavit of Buster Rowland, wherein he states that two or three days after the 4th day of July, 1932, he left Los

Angeles in company with the defendant; that they "caught a ride together almost to Santa Barbara then separated"; that he met the defendant again in San Francisco not later than July 10th; and that they saw each other daily for a period of not less than two weeks thereafter in the city of San Francisco.

It does not appear that at the time the case was called for trial or prior thereto the defendant made any application for continuance of the trial, or made any suggestion to the court that he would need the testimony of Rowland as a witness for the defendant, in support of his claim that he was not in Los Angeles at the time of the robbery. The excuse now offered, for this failure of the defendant to suggest to the trial court that on account of the absence of Rowland he was not ready for trial, is that he was at the time represented by a deputy public defender who was not assigned to the case until the Friday before the Monday when the case was to go to trial. While this interval of time was short, it was amply sufficient for consultation between the defendant and his counsel the said public defender, and for the defendant to give to the deputy public defender a statement concerning Rowland which might have been used in support of an application for continuance of the trial. In fact, the public defender's office had represented appellant for more than two months prior to the trial. This was the second trial of the case. Therefore appellant knew what the evidence against him probably would be, and knew that he would need the testimony of Rowland, if in truth Rowland would have given such testimony as indicated by his affidavit on the motion for new trial.

It thus appears that there is no merit in the contention that the court was guilty of abuse of discretion in its denial of defendant's motion for a new trial.

The judgment and the order are affirmed.

8 Cal.App.2d 357

**VOGUE CREAMERY CO. v. ACME ICE
CREAM CO. et al.**
Civ. 9395.

District Court of Appeal, First District,
Division 2, California.

July 9, 1935.

1. Vendor and purchaser ⇨324

When vendor, under executory contract, renders himself unable to perform, he cannot complain of vendee's repudiation and cannot recover on his offer of performance if he is not able and willing to perform according to offer (Civ. Code, § 1495).

2. Corporations ⇨458

Corporation could not recover damages for breach of contract to purchase corporation's assets where audit showed assets and liabilities of corporation were not of amount represented by corporation, purchaser had paid under contract more than amount due, and corporation could not make valid tender or transfer of its real or personal property, or valid delivery of its treasury stock as required by the contract because its failure to pay its state franchise and license taxes rendered it incapable of exercising any of its corporate rights or duties (Pol. Code, § 3669c; Civ. Code, § 1495).

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by the Vogue Creamery Company against the Acme Ice Cream Company and others. From the judgment, the plaintiff appeals.

Affirmed.

Marshall B. Woodworth and Russell P. Tyler, both of San Francisco, for appellant.

Joseph C. Meyerstein, of San Francisco, for respondent Acme Ice Cream Co.

Gregory, Hunt & Melvin, Gavin McNab, Schmulowitz, Wyman, Aikins & Brune, Brobeck, Phleger & Harrison, and Oliver B. Wyman, all of San Francisco (Wallace Sheehan, of San Francisco, of counsel), for respondents Pacific Dairy Products Co. and Golden State Milk Products Co.

NOURSE, Presiding Justice.

Plaintiff sued for damages for breach of contract. Nonsuits were granted as

to all the defendants, the order relating to the defendant Acme Ice Cream Company stating that it was made on the sole ground that the plaintiff was in default in the payment of its license and franchise taxes and therefore unable to perform its obligations. This defendant had advanced nine grounds in its motion for a nonsuit, and if any one of these grounds is sound, the judgment must be affirmed. The other defendants were joined as subsequent purchasers of some of the assets of the Acme Company.

On May 1, 1924, the plaintiff entered into a written contract with the Acme whereby the latter agreed to purchase the corporate assets of the plaintiff for the full purchase price, to be paid within five years, of \$70,000 of which sum not more than \$35,000 was to go to the payment of the liabilities of the plaintiff. The latter represented that the assets were of the value of \$70,000 and that the indebtedness did not exceed \$35,000. The contract also called for the payment by Acme of \$12,000 of the principal and \$5,700 in interest within two years after the execution of the agreement and the payment of \$500 a month thereafter. The Acme agreed to pay all taxes and assessments on the real and personal property to be acquired.

Following the execution of the contract, the Acme paid for the use and benefit of the plaintiff sums in excess of \$83,000; the president of the plaintiff corporation absconded, and the directors permitted a suspension of its charter for nonpayment of the state license and franchise taxes. On May 1, 1929, the vice president of the plaintiff corporation elected to treat the contract as repudiated and made demand upon the Acme for full performance.

[1,2] On the trial plaintiff proved in its own case that it was unable to perform any of its obligations under the contract because of the suspension of its charter; that it could not vest title to the real estate sold because it did not have title at that time, or at any time subsequent to the execution of the contract; that it could not vest title to the major portion of the personal property because such title, at the time of the contract and at the time of the alleged tender, was continuously in another. Plaintiff's case showed further that it did not meet its stipulation in the contract that an audit

WARD-CHANDLER BLDG. CO. v.**CALDWELL et al.****Civ. 9283, 9405.**

**District Court of Appeal, Second District,
Division 1, California.**

July 12, 1935.

would show that its assets were worth \$70,000 and that its liabilities were not in excess of \$35,000. In both instances the audit showed the contrary. It was also shown that, whereas the contract stipulated that the Acme should assume and pay debts of not more than \$35,000 of the plaintiff, sums in excess of \$83,000 were paid to plaintiff before the alleged breach.

Under the provisions of section 3669c of the Political Code, in effect at the time, the appellant was incapable of exercising any of its corporate rights or powers because of its failure to pay its state franchise and license taxes. It was therefore incapable of making a valid tender, a valid transfer of either real or personal property, or a valid delivery of its treasury stock as required by the contract. *Ransome Crummeys Co. v. Superior Court*, 188 Cal. 393, 397, 205 P. 446. No burden was cast upon the Acme to keep appellant in good standing. The contract merely required the Acme to pay taxes and assessments levied against the "properties hereby leased." Hence appellant, by its own hand, put it beyond its power to perform its obligations under the contract. When a vendor under an executory contract has rendered himself unable to perform, he cannot complain of the vendee's repudiation, and cannot recover upon his offer of performance if he is not able and willing to perform according to the offer. Section 1495, Civ. Code; *Dickey v. Kuhn*, 106 Cal. App. 300, 304, 306, 289 P. 242.

But aside from this, appellant's evidence demonstrated that there had been paid under the contract sums for its use and benefit far in excess of the amounts due from this respondent and that, notwithstanding these payments, it had failed to deliver the consideration called for. Hence upon the evidence offered, taken with all favorable inferences, appellant failed to show any cause for damages against any of the respondents.

The nonsuits as to the other defendants were proper for the additional reason that the evidence demonstrated that they merely purchased some of the assets of the Acme without assuming the liabilities.

The judgment is affirmed.

We concur: **STURTEVANT, J.;**
SPENCE, J.

1. Trade-marks and trade-names and unfair competition Ⓒ1

Right to trade-mark may be acquired without complying with provisions of Code, since recording provided therein is merely means of preserving evidence that trade-mark has been appropriated (Pol. Code, §§ 3196, 3197).

2. Trade-marks and trade-names and unfair competition Ⓒ23

Where trade-mark was used by the original owners and their successors for a number of years to designate their business, property right attached to trade-name which would be protected (Pol. Code, §§ 3196, 3197).

3. Trade-marks and trade-names and unfair competition Ⓒ33

Where services of certain standard, kind, or quality are rendered, name under which such business is conducted is properly transferable under statute (Civ. Code, § 993).

4. Trade-marks and trade-names and unfair competition Ⓒ33

Physical assets of business may not be sold to one, and good will and trade-name thereof to another, for trade-name is destroyed when separated from business to which it applies, and trade-name cannot thereafter be sold.

5. Appeal and error Ⓒ150(1)

Where tenants, who were assignees of original owner of trade-mark, assigned their interest therein to receiver appointed to sell good will and trade-mark and apply proceeds to judgment for rent, tenants held not entitled to appeal from order appointing receiver to make sale, since trade-mark was not severable from business, and assignment thereof passed no title to receiver (Code Civ. Proc. § 943; Civ. Code, § 993; Pol. Code, §§ 3196, 3197).

6. Execution Ⓒ31

Where tenants who were assignees of original owner of trade-mark assigned their interest therein to receiver appointed to sell good will and trade-mark and apply proceeds to judgment for rent, court had no jurisdiction to order sale of trade-mark, since trade-mark cannot be sold upon execution or attachment apart from business in which it has been used (Code Civ. Proc. § 943; Civ. Code, § 993; Pol. Code, §§ 3196, 3197).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Suit by Ward-Chandler Building Company against Mildred J. Caldwell, doing business as Hudgens Permanent Wave Shop, and Rae Goodwin. From two adverse orders, last-named defendant appeals.

Appeals dismissed.

Max Schleimer, of Los Angeles, for appellant.

Chandler, Wright & Ward, of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

Appeals are presented from two orders of the superior court, one authorizing and the other confirming the sale of a trade-mark by a receiver.

Florence Hudgen and Owen Hudgen at one time conducted a beauty parlor and permanent hair waving salon under the name of "Hudgens Permanent Wave Shop." It is not disputed that this name was recorded in the office of the secretary of state as a trade-mark. Pol. Code, §§ 3196, 3197. Thereafter the Hudgens sold the business, including the trade-mark, to the defendant Mildred J. Caldwell, who later sold both to the defendant Rae Goodwin. Subsequently plaintiff secured judgment against both defendants for rent, and in aid of execution of the judgment, procured an order from the superior court appointing a receiver with power "to take an assignment from defendants and each of them of their interest in the said good will and trademark of the Hudgens Permanent Wave Shop, and to sell the same according to law and apply the proceeds of the same in satisfaction of the said judgment." By the same order the defendants were required "to make and execute an assignment in writing to said receiver of all right, title and interest which either or both of them have in and to the good will and trademark of the Hudgens Permanent Wave Shop within a period of three days thereafter."

The defendants complied with the order by delivering the required assignment to the receiver, accompanying it, however, with a notice that the defendant Goodwin had appealed from the order, and that the assignment was delivered "in accordance with the provisions of section 943, of the Code of Civil Procedure," and was to be retained by him until the disposition of

the appeal. The receiver, notwithstanding the appeal, immediately gave notice of sale of the "good will and trade name of the Hudgens Permanent Wave Shop" at public auction. He later petitioned the court for an order approving and confirming his sale of the trade-mark as "the sole asset of said receivership estate" to the plaintiff corporation for the sum of \$100, which petition was granted over the objection of the defendant Goodwin, who has appealed from the order confirming the sale.

The principal points urged by the appellant are that the trade-mark "Hudgens Permanent Wave Shop" is not one within the meaning of section 3196 of the Political Code, and that a trade-mark cannot be sold or assigned except in connection with the sale of the business in which it has been used. Appellant also contends that when she filed her notice of appeal from the order directing an assignment of the trade-mark, and when she delivered the assignment thereof to the receiver, further proceedings were stayed, and the receiver was without authority to make the sale and the court without jurisdiction to confirm it under the provisions of section 943 of the Code of Civil Procedure.

[1-3] The right to a trade-mark or a trade-name may be acquired without complying with the provisions of the Political Code. The recording provided for by this statute is only the means by which evidence that the trade-mark has been appropriated may be preserved. Under the facts in this case, it is unnecessary to decide whether or not the name is one which is of the kind provided for in the statute. It is admitted that it has been used by the Hudgens and their successors for a number of years to designate the business which was being conducted by them. Under such circumstances, a property right attaches to the name which the law recognizes and protects. *Reid v. St. John*, 68 Cal. App. 348, 229 P. 863. Originally the trade-mark which is the subject of this litigation was, presumably, a personal one, in that it indicated to the public that the personal care and skill of the Hudgens were exercised in producing the goods or rendering the services sold. By the sale of the business and the trade-mark the latter had become impersonal, indicating merely that the business was the same one which had for some time been carried on under that name. The general rule is that a personal trade-mark or trade-name is

not assignable. "An exception to the general rule has, however, been made where the mark or name has been so employed as to be deprived of its personal nature and has come to indicate that the goods bearing it are of a certain standard, kind or quality or are made in a certain manner or after a certain formula." 26 R. C. L. 865. The same exception should apply where services of a certain standard, kind, or quality are rendered, and the name under which such a business is conducted is properly transferable under section 993 of the Civil Code.

[4] Under the facts shown in this case, the defendants were, successively, the owners of the trade-mark or trade-name, which was used in connection with the business which they had operated. Appellant urges as a ground for reversal that a trade-mark or name cannot be sold or assigned except in connection with an assignment of the particular business in which it has been used. With this statement we agree. "The right to a trademark or trade name cannot exist as a mere abstract right, independent of or disconnected from the business in which it is used." 26 R. C. L. 838. "A trade-name exists as an incident of the business in which it was lawfully acquired, and with which it remains identified. As a mere abstract right, having no reference to any particular property, commodity, or business, it cannot exist. Separated from the business to which it belongs and with which it is identified, it is not a species of property, and cannot be sold or transferred as such. *American Steel Foundries v. Robertson* [269 U. S. 372], 46 S. Ct. 160, 70 L. Ed. 317. The physical elements or assets of a business may not be sold to one and the good will and trade-name thereof to another, for, when the good will and trade-name is separated from the business to which it applies, it is thereby destroyed, and cannot thereafter be the proper subject of a sale. As it is sometimes expressed, 'the shadow cannot be separated from the substance.'" *Children's Bootery v. Sutker*, 91 Fla. 60, 107 So. 345,

348, 44 A. L. R. 702 and note. See, also, note to *Falk v. American West Indies Trading Co.* (N. Y.) 1 L. R. A. (N. S.) 704, 708.

[5] For these reasons the defendants owned nothing which they could be required to separately transfer to the receiver, and their assignment to the receiver passed no title. In *re Jaysee Corset Co.* (D. C.) 201 F. 779; 63 Cor. Jur. 513. "It may be stated as a general rule that a trademark or trade name is not an article of property that passes from hand to hand by assignment separate from the business of the owner of the mark or name, but that, in order to convey the right of user, the transfer must be coupled with the transfer of some product or business with which it has become identified. The reason for this is that if the bare right of user could be transferred the name or mark would no longer serve to point out and protect the business with which it has become identified, or to secure the public against deception, but would tend to give to a different business the benefit of the reputation established by the business to which the name had previously been applied." 26 R. C. L. 864.

[6] Also the court had no jurisdiction to order a sale of the trade-mark under the facts shown. "A trademark cannot be seized and sold upon execution or attachment, apart from the business in which it has been used." 63 C. J. 520; 26 R. C. L. 866. We, therefore, have a situation where the appellant is complaining of a sale by the receiver of something which did not exist, to the plaintiff which acquired nothing thereby. Appellant has not been aggrieved by the orders, but, on the contrary, has received a credit on the judgment standing against her. There has been no miscarriage of justice by the orders erroneously made. Code Civ. Proc. § 938.

The appeals are dismissed.

We concur: CONREY, P. J.; HOUSER, J.

WELLS v. LLOYD et al. *
Civ. 9074.

District Court of Appeal, Second District,
Division 1, California.

July 12, 1935.

Hearing Denied by Supreme Court
Sept. 6, 1935.

1. Trial ⇨177

In action for fraud, trial by jury *held* not waived because defendants and plaintiff moved for instructions directing verdict where parties were not in agreement that evidence was without conflict, but each was contending that all of inferences of fact ran in his favor (Code Civ. Proc. § 631, subd. 3).

2. Trial ⇨177

Trial by jury in action for fraud *held* not waived on ground that both sides moved for directed verdict where plaintiff's requested instruction for directed verdict was not a "motion for directed verdict" (Code Civ. Proc. § 631, subd. 3).

[Ed. Note.—For other definitions of "Motion," see Words & Phrases.]

3. Trial ⇨176

Motion for directed verdict is regarded as demurrer to evidence, and hence such motion alone does not waive submission of case to jury on denial of motion (Code Civ. Proc. § 631, subd. 3).

4. Conspiracy ⇨13

In action by building and loan association's trustee in bankruptcy for conspiracy to defraud bankrupt in misrepresenting value of assets of another building and loan association which bankrupt had acquired, if proof showed conspiracy, defendant bank could not claim distinction between those acts in which it participated and those acts and representations in which bank had no part, since bank would be answerable for all of acts and statements of its coconspirators.

5. Appeal and error ⇨927(7)

On appeal from judgment for plaintiff on directed verdict, appellate court must disregard all conflicts in evidence and accept as true evidence which tends to show defendant blameless, and must draw all inferences from facts in evidence most strongly in favor of defendant.

6. Conspiracy ⇨13

Where conspiracy exists, none of conspirators are to be exonerated merely because means employed to accomplish common purpose were unknown or unanticipated in beginning, or because they did not join in or know of acts of their coconspirators, or because object accomplished differs from one originally contemplated.

7. Conspiracy ⇨1

"Conspiracy" is a combination of two or more persons to accomplish by concerted action a criminal or unlawful purpose or a lawful purpose by criminal or unlawful means, essence of conspiracy being that parties should have common purpose or design.

[Ed. Note.—For other definitions of "Conspiracy," see Words & Phrases.]

8. Conspiracy ⇨21

In action by building and loan association's trustee in bankruptcy against promoters of another building and loan association which had been acquired by bankrupt, and against bank, on ground of conspiracy to defraud bankrupt, if conspiracy was shown, whether acquisition of bankrupt's certificates for bonds of acquired association was within common purpose of guilty defendants was question of fact.

9. Conspiracy ⇨21

In action by building and loan association's trustee in bankruptcy against promoters of another building and loan association which had been acquired by bankrupt, and against bank, whether bank conspired with codefendants to defraud bankrupt in exchanging bankrupt's certificates for bonds of acquired association *held* for jury.

10. Damages ⇨18

Generally, wrongdoer is liable to person injured in compensatory damages for natural and direct or proximate consequences of his wrongful act or omission (Civ. Code, § 3333).

11. Negligence ⇨136(25)

Where different conclusions may be drawn from evidence as to whether act is proximate cause of injury or damage, question should be left to jury (Civ. Code, § 3333).

"Proximate cause" of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause.

[Ed. Note.—For other definitions of "Proximate Cause," see Words & Phrases.]

12. Fraud ⇨64(1)

In action by building and loan association's trustee in bankruptcy against promoters of building and loan association which had been acquired by bankrupt, and against bank for fraud in inducing bankrupt to exchange its certificates for bonds of acquired association, whether bank's misrepresentations that acquired association held valid permit to do business and that acquired as-

sociation had in bank certain sum of money were proximate cause of bankrupt's loss because acquired bonds were worth half of their alleged value *held* for jury (Civ. Code, § 3333).

13. Fraud ⚡30

That bank, through use of certificate of deposit, made it possible for building and loan association to sell its stock as that of an operating building and loan association did not render bank liable for distinct and independent frauds, consisting of representations in which bank did not participate, or which bank could not reasonably have anticipated would be made.

14. Fraud ⚡64(1)

In action by building and loan association's trustee in bankruptcy against promoters of another building and loan association which had been acquired by bankrupt, and against bank which had certified that it had certain sum of money belonging to acquired association, for fraud in inducing bankrupt to exchange its certificates for bonds of acquired association, whether representations as to value of bonds and other assets were statements of fact or mere expressions of opinions *held* for jury.

15. Fraud ⚡64(3)

In action by building and loan association's trustee in bankruptcy against promoters of another building and loan association which had been acquired by bankrupt, and against bank, for fraud in inducing bankrupt to exchange its certificates for bonds of acquired association, question of fraudulent nature of statements as to value of bonds *held* for jury.

16. Bankruptcy ⚡303(2)

In action for fraud by building and loan association's trustee in bankruptcy against promoters of another building and loan association which had been acquired by bankrupt, and against bank, that one of promoters of acquired association was director of bankrupt and hence in fiduciary relation *held* immaterial as respects bank's liability which depended on actual fraud or on participation with guilty knowledge in breach of duty of bankrupt's fiduciaries.

17. Pleading ⚡248(2)

Change of theory as to basis of recovery or as to measure of damages is not change of cause of action or substitution of new and different action for original.

18. Limitation of actions ⚡127(3)

Amended complaint *held* not to state new cause of action so as to be barred by limitation where party claiming bar of statute was made defendant by original complaint which

set up same transaction and sought recovery of damages, and amended complaint was but amplification of original.

19. Bankruptcy ⚡145(4)

Trustee in bankruptcy of building and loan association *held* entitled to maintain action for fraud in inducing bankrupt to exchange its certificates for bonds of another building and loan association which bankrupt had acquired.

20. Estoppel ⚡58

Building and loan association's trustee in bankruptcy *held* not estopped from maintaining action for fraud in inducing bankrupt to exchange its certificates for bonds of another association which bankrupt had acquired on ground that bankrupt knew that it had been defrauded for two years before bringing action and that in meantime defendant acquired assets of codefendant without knowledge of bankrupt's claims against codefendant, where it was not shown that bankrupt knew of defendant's purchase of codefendant's assets and no injury to defendant was alleged or shown.

21. Bankruptcy ⚡145(4)

As respects right of trustee in bankruptcy of building and loan association to recover damages for fraud in inducing bankrupt to exchange its certificates for bonds of another building and loan association which bankrupt had acquired, bankrupt *held* not required to recoup its loss by questioning validity of certificates transferred to innocent purchasers, since bankrupt's loss was fixed when it parted with its property, and bankrupt was not obliged to engage in litigation with certificate holders who were innocent victims of fraud.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Myron H. Wells, as trustee in bankruptcy for the estate of the Bay Cities Guaranty Building-Loan Association, bankrupt, who was substituted as plaintiff in the place and stead of the Bay Cities Guaranty Building-Loan Association, against Elwood Lloyd IV and others. From a judgment, the Bank of America and another appeal.

Reversed.

Freston & Files, of Los Angeles (Louis Ferrari, of San Francisco, and Edmund Nelson, of Los Angeles, of counsel), for appellants.

A. I. McCormick and Guy Richards Crump, both of Los Angeles, for respondent.

SHINN, Justice pro tem.

This is an action prosecuted by the trustee in bankruptcy of the estate of Bay Cities Guaranty Building-Loan Association, a corporation, bankrupt, to recover damages alleged to have been suffered by the bankrupt corporation by reason of alleged fraudulent acts of the defendants. The action was brought by the corporation before bankruptcy, the trustee, as such, being thereafter substituted as plaintiff. Upon the trial the action was dismissed as to all defendants except Merchants National Trust & Savings Bank of Los Angeles, herein referred to as the bank, and its successor, Bank of America.

The case was tried before a jury which, under an instruction of the court so to do, rendered a verdict in plaintiff's favor. The question of the amount of plaintiff's damage was submitted to the jury and was fixed by the verdict at the sum of \$60,000.

Appellants assign error in the giving of the first instruction, contending that no fraud was shown on the part of the bank and that in any event there were issues of fact other than the question of damages, which should have been submitted to the jury. In addition to a denial of the claims of appellants, respondent takes the position that trial of questions of fact by the jury, except as to the issue of damages, was waived. The alleged waiver is to be found, if at all, in an agreement of the parties that there were no questions of fact to be decided and that therefore the case should be withdrawn from the jury and decided by the court upon the questions of law presented. Whether there was such an agreement must be determined from a consideration of the acts and statements of the parties at the time the evidence was closed. At that point defendant made a motion for nonsuit, specifying certain grounds therefor. This motion was denied. Defendant then moved the court that the jury be instructed to render a verdict for defendant, basing this motion upon the same grounds as the motion for nonsuit. This motion was denied. Instructions were presented to the court by each party, those of the defendant, at least, covering the entire case. The case was argued to the jury and, upon conclusion of the argument, the court instructed the jury to render a verdict in plaintiff's favor and to assess the damages according to the theory adopted by the court for the measurement thereof. The instruction for di-

rected verdict was requested by plaintiff. Plaintiff now invokes the rule that mutual requests for an instructed verdict amount to a withdrawal of the case from the jury and a consent that the same may be decided by the court. This rule is one which has received general recognition in the greater number of state courts and in the federal courts. In numerous other jurisdictions the courts have declined to adopt it. The question has not been presented to an appellate court in California, at least no decision has been cited to us dealing with this question.

The basis of the rule relied upon by respondent, which is sometimes referred to as the New York rule, is that mutual motions for an instructed verdict amount to a waiver of trial by jury. The foundation of the waiver rests in the tacit agreement that there are no questions of fact for the jury to determine. The waiver of jury trial is held to be the necessary result of such agreement. *Beuttell v. Magone*, 157 U. S. 154, 15 S. Ct. 566, 39 L. Ed. 654; see, also, 64 Cor. Jur. 434, and notes 18 A. L. R. 1433, and 69 A. L. R. 634. The rule does not apply where either of the moving parties, after denial of the motions, requests that the case be submitted to the jury. *Empire State Cattle Co. v. Atchison, T. & S. F. R. Co.*, 210 U. S. 1, 28 S. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70. See note, 18 A. L. R., pages 1446 and 1449.

In the states where the rule is not followed it is held that motions by each of the parties for a directed verdict do not, of themselves, establish consent that no questions of fact are involved, and therefore do not amount to a waiver of trial by jury. In these states it is held that a case may be withdrawn from the jury, but that something more than motions of each party for a directed verdict is required to show an agreement to a trial by the court, such as an express agreement that there is no dispute as to the facts or an express waiver of jury trial in connection with motions for an instructed verdict.

[1-3] Well-reasoned opinions are to be found supporting the general rule and also in opposition thereto. The question in each case is whether the record shows a sufficient waiver of jury trial. In this state there are several methods by which a jury may be waived. The only one which might apply here is the one found in subdivision 3, § 631, Code of Civil Pro-

cedure, which provides that the waiver may be made by oral consent in open court, entered in the minutes. We are of the opinion that the proceedings had, as set forth herein, do not show a waiver. The parties were not in agreement that the evidence was without conflict. Each was contending that all of the inferences of fact ran in his favor. According to the plaintiff, fraud on the part of the bank was proven and damage as the direct result thereof. According to the defendant, no fraud was shown nor any damage resulting from the acts of the defendant bank. Where the opposing parties hold such contrary views as to what facts are proved directly, or by inference, it is difficult to understand how it can be said that the parties agree that the facts are undisputed and that questions of law only are involved. In some jurisdictions where the majority rule has been long established, motions by each party for a directed verdict are held to amount to a waiver of jury trial, even though the facts are in dispute. But we think there is no reason why the rule of implied waiver should ever be followed except where it clearly appears that the parties have agreed that the evidence upon all of the material issues is unconflicting. So much, at least, should be shown in this state, where the methods of waiver of jury trial are prescribed by statute, before it could properly be held that the parties have even substantially complied with the requirement that a jury may be waived by oral consent, expressed in open court and entered in the minutes. We therefore conclude that the case was not withdrawn from the jury. An additional reason for so holding is the fact that the presentation of plaintiff's requested instruction for a directed verdict was not a motion for a directed verdict. In *re Easton*, 118 Cal. App. 659, 5 P.(2d) 635; *Estate of Caldwell*, 216 Cal. 694, 16 P.(2d) 139. While a party, in requesting an instruction for a directed verdict, asks that the case be taken from the jury, we can accord to such request only a limited effect. We cannot say that the party has thereby waived the right to jury trial, and to preserve his right must at some future stage withdraw his request and ask for submission to the jury. It is not an uncommon practice for each party to submit an instruction for a directed verdict in his favor. Also under our practice a motion for a directed verdict is regarded as a demurrer to the evidence (*Hunt v. United*

Bank & Trust Co., 210 Cal. 108, 291 P. 184), and it assumes no different character in a case where each party makes a motion. We hold that such motions alone do not waive submission of the case to the jury upon denial of the motions.

Lloyd Building & Loan Association was organized as a guarantee capital association, and had issued, without consideration, 1000 shares of guarantee capital stock. The issued stock was held for the benefit of the association, which had no other assets of more than nominal value and had not received a permit from the building and loan commissioner to do business. In order to obtain a permit, without which it could not lawfully engage in business, it was necessary for the Lloyd Company to have at least \$100,000 in cash capital and at least \$10,000 for organization and operating expense. Under the rules and regulations of the commissioner, a guarantee capital building and loan association, to be qualified to do business, was required to have \$100,000 paid-in capital. An applicant for a permit was required to furnish a certificate from its bank showing it to have not less than the sum of \$100,000 on deposit to its credit. Lloyd Association obtained a permit in the following manner:

Defendant Commagere, acting in concert, with Lloyd Association, gave Merchants National Bank his thirty-day promissory note for \$120,000, interest on which, for said period, was guaranteed by Alvin H. Frank & Co. The bank credited the account of Commagere with the amount of the note. Commagere purchased a cashier's check payable to himself for a like amount, and, with the cashier's check purchased, in the name of Lloyd Association, and the bank issued, its certificate of deposit for \$120,000, payable in thirty days. This certificate was indorsed and placed in an escrow with the escrow department of the bank, together with certificates for 1,000 shares of the capital stock of Lloyd Association, being all of the outstanding stock. Nine hundred and ninety-five of the shares were in the name of Commagere, and 1 share in the name of each of five other persons. Escrow instructions were given the bank by Lloyd Association, which provided that the stock might be sold for \$120,000 within a thirty-day period; that if this money was provided from stock sales, certificates were to be issued to the purchasers, the money received therefrom was to be used to pay

the Commagere note, and the certificate of deposit was to be delivered to Lloyd Association. If the full sum of \$120,000 should not be received from stock sales, such sums as had been paid in were to be returned to the persons furnishing the same, the stock was to be returned to Lloyd Association, and the certificate of deposit was to be delivered to the note department of the bank for the purpose of paying the Commagere note.

The note was given, the certificate issued, and the escrow opened on October 23, 1928, and on the same day a vice president of the bank wrote a letter to the building and loan commissioner, stating that the bank had on that day issued a certificate of deposit to Lloyd Association in the sum of \$120,000. By the use of this letter Lloyd Association procured from the building and loan commissioner, on November 9, 1928, a permit under which it became authorized to engage in the building and loan business in Los Angeles.

On October 22, 1928, defendant Commagere had arranged with a bond house, Alvin H. Frank & Co., to purchase, for cash, bonds owned by the company at their par value of \$120,000. Nothing was done toward completing this purchase, nor was anything accomplished toward selling, for cash, the stock of Lloyd Association, as was contemplated when the escrow was opened.

At about the time the permit was issued, Elwood Lloyd IV and Commagere contacted the officers of Bay Cities Building & Loan Association, a company engaged in the building and loan business in Santa Monica. The Bay Cities company was desirous of acquiring a building and loan association doing business in Los Angeles, and entered into negotiations to acquire the Lloyd Association, under representations that the latter held a permit and had assets of the value of \$120,000.

Alvin H. Frank & Co. agreed to accept certificates of \$120,000 par value of the Bay Cities company for the bonds Commagere had agreed to buy, and Bay Cities agreed to accept the bonds and the 1000 shares of the outstanding stock of Lloyd Association in exchange for its certificates. This exchange was completed through the same escrow in the bank. Bay Cities thereupon became the owner of the bonds and stock, and Alvin H. Frank & Co. acquired the Bay Cities certificates, which it sold to its customers. The certificate of

deposit was delivered to the note department of the bank, together with \$700, as interest, and the note was canceled. Defendant Commagere received some \$4,400 commission from Frank & Co. The bank received \$700 interest and the return of its certificate of deposit and \$100 as an escrow fee. The bonds which Bay Cities acquired were found by the jury to be worth only \$60,000. The difference between that amount and the face value of the Bay Cities certificates, or \$60,000, was awarded plaintiff as damages.

Plaintiff claims to have been defrauded, in that its principal object in making the deal being to acquire the Lloyd Association, so that it could engage in business in Los Angeles, it acquired only the stock of the Lloyd Association and a permit to do business procured from the building and loan commissioner, which was invalid because it had been obtained by fraud. Under the theory upon which the case was tried and submitted to the jury, plaintiff's damage must be regarded as the amount of the loss sustained in acquiring the bonds, which were actually worth \$60,000 less than they were represented to have been worth. No other damage was claimed or proven.

With reference to the claim of the bank that there was no evidence of any wrongdoing on its part, we will point out briefly sufficient reasons why we must hold otherwise. The statement in the letter of the bank to the building and loan commissioner to the effect that a certificate of deposit had been issued in favor of the Lloyd Association was false. It was a positive assertion not warranted by the information of the vice president who signed the letter. It was a suppression of material facts of which the author of the letter had knowledge. The certificate of deposit never left the custody of the bank, but was at all times held as security for the Commagere note. Mr. Brown knew, when he wrote the letter, that the bank would never part with the possession of the certificate of deposit or any money thereon until funds were provided from some other source for the payment of the Commagere note. Therefore the statement that the certificate had been issued to the Lloyd Association was true only in a limited sense and not in the sense in which the statement would be understood, and was understood, by the building and loan commissioner. The representation regarding

the certificate of deposit was made by the bank with the intention that it should be sent to the commissioner. Merchant's National Bank, therefore, actively participated in the deceit practiced upon the building and loan commissioner as a result of which a permit was issued.

But this fact, alone, is not necessarily sufficient to fix responsibility on the bank for what transpired later. Bay Cities made its purchase in the belief that Lloyd Association had a valid permit to do business, and would not otherwise have purchased. Its loss, however, was sustained because of its belief that the assets of Lloyd Association were worth more than was their actual value. The liability of the defendants can arise only out of fraudulent representation as to the value of Lloyd assets. It is necessary, therefore, to inquire into those representations and the question of responsibility. The question of conspiracy is presented at the outset.

It is alleged in the amended complaint that all of the acts of the defendants, down to and including the exchange of properties, were committed under a general conspiracy and scheme of all of the defendants, except Bank of America, to cheat and defraud Bay Cities and others. It is also alleged that all of the same defendants falsely and fraudulently represented the assets of Lloyd Association to be worth \$120,000, and that Bay Cities believed and relied upon all of the said acts and statements of the defendants and so doing, and relying especially upon the false representations of the bank concerning the certificate of deposit, exchanged its certificates for the stock of the Lloyd Association, thus acquiring the bonds.

Bay Cities was entitled to receive a valid permit and it received one that was invalid. It suffered detriment on this account. It sustained further damage, in the amount of \$60,000, in accepting the bonds at a valuation of \$120,000, and this was the only damage for which a recovery was had.

[4] Appellants, in denying responsibility for the acts which caused the damage, rely upon a claimed distinction between those acts in which the bank participated and those acts and representations in which the bank had no part. No such distinction may be drawn if the proof shows a conspiracy under which the bank would be answerable for all of the acts and state-

ments of its coconspirators. Respondent claims that the evidence conclusively proves the existence of such a conspiracy.

[5] Under the rule limiting the right of the court to direct a verdict, which applies on this appeal, we must disregard all conflicts in the evidence and accept as true the evidence which tends to show the defendant blameless, and must draw all inferences from the facts in evidence most strongly in favor of the defendant. *Estate of Lances' Estate*, 216 Cal. 397, 14 P. (2d) 768. We must determine whether it might reasonably be held that the exchange of properties with Bay Cities was accomplished independently of the plan in which the bank joined with Commagere and Lloyd Association. We are not here permitted to consider the weight of the evidence which would support such a finding, other than to decide whether it would have sufficient substance to support a reasonable conclusion that the end accomplished was not within the scope of what the bank had a purpose to do or assisted in doing.

As we have heretofore pointed out, the original plan of the promoters, Lloyd and Commagere, was to qualify the Lloyd Association, and, thereafter, to sell 1000 shares of the stock for cash; the exchange with Bay Cities was agreed upon later. The thing which was ultimately accomplished was not shown to have been within the contemplation of the parties in the beginning.

[6] It was not shown without contradiction that Brown knew that the letter he wrote to the building and loan commissioner was to be used to obtain a permit for the Lloyd Association or that he knew that such a letter was required before a permit would be issued, although, as we have stated, the statement was knowingly false. The bank had no part in the negotiations between Lloyd Association and Bay Cities. It did not know, until a day or two before the exchange of property was made, that Bay Cities was an intending purchaser. It acted only as escrow holder of Bay Cities certificates and the property that was exchanged therefor. It knew nothing of the representations made by Lloyd Association as to the value of the bonds, or of the investigation thereof made by Bay Cities, or the knowledge it acquired. The terms of the exchange it knew by reason of the escrow. The position of purchasers of stock, under the orig-

inal plan, would have been very different from that of Bay Cities, after its purchase was concluded. While the bank may have entered into a conspiracy with Lloyd and Commagere at any time, its participation, even as escrow holder of Bay Cities certificates and the bonds, was without knowledge of the circumstances under which the exchange had been arranged. It is to be conceded, that where a conspiracy exists, none of the conspirators are to be exonerated merely because the means employed to accomplish a common purpose were unknown or unanticipated in the beginning, or because they did not join in or know of the acts of their coconspirators, or because the object accomplished differs from the one originally contemplated. But we think the present case is one in which all of these facts must be given consideration in deciding whether the bank entered into any conspiracy and if it did, whether it had a common purpose with the others in the conspiracy to perpetrate the fraud with which it was charged and for which it was held liable by the judgment.

[7-9] The conspiracy that must be shown is a combination of two or more persons to accomplish by concerted action a criminal or unlawful purpose or a lawful purpose by criminal or unlawful means. *Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 P. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165.

It is of the essence of a conspiracy that the parties should have a common purpose or design. Whether the defendants conspired together for any purpose, and, if so, what that purpose was, were questions of fact. And if a conspiracy should be found to exist between the bank and some of the other defendants, it is a question of fact whether the object accomplished, namely, the acquisition of the Bay Cities certificates for the consideration paid, was within the common purpose of the guilty defendants. When we take into consideration the extent of the bank's interest in the transactions, its limited participation in and knowledge of entire scheme of the other defendants, and of the methods employed to put them into effect, we cannot say that the evidence establishes, to the exclusion of every other reasonable conclusion, that the bank conspired to perpetrate the fraud on Bay Cities, which was ultimately accomplished. That question, we think, should have been submitted to the jury.

Assuming, therefore, that the bank is not responsible, as a matter of law, for the active representations made by the other defendants as to the value of the bonds, the next question is whether the acts in which the bank did participate were necessarily the proximate cause of the loss sustained. Under the court's instruction, this issue was tried and determined by the jury upon the theory that the damage represented by the disparity in the value of the bonds resulted proximately from the acts of the defendants in qualifying the Lloyd Association to do business, which was done for the purpose of enabling the association to sell its stock. This view of the case, we think, was erroneous.

[10] Under section 3333, Civil Code, the measure of damages for the breach of an obligation not arising from contract is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. The Code declares the general law on the subject, stated in 17 Corpus Juris 728, as follows: "It may be stated as a broad general rule that a wrongdoer is liable to the person injured in compensatory damages for all the natural and direct or proximate consequences of his wrongful act or omission."

Proximate cause is defined in 22 Ruling Case Law 110, as follows: "The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. * * * It is the efficient cause." These definitions have oftentimes been approved by our courts.

The negotiations with the Bay Cities Association commenced shortly before November 9th. It was represented to the Bay Cities Association by the Lloyd Association that the latter held a valid permit and had assets of the value of \$120,000. The Bay Cities Association was furnished with a list of the bonds belonging to Alvin H. Frank & Co., which Commagere had agreed to buy and it was willing to take over the Lloyd Association if the bonds were worth par. Bay Cities made some inquiry as to the value of the bonds. Mr. Rishell, president of the company, and one or two others of its directors were appointed by the board to investigate the value of the bonds. Mr. Rishell inquired of Alvin H. Frank & Co., by whom he was

told that the bonds were quoted at par, but that Alvin H. Frank & Co. would not guarantee to sell them at par. On November 26 he went to San Francisco, where he interviewed the building and loan commissioner, confirmed the fact that Lloyd's held a permit and learned that the commissioner was not interested in the value of the bonds so long as they were a legal investment for the funds of a building and loan association. While in San Francisco, he interviewed a banker and obtained some information concerning some of the bonds. On the morning he left Los Angeles for San Francisco he delivered the Bay Cities certificates to Mr. Stintin, vice president of Bay Cities, to be placed in escrow. Stintin took the certificates to the bank where he entered into an escrow agreement to exchange them for the stock and bonds. This escrow was closed the second day following. There was testimony to the effect that this exchange was completed before Mr. Rishell intended it should be done.

It was alleged in the amended complaint that the bank, with certain of the other defendants charged, joined in making the representations as to value, but the evidence does not show that to be a fact. It was not shown that the bank had any knowledge of the value of the bonds or the value they were considered to have by the officers or directors of the Bay Cities Association or that it made any representations concerning them. It does not appear that the bank was under any duty to investigate the value of the bonds or to make inquiry as to any representations that may have been made concerning the same. The fact that the Lloyd Association was qualified as a guarantee stock building and loan association was an implied representation that, at the time it received its license to do business, it had a paid-in capital of at least \$100,000. The representation of the bank to the building and loan commissioner was that the capital of the association in the amount of \$120,000 consisted of cash on deposit in the bank. The officers and directors of Bay Cities Association presumably knew what was required in order to qualify the Lloyd Association. They did not, however, purchase the Lloyd Association stock under the belief that the latter association possessed any cash or any capital assets other than the bonds. They, therefore, were not deceived as to what the assets were.

Several other questions of fact were presented which we think should have been submitted to the jury. These related to questions of proximate cause and reliance by Bay Cities Association upon the different representations made. It did not necessarily follow, as a natural or probable result of the fraud in procuring the permit that some one would purchase the assets of the Lloyd Association for twice their real worth. According to the complaint, Bay Cities' purchase was made in reliance upon the represented value of the assets. Plaintiff's evidence tended to show that Bay Cities relied upon express representations as to the value of the bonds themselves. If such values had not been misrepresented, or the bonds had been worth the full price paid, plaintiff would have sustained no substantial damage, for there was no representation at any time that the property purchased was worth more than the price paid. Again, it appears that Bay Cities Association made an independent investigation of the value of the bonds, and superficial as that investigation may have been, it does not appear that the purchaser did not to some extent rely thereon.

Respondent contends that these are immaterial facts; that the parties are joint tort-feasors; and that the value of the bonds is material only as affecting the question of damages. He takes the position that the bank's participation in the fraud, in obtaining the permit, directly induced Bay Cities to buy, as without a permit it would not have bought. We may concede the last statement to be correct, but we do not agree that the representation as to the value of the bonds does not go to the question of the right to recover as well as to the measure of damages. Each fact which, to a greater or less extent, induced the Bay Cities' purchase is not necessarily the proximate cause of its damage.

[11] The question of proximate cause is one for the jury in every case where there is room for a reasonable difference of opinion.

"Thus, where the facts of the particular case are disputable, and are of such character that different minds might reasonably draw different conclusions therefrom, a question of fact is presented properly determinable by the jury. * * * So where the rule of intervening efficient cause is relied on by the defendant, it is

ordinarily a question for the jury whether there was such an intervening efficient cause as would prevent the negligent act or omission of the defendant from being the proximate cause of injury. * * * Where it is claimed that the defendant's act was not the proximate cause of injury because the result could not reasonably have been foreseen, it is ordinarily a question for the jury whether the result should reasonably have been foreseen." 22 R. C. L. 148-150.

Where different conclusions may be drawn from the evidence as to whether the act is the proximate cause of injury or damage, the question should be left to the jury. *Mansfield v. Eagle Box & Mfg. Co.*, 136 Cal. 622, 69 P. 425; *Anderson v. Seropian*, 147 Cal. 201, 81 P. 521; *Elder v. Rose*, 63 Cal. App. 545, 219 P. 74; *Kreitzer v. Southern Pacific Co.*, 38 Cal. App. 654, 177 P. 477.

[12] We are of the opinion that it cannot be said, as a matter of law, that the loss was sustained as a natural and probable consequence of the representation joined in by the bank that Lloyd Association held a valid permit or the representation that it had in the bank \$120,000 at the time the permit was issued. There was sufficient evidence upon which the jury might have decided either that Bay Cities Association did, or that it did not, part with its property as the direct and proximate result of the representations made solely by and on behalf of the Lloyd Association. These were questions of fact which the jury should have been allowed to decide.

[13] Because the bank, through the use of the certificate of deposit, made it possible for the Lloyd Association to sell its stock as that of an operating building and loan association, it does not follow that it thereby became responsible for distinct and independent frauds, consisting of representations in which the bank did not participate, or which it could not reasonably have anticipated would be made. Whether it should have anticipated the acts of the other defendants was a question for the jury. The fact that without participation on the part of the bank the loss would not have been sustained is not sufficient to prove as a matter of law that the fraud in which the bank did join was the proximate cause of the loss.

[14] Another point, unrelated to those already discussed, is that it is open to question whether the representations as to the value of the bonds and other assets were statements of fact or mere expressions of opinions. We cannot say that the jury could not have classed them as opinions only. *Meeker v. Cross*, 59 Cal. App. 512, 211 P. 229; *Coleman v. Dawson*, 110 Cal. App. 201, 294 P. 13; *Reton v. J. D. Millar Realty Co.*, 132 Cal. App. 708, 23 P.(2d) 419. Lloyd and Commagere were not shown to have had or claimed to have any peculiar or special knowledge regarding the bonds. Bay Cities was not hindered in any way in making a full and independent investigation. No claim is made of any representation of fact in that transaction, aside from the statements as to the value of the bonds. We think the jury should have been allowed to decide whether the representations as to values were more than expressions of opinion. Upon the whole evidence we cannot say that there could not be a reasonable difference of opinion on that issue.

[15] Furthermore, the question of the fraudulent nature of the statements was in issue. There was no evidence which would compel the conclusion that the representations were made in the knowledge that they were untrue or were not warranted by the information of those by whom they were made. We cannot say that the information given Commagere by Alvin H. Frank & Co. was legally insufficient to justify a reasonable belief that the bonds were worth par. The evidence upon this issue of fraudulent intent called for its submission to the jury.

[16] Elwood Lloyd was a director of Bay Cities at the time of the transaction. Respondent argues that because of his fiduciary relationship to his company he owed it a duty which he breached by his failure to make a full and fair disclosure of all the facts which might have had an influence upon his company's decision. There can be no doubt as to the correctness of this position. The fact of the fiduciary relationship, however, is not needed to show the culpability of Lloyd in concealing the circumstances under which the permit was issued and in failing to disclose that Lloyd Association had no assets, either in money or bonds. So far as Lloyd is concerned, his breach of duty to his company gave rise to a cause of action

against him regardless of the motives that prompted his actions, but this fact does not alter the views we have expressed upon the other points decided. There was no evidence that the bank knew that Lloyd was a director of Bay Cities. The fiduciary relationship was an important fact in the proof required to show the liability of Lloyd, but the same measure of proof is not applicable to the case of the other defendants. The liability of the bank must depend upon actual fraud or upon participation with guilty knowledge in the breach of duty of the fiduciaries of Bay Cities.

[17, 18] Appellants call attention to certain particulars in which the allegations of the amended complaint differ from those of the original complaint and maintain that a new and different cause of action is stated in the amended complaint. This argument is addressed to the proposition that the action was barred by the statute of limitation before the amended complaint was filed. It is unnecessary to discuss this point with particularity. Appellant bank was made a defendant by the original complaint. Each complaint set up the same transaction and sought recovery of damages. The amended complaint was but an amplification of the original. A change of theory as to the basis of recovery or as to the measure of damages is not a change of cause of action or the substitution of a new and different action for the original. *Hutchinson v. Ainsworth*, 73 Cal. 452, 15 P. 82, 2 Am. St. Rep. 823; *Frost v. Witter*, 132 Cal. 421, 64 P. 705, 84 Am. St. Rep. 53; *Doolittle v. McConnell*, 178 Cal. 697, 174 P. 305; *Phillips v. Stark*, 186 Cal. 369, 199 P. 509; *Babcock v. Jewell*, 110 Cal. App. 323, 294 P. 30.

[19] Appellants' contention that the cause of action involved did not pass to the plaintiff, as trustee in bankruptcy of the estate of Bay Cities, is answered adversely by the decisions in the following cases: *In re Landis*, 41 F.(2d) 700 (C. C. A.); *Morris v. Standard Oil Co.*, 200 Cal. 210, 252 P. 605; *Wikstrom v. Yolo Fliers Club*, 206 Cal. 461, 274 P. 959; *Jackson v. Deauville Holding Co.*, 219 Cal. 498, 27 P.(2d) 643; *Connolly v. National Surety Co.*, 35 Ohio App. 76, 171 N. E. 870; *In re Gay* (D. C.) 182 F. 260; *In re Harper* (D. C.) 175 F. 412.

[20] Appellants urge the defense of estoppel. Briefly stated, the foundation of this defense is that Bay Cities knew it had been defrauded for some two years before it brought this action; that it made no complaint in the meantime, ratified the transaction by its silence and by allowing transfers to be made of some of the certificates which it had parted with, recognized the validity of the certificates and redeemed some of them; that in the meantime Bank of America acquired the assets of Merchants National Bank in a consolidation without knowledge of the Bay Cities' claims against Merchants National. A statement of the grounds of the claimed estoppel is sufficient to disclose its entire inadequacy.

Bay Cities was under no obligation to appellants to disclose or prosecute its claim against Merchants National Bank. It was not shown to have had knowledge of the purchase of Merchants National by appellant Bank of America. No occasion called for an assertion of its claim and hence its silence was not culpable. No injury to appellant Bank of America was either alleged or shown and no action was taken by that appellant that was induced by its want of knowledge of the facts. The court correctly held the defense of estoppel to be unsustainable. 10 Cal. Jur. 654.

[21] The further argument that Bay Cities should have recouped its loss by questioning the validity of the certificates transferred by Alvin H. Frank & Co. to innocent purchasers and attempting to throw the loss upon them does not tempt us to so rule. Its loss was fixed when it parted with its property. *Hines v. Brode*, 168 Cal. 507, 143 P. 729. It was not obliged to engage in litigation with its certificate holders who were the innocent victims of the fraud. *Knight v. Linzey*, 80 Mich. 396, 45 N. W. 337, 8 L. R. A. 476.

The liability of appellants was not established by evidence of that conclusive nature necessary to warrant an instructed verdict, and appellants therefore were deprived of the right of jury trial.

The judgment is reversed.

We concur: CONREY, P. J.; YORK, J.

ALES v. RYAN,*
Civ. 9475.

District Court of Appeal, First District,
Division 2, California.

July 24, 1935.

Rehearing Granted Aug. 23, 1935.

1. Physicians and surgeons ⇨18(10)

In action for malpractice, instruction that fact that a sponge was found in patient's abdomen would not support verdict against physician, and that it must be shown that sponge was left in abdomen due to physician's failure to exercise ordinary care *held* proper as against contention that the fact that sponge was found in abdomen constituted negligence per se.

2. Physicians and surgeons ⇨18(10)

In action for malpractice where contention was that surgeon left sponge in abdomen of patient, instruction that plaintiff had burden of proof and that fact the sponge was found in patient's abdomen raised no presumption that it was left there by negligence of the surgeon *held* proper as against contention that doctrine of *res ipsa loquitur* applied, where plaintiff assumed burden of proof during trial.

3. Trial ⇨260(8)

Refusal of instruction that surgeon though he acted gratuitously was bound to exercise ordinary care and skill *held* not error where subject-matter was fully covered by another correct instruction.

4. Physicians and surgeons ⇨16

Surgeon who, at request of medical director, performed operation at county hospital and was assisted by an interne and nurses who were employed and paid by hospital *held* not liable on doctrine of respondeat superior for negligent acts of interne or nurses, since relation of master and servant did not exist between surgeon and hospital employees.

5. Evidence ⇨571(3)

General rule that evidence of expert witnesses is offered to supplement general information of jurors and that they are not bound to accept the expert opinion does not apply in action for malpractice.

6. Physicians and surgeons ⇨18(10)

Instruction that only ground for recovery was on allegation of negligence that surgeon negligently left sponge in abdomen of patient and that there was no allegation charging surgeon with being unskilled or with using improper sponge *held* proper where complaint alleged only that surgeon negligently, carelessly, and recklessly left sponge in

abdomen of patient and sewed up incision without removing sponge.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Frank Ales, as administrator of the estate of Rose Carauddo, deceased, against Fred S. Ryan. From a judgment for defendant, plaintiff appeals.

Affirmed.

R. V. Bressani, David M. Burnett, and John M. Burnett, all of San Jose, for appellant.

Bohnett, Hill & Campbell, Frank V. Campbell, L. H. Schellbach, and D. T. Jenkins, all of San Jose, for respondent.

STURTEVANT, Justice.

As administrator of the estate of Rose Carauddo, the plaintiff has appealed from a judgment in favor of the defendant in an action brought to recover damages for alleged malpractice which the plaintiff claimed caused the death of his decedent. The points presented involve the soundness of certain instruction. Any facts necessary to a complete understanding of the record will be stated as the occasion may require.

[1] The trial court, at the request of the defendant, instructed the jury as follows: "The mere fact that a sponge was found in the abdomen of the deceased will not support a verdict against the defendant Fred S. Ryan in this case, for, in order for plaintiff to recover against Fred S. Ryan, it must be established that a sponge was left in her abdomen due to the failure of defendant Fred S. Ryan to exercise ordinary care." The plaintiff contends that the alleged negligence in the instant case was negligence per se and therefore that the above instruction was an erroneous statement of the law. He cites and relies on *McCormick v. Jones*, 152 Wash. 508, 278 P. 181, 65 A. L. R. 1019; *Moore v. Ivey* (Tex. Civ. App.) 264 S. W. 283; *Saucier v. Ross*, 112 Miss. 306, 73 So. 49; *Harris v. Fall* (C. C. A.) 177 F. 79, 27 L. R. A. (N. S.) 1174; 21 R. C. L. 388. The defendant attempts to distinguish each of those cases on the facts that were before the court. We cannot say he does not satisfactorily do so. But conceding, solely for the purposes of this

case, that the cases cited by the plaintiff support his contention, it must also be conceded that there are well-considered cases holding otherwise. In *Cassingham v. Berry*, 150 P. 139, the Supreme Court of Oklahoma was considering a case in which an instruction of the same import was given by the trial court. The plaintiff in that case made the same contention which this plaintiff now makes. In 150 P. 139, on page 141, the court said: "The basis and gist of this action was not the result of the operation, but negligence in the performance of it. If there was no negligence in the performance of the operation, then there was no cause of action, and could be no recovery; if there was negligence in the performance of the operation, than a recovery could be had. Whether or not the defendant exercised that degree of care in performing the operation that the law imposed upon him was the paramount question, and the test of the rights of the parties. And we think the defendant was entitled to this instruction, and, when taken in connection with the other instructions, that it did not prejudice the rights of the plaintiffs." To the same effect see *Rayburn v. Day*, 126 Or. 135, 268 P. 1002, 59 A. L. R. 1062; *Roark v. Peters*, 162 La. 111, 110 So. 106; *Funk v. Bonham* (Ind. App.) 151 N. E. 22; *Guell v. Tenney*, 262 Mass. 54, 159 N. E. 451; *Jackson v. Hansard*, 45 Wyo. 201, 17 P.(2d) 659. The last case cited was decided by the Supreme Court of Wyoming in 1933. It is a careful review of the authorities down to date. Having made that review, 45 Wyo. 201, 17 P.(2d) 659, on page 664, the court said: "And we think that under the evidence in this case as outlined above, the question of due care was not a question of law, but was one for the jury to decide, subject, of course, to the ordinary right of the trial judge in such cases." The trial court did not err in giving the instruction complained of.

[2] Upon the request of the defendant the trial court instructed the jury as follows: "The burden is upon the plaintiff to prove negligence on the part of defendant Fred S. Ryan, and it must be proved by a preponderance of the evidence. The law presumes that defendant Fred S. Ryan was free from negligence and the mere fact that a sponge was left in the abdomen of Rose Carauddo raises no presumption that it was left there by defendant Fred S. Ryan, or that it was left there by reason

of his negligence. And if it is just as probable that said sponge was left there by the negligence of another, or by reason of the mistake in the sponge count, or even by Fred S. Ryan under circumstances which would not amount to negligence on his part, then your verdict must be in favor of defendant Fred S. Ryan." Having quoted that instruction, the plaintiff contends that it was error because the doctrine of *res ipsa loquitur* applied to the instant case. We think that the point may not be sustained by the record before us. In introducing his case the plaintiff did not in the trial court present the point. He called Dr. Ryan as a witness in behalf of the plaintiff and examined him as to the facts of the operation. In the same manner he called other witnesses who were present at the operation. Thereafter he called Dr. Gattuccio, the doctor who performed the second operation, and discovered the presence of the sponge in the abdomen of decedent. In short, the plaintiff assumed the burden of proof and presented his entire case. When the plaintiff rested, the defendant made a motion of a nonsuit. That motion was denied, and thereafter the defendant proceeded to introduce his case. Under these circumstances we think that it is clear that the trial court did not err in giving the instruction complained of. *Bonneau v. North Shore R. R. Co.*, 152 Cal. 406, 412, 93 P. 106, 125 Am. St. Rep. 68.

[3] It is next contended that the trial court erred because it refused to give an instruction to the effect that the defendant, even though he acted gratuitously, was bound to exercise ordinary care and skill. Whether the instruction was correct or incorrect, the subject-matter was fully covered by an instruction that was given and which was as follows: "The fact that a physician or surgeon renders his services gratuitously does not absolve him from the duty to use reasonable and ordinary care, skill and diligence."

[4] The alleged act of malpractice complained of occurred while performing an operation at the county hospital of Santa Clara county, which is located in San Jose. The record does not disclose that defendant had any authority at the hospital except as stated in this opinion. Dr. D. R. Wilson, the medical director of the county hospital, has general charge of operations to be performed at the hospital and desig-

nates the individual who is to perform the operation. He diagnosed the decedent's case, recommended the operation, and summoned Dr. Ryan to perform it. Dr. Ayers, an interne of the hospital, was present and assisted. All nurses in attendance were employed by the hospital and not by Dr. Ryan. The operation performed by Dr. Ryan consisted in removing stones from the gall bladder. The decedent was very corpulent. An incision about eight inches in length was made in the abdominal cavity. In the course of the operation many sponges were used—forty or more. At times certain acts were performed by the defendant, at other times certain other acts were performed by Dr. Ayers, at other times certain acts were performed by the nurses who were present and assisting. Acting on the defendant's request, the trial court gave an instruction which, among other things, contained passages as follows: "if it is just as probable that said sponge was left there by the negligence of another * * * then your verdict must be in favor of defendant Fred S. Ryan." It also gave an instruction as follows: "If you find from the evidence that none of the nurses or attendants or doctors or assistants present at the operation of the deceased were in the pay or employ of defendant, Fred S. Ryan, then any negligence, if any, committed by any of said nurses, attendants, doctors, or assistants cannot be charged to Dr. Fred S. Ryan, unless you find that he directed the act complained of or that he knew of the existence of such negligent conduct and had a chance to remedy the fault, but failed to do so." But the trial court declined to give an instruction requested by the plaintiff which was worded as follows: "You are instructed that where a surgeon performs an operation at a hospital and an assistant surgeon acts under his direction, it is no defense to an action for negligently leaving a sponge in the patient's body that it may have been left by another surgeon." Asserting that the relation of respondeat superior existed between Dr. Ryan and the others in the room at the time the operation was performed, the plaintiff contends that the trial court erred in giving the first two instructions just mentioned and refusing the other. With this contention we do not agree. It cannot be said that the relation of master and servant existed between Dr. Ryan and any other person present in the room. There is no evidence that would justify the

application of the doctrine of *qui facit per alium facit per se*. The court did not err. *Guell v. Tenney*, 262 Mass. 54, 159 N. E. 451; *Maberto v. Wolfe*, 106 Cal. App. 202, 289 P. 218.

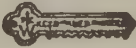
[5] Contending that the jurors may act on their general knowledge as laymen, that the evidence of expert witnesses is introduced solely to supplement the general information of the jurors, and that the jurors are not bound to accept and follow the opinions of experts, the plaintiff would have us follow that general rule in determining this case. We freely concede that the general rule is as claimed by the plaintiff, however, we think it is equally plain that there are well-defined exceptions to that general rule and that an action for malpractice falls within the exception. That was of the essence of our holding in *Ross v. Hieronymus*, 2 Cal. App. (2d) 258, 37 P.(2d) 837. See, also, *Jackson v. Hansard*, 45 Wyo. 201, 17 P.(2d) 659.

[6] Acting upon the request of the defendant, the trial court instructed the jury as follows: "The plaintiff in this action is limited to the allegation of negligence which he makes in his complaint. He can recover on no other ground. The only charge is that the defendants negligently left a sponge in the abdomen of Rose Caraudo. There is no claim that defendants were unskilled or that they negligently used any improper kind or type of sponge, or that an improper or a negligent kind of a sponge was used, or of using an improper sponge, or one not provided with rings or hemostats." The plaintiff asserts that said instruction was erroneous, but we think it was not. Paragraph IX of plaintiff's complaint was as follows: "That said operation was negligently, carelessly and recklessly performed by said defendants Fred S. Ryan and Doxey R. Wilson; that said negligence, carelessness and recklessness consisted in this: that they negligently, carelessly and recklessly left within the abdomen of said Rose Caraudo a large laparotomy sponge, and that after the gall bladder of said Rose Caraudo was removed the incision made therefor, was sewed up without removing said sponge." That clearly stated the claims of the plaintiff. No single ruling was made excluding any part or portion of all of the facts of and concerning the operation as it was performed by the defendant. The facts as to the kind of sponge used, the

manner in which it was used, and the ordinary practice in the particular neighborhood were testified to by the witnesses, and, so far as called to our attention, not a single erroneous ruling in the admission or exclusion of evidence occurred. We find no error in the record.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



8 Cal.App.2d 613

CONNER v. EAST BAY MUNICIPAL UTILITY DIST. et al.*

Civ. 9556.

District Court of Appeal, First District,
Division 1, California.

Aug. 5, 1935.

Rehearing Denied Sept. 4, 1935.

1. Highways ⇨183

One engaged in lawful occupation on public highway owes to person present without invitation and merely for purpose of satisfying curiosity only duty to refrain from wantonly or intentionally inflicting injury on such person.

2. Municipal corporations ⇨801(1)

Stopping in course of journey is normal use of street or sidewalk, and status of traveler is not lost by neglecting to constantly keep moving.

3. Municipal corporations ⇨801(1)

Whether traveler engaged in lawful occupation has remained at particular place on highway long enough to become onlooker rather than traveler is question for jury.

4. Municipal corporations ⇨821(1)

In action to recover for loss of eye sustained when flake of steel from chisel used by workmen placing connection in water main at street intersection struck pedestrian in eye, pedestrian who paused for purpose of ascertaining what was occurring on street remained a traveler, entitling him to protection accorded traveler, where evidence showed danger to be undisclosed.

5. Municipal corporations ⇨763(1)

Corporation and its employees engaged in placing connection in water main at street intersection were bound to employ implements, equipment, and devices which could be

used with reasonable safety to protect travelers having equal rights to use of street.

6. Negligence ⇨58

Where person is negligent, he is liable for all natural and probable consequences of his negligent act.

7. Municipal corporations ⇨794

Where person having right to use of sidewalk or street stops to watch work performed, though stopping may be result of idle curiosity, if instrument being used has defect which could not be apparent to pedestrian using ordinary care, it is incumbent on user of instrument to take necessary precaution to avert injury to pedestrian.

8. Appeal and error ⇨1052(8)

In action to recover for loss of eye sustained when flake of steel from chisel used by workmen placing connection in water main at street intersection struck pedestrian in eye, admission of testimony of expert witness that chisel blade was not in reasonably safe condition for use in public street while people passed on sidewalk held harmless error, where evidence was sufficient to support verdict without such testimony.

9. Damages ⇨132(14)

\$20,597.93 for loss of left eye held not excessive.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by D. L. Conner against the East Bay Municipal Utility District and others. Judgment for plaintiff, and defendants John Storer and another appeal.

Affirmed.

Crosby & Crosby, of Oakland, for appellants.

Clark, Nichols & Eltse, of Berkeley, for respondent.

WARD, Justice pro tem.

Upon the date mentioned in the complaint plaintiff was going to work and stopped on a sidewalk for a few seconds near the intersection of public streets in the city of Berkeley. Defendant East Bay Municipal Utility District, a corporation, and codefendants and employees thereof, Storer and Klobas, were engaged in placing a connection in a certain water main at the intersection of the streets. Klobas was cutting chunks from a pig of lead preparatory to heating it to be used in sealing the connection. The tools used in

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing denied 48 P.(2d) 982.

this work were a ten-pound sledge hammer, and a type of cold chisel referred to variously in the testimony as a bitumen, lead, or babbitt cutter. The head of the cutter had mushroomed, spread, and chipped from repeated pounding. A flake of steel from the cutter flew into the left eye of plaintiff resulting in the loss of the eye. A jury rendered a verdict in favor of plaintiff in the sum of \$20,597.93. Defendants urge alternative contentions, namely, that defendants owed plaintiff no greater duty than that they should not willfully or wantonly injure plaintiff, or that if the degree of care required be that of ordinary care, the breach of that duty has not been proven.

[1-4] The theory of the onlooker rule is that one engaged in lawful occupation on a public highway owes to a person who has no business requiring his presence and who is present without invitation and merely for the purpose of satisfying curiosity only the duty to refrain from wantonly or intentionally inflicting injury upon such person. 45 Cor. Jur. 840. The defendants were engaged in a lawful occupation. The plaintiff likewise had a right to the use of the street in traversing the sidewalk on his way to work. *Schediwy v. McDermott*, 113 Cal. App. 218, 222, 298 P. 107. An onlooker "must take care of [himself], except as against wantonness or willfulness, or except under peculiar circumstances of some undisclosed danger." *Currier v. Trustees of Dartmouth College (C. C. A.)* 117 F. 44, 50. The plaintiff in this case stopped at the intersection long enough to witness the defendant Klobas strike the babbitt cutter four or five times. Stopping in the course of a journey is a normal use of the street or sidewalk, and the status of a traveler is not lost by neglecting to constantly keep moving. *Silverman v. Usen*, 128 Me. 349, 147 A. 421. A traveler engaged in a lawful occupation may become an onlooker, but the question of how long one may remain in a particular place upon a highway without ceasing to be a traveler is a question for the jury to decide. 13 R. C. L. p. 517, § 429. The jurors evidently determined by their verdict that plaintiff's act in pausing for the purpose of determining what was occurring on the street did not take the plaintiff out of the category of a traveler. In addition thereto, the evidence proved that there was an undisclosed danger. Under all the circumstances of the case, this de-

termination of the jury should not be disturbed. *O'Brien v. Hudner*, 182 Mass. 381, 65 N. E. 788; *Burford v. City of Grand Rapids*, 53 Mich. 98-104, 18 N. W. 571, 51 Am. Rep. 105; *Lydston v. Rockingham County Light & Power Co.*, 75 N. H. 23, 70 A. 385, 21 Ann. Cas. 1236; *Parker v. Oswego Construction Co.*, 80 Misc. 295, 142 N. Y. S. 214.

[5-7] Defendants may be absolved of conduct evincing a reckless disregard for the safety of others or a willingness to inflict injury, but if there was a neglect to use ordinary care in the operation of cutting the lead, plaintiff is entitled to redress. Defendants were bound to employ implements, equipment, and a device which could be used with reasonable safety to protect travelers having equal rights to the use of the highway. Plaintiff was using the sidewalk for traveling, the purpose for which it was established. The requirements of the rule of care vary in direct ratio with the degree of danger to another. Knowledge of the dangerous character of an instrument is sometimes equivalent to foresight of the way in which it will act. This is not a case of a hidden, unsuspected defect in the instrument; on the contrary, defendants had reason to anticipate the likelihood of injury to another. A cold chisel may not be in and of itself a dangerous instrumentality, but its use under certain circumstances may render it so. *Sutliff v. Sweetwater Water Co.*, 182 Cal. 34, 186 P. 766. It may be applicable for one purpose, but unsuitable for another. Defendant Storer, the foreman, testified that he had control over the implement used; that he was familiar with the babbitt or lead cutter selected for this particular work; that he saw it before it was taken out of the tool box; that the chipping down the sides of the implement had started eight months before the accident; that if it was used in the public street and hit by a sledge hammer, probably pieces might fly off and strike some person. Defendant Klobas testified that no guard or other device was used to stop flying chips; that it was probable, but that he could not tell whether or not "when a chisel has that much gone off of it and you were about to hit it * * *, that somebody was likely to get hurt as a result of chips flying off." The cutter was introduced in evidence; the jury had the opportunity of examining it minutely, and from all the circumstances were justified in de-

termining that the tool was in such condition from breakage and deterioration that it would likely chip at any time from the blow of a sledge hammer, and that such fact was known by defendants. It is not the law that the exact injury should be anticipated. When a person is negligent, he is liable for all the natural and probable consequences of his negligent act. 45 Cor. Jur. 913-920. The defectiveness of the instrument was not apparent to plaintiff in his position, fifteen or eighteen feet away. The fact that a person having a right to the use of the sidewalk or street stopped to watch the work performed, though the stopping may have been the result of idle curiosity, still if the condition of the instrument was defective and the defect was not or could not be apparent to a pedestrian using ordinary care, it is incumbent upon the user of the instrument to so protect those having equal rights to the use of the street as to take necessary precaution to avert injury. The rule of ordinary care is not rigid or inflexible, but is based upon the theory that such prudence and caution should be exercised as would be taken by a reasonable person acting under similar circumstances.

[8] Defendants produced an expert witness who was interrogated relative to certain technical facts concerning cohesive strength of steel, the effect of striking the steel, whether the chisel or cutter could have been treated in a manner to eliminate breaking and chipping, and whether if chipped the pieces thereof would be likely to fly through the air when hit with a ten-pound sledge hammer in the hands of a two hundred thirty-five-pound workman. After eliciting evidence upon these subjects, counsel for defendants asked the witness in substance whether the blade was in a reasonably safe condition for use in the public street while people passed on the sidewalk. The last question and the negative answer invaded the province of the jury, but the evidence was amply sufficient to support the verdict without the answer of the expert. Eliminating the court's ruling in permitting this question, the record is free from error. Appellate courts are seldom in a position to measure the precise effect that flows from the presentation of inadmissible evidence. The general rule seems to be that when the weight of the evidence is closely bal-

anced the admission of opinion evidence which invades the prerogatives of the jury is prejudicial. We are not satisfied that this opinion evidence prevented the jury from considering the case on its merits. The right of plaintiff to recover did not depend primarily upon the expert's testimony. The answer to the question was not one to appeal to the sympathy of the jurors and cause them to become prejudiced against defendants, or one without which a contrary verdict would have been rendered. We are satisfied that upon a retrial, without this evidence, a second jury would likewise find for the plaintiff.

[9] Appellant contends that the damages awarded, \$20,597.93, are so excessive as to appear to have been given under the influence of passion and prejudice. The amounts fixed in verdicts rendered by juries in other cases and approved by the courts constitute a fair criterion to follow. *Maede v. Oakland High School District*, 212 Cal. 419, 298 P. 987, and *Damgaard v. Oakland High School District*, 212 Cal. 316, 298 P. 983, are somewhat similar cases, involving the loss of sight, wherein the damages were fixed at \$16,000 and \$15,000, respectively. In *Langford v. Kosterlitz*, 107 Cal. App. 175, 290 P. 80, 85, the court, referring to the loss of an eye, assessed damages in the sum of \$15,000 and said: "The sum of \$15,000 is very small rather than excessive." In *Katz v. Helbing*, 215 Cal. 449, 10 P.(2d) 1001, the amount of the verdict, \$30,000, was upheld; and in *Szasz v. Joyland Co.*, 84 Cal App. 259, 257 P. 871, a judgment of \$20,000 was affirmed. The facts in each of the above cases are dissimilar relative to the age of the injured, the humiliation suffered, the ability to attend to business, and in other factors, but the award adjusted was declared in each case to be fair. The verdict rendered in this case is not greatly disproportionate to that in the cases cited, and the facts are sufficiently similar to justify the conclusion in the absence of a showing to the contrary that the jury was not under the influence of passion and prejudice in assessing this award.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

McDONALD v. STANDARD GAS**ENGINE CO. et al.****Civ. 9457.****District Court of Appeal, First District,
Division 2, California.****July 23, 1935.****Rehearing Denied Aug. 22, 1935.****Hearing Denied by Supreme Court
Sept. 19, 1935.****1. Landlord and tenant ⇨167(8)**

Lessor of part of manufacturing plant held not liable to student for injuries received while student was a visitor at demonstration of a Diesel engine in part operated by lessee, where it appeared that lessor had no control over operations, did not assume to direct lessee's manager in selection of machinery which caused injuries, and where it appeared affirmatively that machinery was under exclusive control of lessee.

2. Landlord and tenant ⇨169(4)

Invitee, claiming that lessor and lessee of manufacturing plant where invitee sustained injuries when viewing a demonstration of Diesel engines were joint tort-feasors, has burden of establishing such fact.

3. Landlord and tenant ⇨169(8)

Evidence that defendants were manufacturers of Diesel engines of which they hoped to sell large number to Navy, that plaintiff who was naval officer attended plant as part of class in Diesel engines, and that class was present through arrangement with defendants, held to establish that plaintiff was "invitee," as respects defendants' liability for injuries caused by explosion of pulley during demonstration.

[Ed. Note.—For other definitions of "Invitee," see Words & Phrases.]

4. Appeal and error ⇨204(7)

In personal injury action, defendants could not complain that damages were based on speculative testimony of physician as to possible consequences of injuries, where testimony was not objected to and defendants introduced no rebutting evidence (Civ. Code, § 3283).

5. Appeal and error ⇨204(1)

In naval lieutenant's action for personal injuries, defendants' objection to testimony of plaintiff's wife that he had not been retired as yet, but doubtless would be, could not be urged for first time on appeal, although testimony may have been incompetent.

6. Damages ⇨132(1)

\$100,000 to senior grade naval lieutenant whose pay was \$330 per month and whose life expectancy was 32½ years, for injuries resulting in compound comminuted skull frac-

ture, elbow fracture, and injury to cranial nerves affecting movement of facial muscles and eyes, and which would force retirement from Navy on pay of \$100 per month, held not excessive.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Charles E. McDonald against the Standard Gas Engine Company and others. Judgment for plaintiff, and defendants appeal.

Affirmed in part, reversed in part.

Glikbarg & Wolf, of San Francisco, for appellants Charles A. Winslow and Standard Diesel Engine Co.

McEnerney & Morris and A. J. Coogan, all of San Francisco (Hatch & Mahl, of San Francisco, of counsel), for appellant Standard Gas Engine Co.

Elliott Johnson and Christopher M. Jenks, both of Oakland, for respondent.

STURTEVANT, Justice.

For injuries sustained by the explosion of a pulley in an iron factory the plaintiff sued to recover damages. He named as defendants the Standard Gas Engine Company, hereinafter called the Gas Company, the owner of the plant, he also named Standard Diesel Engine Company, a lessee, hereinafter called the Diesel Company, and he also named Charles A. Winslow. The jury returned a verdict in favor of the plaintiff and against all of the defendants. From that verdict the defendants have appealed. As each appellant stands on a different footing, it is necessary to consider the appeals separately.

Appeal of Standard Gas Engine Company.

[1,2] For many years the Gas Company, a corporation, has been engaged in manufacturing internal combustion engines. It has a manufacturing plant at Dennison and King streets, East Oakland. Mr. Winslow is a mechanical engineer. For some time he had in his mind certain theories regarding a new type of Diesel engine. Early in 1931 he made arrangements with the Gas Company under the terms of which he took employment with that company and proceeded to construct a monovalve engine under and according to the plans he had in mind. The costs were such that the Gas Company was un-

able to go further. However, it was desirable to proceed and construct multicylinder engines on the same general plans. Finally, the parties determined that a new corporation should be created which would take over the entire enterprise. A corporation, Standard Diesel Engine Company, was formed and on September 10, 1932, three several contracts were executed. They are called by this defendant, Defendant's Exhibits D, E, and F. By those instruments, in legal effect, the Standard Gas Engine Company for 100 shares of the common capital stock of no par value of the Standard Diesel Engine Company, agreed to exchange a single-cylinder Diesel engine, known as the Winslow engine, together with the castings, patterns, dies, accessories, and blueprints, used in connection with the manufacture thereof, and a lease for the joint use by both corporations for the period of six months of both the labor and equipment of the plant owned by the Standard Gas Engine Company. The lease provided that the term thereof should commence on September 15, 1932, and continue until March 14, 1933. It contained no covenant that either tenant should have or exercise any control over the other. Nor did it contain any other special covenant pertinent to the issues presented in this action.

Mr. Winslow was designated manager on the records of each corporation. After the said documents were executed he performed no services for the Gas Company except to act gratuitously in an advisory capacity. From July 1, 1932, it paid him no salary. All materials which were thereafter used in the construction of Diesel engines were furnished and paid for by the Diesel Company. Except as recited in the said exhibits, Mr. Winslow did not act for the Gas Company. Each corporation proceeded to function as in those papers provided. The record presents no question of fraud on the part of either of the corporations, or any of the officers thereof.

Prior to the 27th day of January, 1933, the Diesel Company had been engaged in the manufacture of multicylinder Diesel engines in the plant above mentioned. A rectangular room 17 feet by 27 feet was selected for the purpose and was known as the test room. Within it was a test stand for testing motors. It consisted of a motor bed to which was attached a dynamometer used to apply a

load to the engine or to test its horse power. On January 27, 1933, a four-cylinder multicylinder Diesel engine was mounted on the stand and attached to the dynamometer. A pulley wheel was mounted on the shaft protruding from the side of the dynamometer away from the engine. It had only one use—to start the engine at which time a leather belt connected it to an electric motor. When the engine started the belt would be pushed off and allowed to coil up at one side of the test room. After the engine started the pulley wheel revolved with the speed of the engine. The engine had been in place and had been operating day and night for a period of three weeks immediately preceding January 27, 1933. For some time prior to the date last-mentioned, Professor Carl A. Vogt, of the University of California, was conducting a post-graduate course in mechanical engineering. He had a class in Diesel engines, the members consisting of a group of young naval officers. In the month of December, 1932, at a meeting of the Society of Automotive Engineers, a paper was read regarding the monovalve Diesel engine which had come to be known as the Winslow type. The students of Professor Vogt were not present at the reading, but the paper was discussed in his classes. At times the classes visited various factories. One of the students asked Professor Vogt whether it would be possible to visit the Standard Gas Engine Company plant to see the Winslow Diesel engine. Professor Vogt thereupon telephoned to Mr. Winslow asking for permission and the request was granted. At 2 o'clock on January 27, 1933, Professor Vogt, together with the plaintiff and other members of the class, went to the plant. After the class arrived the Diesel engine was demonstrated to the class. During such demonstration the pulley wheel, hereinabove mentioned, exploded injuring several, including this plaintiff.

In paragraphs IV and V of his amended complaint, the plaintiff alleged:

"IV. That on or about the 27th day of January, 1933, the defendant *Standard Gas Engine Company*, a corporation, and the defendant *Standard Diesel Engine Company*, a corporation, owned and were operating for purposes of demonstration a certain Diesel engine at said factory; that on said day at about the hour of 2:30 o'clock p. m. thereof, plaintiff at the in-

vitiation of the defendant Standard Gas Engine Company, a corporation, and the defendant Standard Diesel Engine Company, a corporation, and the defendant Winslow, visited said factory for the purpose of inspecting said Diesel engine and its operation; that at said time and said place the plaintiff, at the invitation as aforesaid of the defendant corporations and the defendant Winslow, did in fact inspect said engine and the operation of said engine was demonstrated to plaintiff by the defendant Winslow; that during the operation of said engine the defendant Winslow personally exercised exclusive control of the operation thereof; that at all times herein mentioned said Diesel engine and its operation were under the exclusive control of the defendant Standard Gas Engine Company, a corporation, the defendant Standard Diesel Engine Company, a corporation, and the defendant Winslow: that at said time and said place there was attached to the brake shaft of said Diesel engine a certain metal pulley about thirty inches in diameter, constructed of ten cast iron spokes attached to a steel rim, owned by the defendant Standard Diesel Engine Company, a corporation; that during the operation of said Diesel engine said pulley was caused to revolve on the brake shaft of said engine at speeds as high as 1400 revolutions per minute; that during the operation of said Diesel engine said pulley was caused to revolve on the brake shaft of said engine at different speeds varying from 200 revolutions per minute to as high as 1400 revolutions per minute, with the knowledge, consent and permission of the defendants Standard Gas Engine Company, a corporation, and Standard Diesel Engine Company, a corporation.

"V. That during the course of the operation of said Diesel engine, as aforesaid, *the defendants so carelessly and negligently operated the same* as to cause said pulley to become detached from said shaft and to break into a number of fragments; that one of said fragments struck the body of plaintiff, and as a proximate result of said *carelessness and negligence of the defendants*, as aforesaid, there was inflicted upon plaintiff the following personal injuries, to-wit: (Naming them.)"

This defendant claims there was no evidence that it was guilty of any actionable negligence. We think the point must be sustained. There was at no time any

claim that the lessor or lessee departed from the provisions of the exhibits hereinabove referred to. While those exhibits provided for a joint right to use this defendant's plant, they did not provide for a synchronous joint use. They provided a scheme by and under which each company could transact its business separately, but under the same roof. Said exhibits did not vest any ownership to any Diesel engine in this defendant, but did provide for vesting ownership in the Diesel Company. As to the charges which we have italicized, an examination of the record discloses there was not a particle of evidence that after September 10, 1932, this defendant ever owned or operated, either alone or jointly with the Diesel Company, any Diesel engine, nor that the Diesel engine mentioned in the plaintiff's pleading or its operation was under the exclusive control or any control whatever of this defendant, nor that said engine was operated with its permission, nor that it had any right or power to grant or withhold permission as to how and at what speed said engine could or should be operated.

In support of his claim that this defendant invited him to the premises and that it operated the engine at the time of the accident, the plaintiff presents several contentions. He contends that Mr. Winslow did not at once volunteer a statement for whom he was acting. The plaintiff does not quote any part of the record in which Mr. Winslow was asked whether his authority and duties as manager of either corporation was oral or in writing, or whether it was designated by the president or board of directors, and if so by whom. Counsel sought at times to elicit the conclusion of the witness on the subject of his authority. However, we find no statement showing that at the time of making the demonstration this defendant had assumed to give to Mr. Winslow any direction or authority in the premises. The second contention is that, in selecting the pulley, Mr. Winslow, as manager of this defendant, selected the pulley and turned it over to Mr. Winslow, as manager of the Diesel Company. The facts do not support the contention. The term of the lease commenced September 15, 1932. Thereupon the possession of the entire premises and all of the equipment became vested in the two corporations as tenants in common. Civ. Code, § 686; McClure v. Colyear, 80 Cal. 378, 22 P. 175. The

documents signed September 12, 1932, do not show, and there is no evidence to show, that this defendant was after said date to make any selections for, or deliveries to, the Diesel Company after the vesting of the possession designated in the lease. Then it is contended that when a lessor reserves a portion of the premises he must keep such portion in repair. 16 R. C. L. 1072. But here no portion was reserved. The lease provided a tenancy in common. Under that instrument such tenants took on September 12, 1932, "per my et per tout." *Lytle Creek W. Co. v. Perdew*, 65 Cal. 447, 4 P. 426. At that time the evidence does not show there was any defect in the pulley. The record shows affirmatively that from the time Mr. Winslow took the pulley out of the storeroom it was in the exclusive use of the Diesel Company. Because the Gas Company was a tenant in common did not ipso facto render it liable for the acts of the Diesel Company. *Marsh v. Hand*, 120 N. Y. 315, 321, 322, 24 N. E. 463. If the plaintiff claimed that the two corporations were joint tort-feasors he had the burden of establishing those facts. 45 C. J. 895.

Appeal of Standard Diesel Engine Company and Charles A. Winslow.

These two defendants make two points not discussed above. They claim the plaintiff under the facts was a licensee and that there was no evidence of wanton or willful injury and therefore they are not liable. And they also claim that the verdict for \$100,000 was excessive. We will take up those two points separately in the order stated.

[3] The federal government is one of the largest, if not the largest purchaser of gas engines and of Diesel engines in particular. The plaintiff is a naval lieutenant, junior grade, having graduated from the United States Naval Academy. Nearly all, if not all of the class of Professor Vogt were also young naval officers each of whom, some time in the future, might be called upon to pass on and approve large purchases by the federal government. That their attention was particularly centered on Diesel engines appears from the fact they were taking a post graduate course on that subject under Professor Vogt. There is considerable evidence in the record to the effect that after the Winslow type had been completely developed as a monovalve and satisfactorily developed as a multicylinder, these two

defendants were justly very proud of the inventions and anticipated at an early date that they would enter into the manufacture thereof on a large scale. So anticipating, numerous groups were allowed to attend, and, when they did so, demonstrations were held for the purpose of advertising the new invention. These defendants cite "the student cases" where the facts showed the students attended to see the "wheels turn 'round," and in which it was held that the students were licensees. The plaintiff freely admits the general rule in "the student cases" but contends that the instant case contains facts that distinguish it from that general line. As to who is an implied invitee in *Aguilar v. Riverdale C. C. Ass'n*, 104 Cal. App. 263, at page 266, 285 P. 889, 891, the court said: "If it be shown that his purpose in so entering was one of common interest or mutual benefit to the owner or occupant and himself, or was in connection with the former's business which was there being carried on, an invitation is implied." In the case of *Dyer v. McCorkle*, 208 Cal. 216, at page 218, 280 P. 965, 966, the court said: "There is no evidence whatever upon which to conclude that plaintiff was an employee of the master. In attempting to board the truck of defendant corporation, plaintiff was there as one of three classes of persons: A trespasser, a licensee, or an invitee. If there without the knowledge or consent of the master or servant, he was a trespasser. If there without the knowledge of the master but with the knowledge of the servant, who had no authority to invite him, he was a mere licensee. But, if there with the consent of the master or with the consent of the servant having authority, express or implied, to grant the privilege, he was an invitee. As an invitee he was entitled to ordinary care at the hands of the servant, and the omission in this particular would be binding upon the master, if at the time of infliction of the injury the servant was engaged in accomplishing an object in the line of the duties assigned to him by such master." In *Gilliland v. Bondurant*, 332 Mo. 881, 59 S.W.(2d) 679, is found a full discussion of the "student cases." After stating the facts in the case before it, in 332 Mo. 881, 59 S.W.(2d) 679, on page 683, the court said: "It is a reasonable inference from the evidence that this was one of defendants' methods of advertising their products; that it was done through

arrangements with the school authorities to bring classes there; and that they were brought there in connection with and as a part of their school work, not out of mere curiosity on the part of the children to watch the wheels go 'round." And then, in 332 Mo. 881, 59 S.W.(2d) 679, at page 689 the court said: "From the long-established custom of bringing this class and other classes there annually and instructing them in butter making and ice cream making just as any class is instructed in school, the jury would be justified in believing that such an arrangement of long standing grew out of and was based upon some benefit to defendants, and implied an invitation to the school authorities." The facts of the instant case we think bring it clearly within the doctrine of the cases just cited.

[4] It is earnestly asserted that the verdict was excessive and for that reason the judgment should be reversed. The verdict was in the sum of \$100,000, and it will be conceded at once that that is a very high figure. It is equally clear that the injuries suffered were appalling. After the accident the plaintiff was taken at once to Highland Hospital. Dr. Schwartz, the assistant superintendent, was at the hospital when the patient arrived. He testified: "The patient arrived deeply unconscious and in a state of profound shock. There was a large area of the scalp torn loose, appeared to be about half scalped, over the left frontal region. A large strip of the scalp cap had been torn away, leaving an opening about the size of a saucer. The dura mater, which is the covering of the brain, had been torn in two, thus exposing the brain. Large quantities of macerated brain tissue were exuding from the hole in the skull cap. His clothes were spattered with bits of brain tissue. I noticed on his left shoulder a big gob about the size of an English walnut. The wound was contaminated. It looked like streaks of grease or oil, bits of pulverized bone. * * * That was a compound comminuted fracture of the skull, and brain was exuding, and brain was spattered all over the outside." Dr. Allen, chief of staff of the hospital on brain injuries, gave similar testimony, but stated that the hole broken in the skull cap measured two and one-half by two inches. Continuing, Dr. Allen stated: "He also had a contused wound on the left elbow which indicated a frac-

ture of that elbow. * * * There was a large cut on his neck, his throat was cut. He had a lesion which made the left eye appear crossed. * * * There are several nerves in the brain, twelve on each side, that supply various structures about the head and the muscles that make our eyes move from side to side or up and down and are controlled by some of those nerves. One in particular called the sixth cranial nerve is the one that makes our eyes turn to the left and to the right. This particular nerve had been injured and he could not move his eye. There was one other nerve injured in his face, the seventh nerve. That nerve supplies the muscles of expression on the side of the face so that he was unable to wrinkle the face in the normal manner. There was another result much more serious, and this is what is known as aphasia. He was unable for many weeks after this accident to talk coherently, or to even make known his wishes. He understood our language but was unable for at least two or three weeks to express himself and that was due to a particular lesion of the left side of the brain. That in my opinion was the most serious injury sustained." He received apparently the best medical attention and hospitalization. While yet unconscious the patient was taken to the operating room, the wound in the skull was thoroughly cleansed, the dura mater was sewed up, the scalp was drawn over it and sewed up. In this form the skull wound was healed. The cranial nerves were in part grafted, and much relief was given to the patient enabling him to more nearly control his left eye. The wound on the throat was satisfactorily treated and so was the broken elbow. At the time of the trial the patient had regained the power to talk, not fluently, but there had been some restoration of that function. The sixth cranial nerve could not be restored. The function of the nerve controlling facial expression appeared to be fully restored. The hole that had been broken in the skull remained, but the dura mater and the scalp were in place over the depression. The injury to the left eye had become less, but at the time of the trial there was some loss of vision in that eye. Testifying as to the then condition of the left eye, Dr. O'Connor said: "He can see singly and not double and see straight ahead. Before we did the first operation there was motion upward about fifteen degrees from

the straight position. We gained about ten degrees on that. If he is left in his present condition he can never turn his eye upward any more than at present. I have done all for him I expect to do." Dr. Fleming testified: "I examined Mr. McDonald at our office yesterday afternoon. * * * He has a defect in the left frontal temple region that measures five centimeters by six. When you palpate this depression you can feel the brain substance underneath and when he coughs there is a very marked protrusion of the brain substance and along the frontal region there is a tenderness. He has a scar up there over his eye and ear. That resulted from the removal of the bone at the time of his injury. Defect is referable to the left eye. The left pupil is smaller than the right, and the left pupil does not react as well as the right. He cannot look to the left nor apparently upward, because the injury to the sixth nerve is so great and also the third. When he looks far to the left he sees double and if he looks upward he does the same. He had a very definite injury at the side of his neck, a lacerated wound that has caused a scar. He has some difficulty in opening his mouth fully because of the temporal muscle that has become adhered to the bone. At first he was unable to open his mouth at all but because of constant exercises he is now able to open it about two-thirds of normal. That is due to a restricted muscle on the left side of the head. He has a scar on the left elbow and limitation of movement of the left elbow and left arm and hand, a trifle weaker than the right."

Speaking of the future treatment of the case, Dr. Fleming testified: "The contemplated operation is one to fill in a defect in the left frontal region. He has a depression there and from a cosmetic point of view it would be important to correct that, but the more important thing is to cut down the adhesions. The thing to do will be to graft down a bone in there and give protection. That operation will be to incise the scar at the scalp wound and turn back healthy scalp and muscle and freshen up the edges of the bone, cut down the adhesions between the brain itself and the dura, and then take several pieces of bone from his leg and fit those over the defect in such a way that it will fill the defect in and put a layer of bone between the brain and the scalp to give him further protection from in-

jury. The pieces of bone will be taken from the anterior portion of the tibia. The particular place to cover is about two and one-half inches long." Dr. Allen testified that in his opinion the patient will never be fit to perform the functions of an officer in the navy. "Although he has made a very good recovery to date, I feel there may be further deterioration of his mental powers and also the possibility of epilepsy comes up. * * * I did not know the patient prior to the time of his accident but I would feel that his mental concentration is not as good as it was."

At the time of the accident the plaintiff was an officer in the navy, he was injured in line of duty and his medical bills were paid by the navy. He was receiving \$273 per month, but in the following June his class was promoted, and at the time of the trial he was receiving \$330 per month. His life expectancy is 32½ years. Instead of being promoted he is to be retired. When he is discharged from the hospital then his pay will be only \$100 per month. Based on the pay of a senior grade lieutenant his actual financial loss is \$89,700 without giving any consideration to the probability of further promotions with increasing base pay and allowances, nor to the fact that an officer's pay is automatically increased 5 per cent. of the base pay for each three years of service up to 30 years.

In support of their attack on the verdict, the defendants argue that the future damages are those only which "are reasonably certain to result." *Silvester v. Scanlan*, 136 Cal. App. 107, 111, 28 P.(2d) 97. They then quote the experts. Dr. Fleming testified as to the future. Among other things, he said: "Although he (the plaintiff) has made a very good recovery to date, I *feel* there *may* be further deterioration of his mental powers and also the *possibility* of epilepsy comes up. I would think there is some mental deterioration that cannot be repaired. I did not know the patient prior to the time of his accident, but I would *feel* that his mental concentration is not as good as it was. Epilepsy is *likely* to follow a condition of this kind *quite often*. A man who has had a loss of brain substance and there has been damage to the brain caused by adhesions, it develops definite pressure on the brain and we know that oftentimes epilepsy follows." The defendants emphasize the words which we have italicized

and then they argue: " * * * No doctor essayed to testify that he would have epilepsy or any definite mental impairment, the only thing at all of this character being the above-mentioned speculation that he might." But none of the evidence quoted was objected to. No ruling was asked of or made by the trial court. Defendants introduced no evidence rebutting the above excerpts. Under these circumstances we think the provisions of section 3283 of the Civil Code were complied with.

[5] They also contend there is no competent testimony that the plaintiff will be retired or when. The record made was this. The plaintiff's wife was called by him as a witness. On cross-examination she testified: "Lieutenant McDonald has not been retired as yet, but he will be no doubt." Thereupon the plaintiff stipulated, and the stipulation was accepted, that while the plaintiff is under hospital attention he has been receiving his full pay as lieutenant junior grade and will continue to receive his full pay until the medical men are through with him. To Mrs. McDonald's testimony there was no objection or exception. It may have been incompetent, but the record does not clearly show the fact. But, assuming it was incompetent, the objection thereto may not be made for the first time in this court. *Sanders v. Austin*, 180 Cal. 664, 666, 182 P. 449.

[6] In this same connection it is said there is no competent testimony that plaintiff has sustained, or will hereafter sustain, any monetary damage. Assuming, solely for the purposes of this case, that such is the fact, the contention does not materially assist these defendants. In weighing the amount of the verdict the jury was considering two separate factors. The plaintiff was a naval officer under pay and entitled to draw some pay until his death. In so far as such compensation should be lessened by reason of his accident his damage could or would be increased in large sums. Turning from the factor of salary to the physical injury which he sustained, and speaking solely regarding that physical injury, the jury was entitled to bring in a verdict amounting to a large sum. From the record before us we are unable to ascertain to what extent the jury based its verdict on the physical injury and to what extent, if any, on the loss of emoluments in the future.

Under these circumstances we think it may not be said the record before us shows that any act or ruling of the trial court has resulted in a miscarriage of justice.

The judgment against the Standard Gas Engine Company is reversed and that defendant will have judgment against the plaintiff for its costs. The judgment against the other defendants is affirmed, and the plaintiff will have judgment against those defendants for his costs.

We concur: NOURSE, P. J.; SPENCE, J.



8 Cal.App.2d 490

PACIFIC GAS & ELECTRIC CO. v. INDUSTRIAL ACCIDENT COMMISSION

et al.

Clv. 9756.

District Court of Appeal, First District,
Division 1, California.

July 25, 1935.

Hearing Denied by Supreme Court
Sept. 23, 1935.

1. Estoppel $\S$ 52, 58

Waiver can result only from an intentional relinquishment of a known right, and may be inferred only when conduct of parties has resulted in some prejudice by reason of a warranted belief that a waiver was intended.

2. Master and servant $\S$ 385(17)

Employer by joining with third party in executing settlement of employee's action for injuries against third party and relinquishing therein its right of lien against settlement sum for advancements made to employee held not to have waived right to a credit of settlement sum to be applied against employer's liability for compensation, especially where nothing was intimated about a credit at time of negotiating settlement, employee was ignorant of any question of a credit, and employer had considered case closed upon relinquishing right to lien (St. 1931, p. 2370, $\S$ 26).

3. Master and servant $\S$ 385(17)

Failure to segregate in injured employee's settlement agreement with third party tort-feasor items of compensable damage under Compensation Act and items of general damage at common law held not to destroy employer's right to credit of settlement sum to be applied against employer's liability for compensation (St. 1931, p. 2370, $\S$ 26).

Proceedings under the Workmen's Compensation Act by Walter Bolin Johnson, employee, opposed by the Pacific Gas & Electric Company. On petition by employer for writ of review for purpose of having annulled an order of the Industrial Accident Commission denying credit to employer against liability to employee.

Award annulled.

Thomas J. Straub and John J. Briare, both of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

PER CURIAM.

Petition for writ of review for the purpose of having annulled an order issued by respondent Industrial Accident Commission denying credit to an employer against liability to its injured employee. From the petition it appears that respondent Walter Bolin Johnson, a foreman in the gas department of petitioner Pacific Gas & Electric Company, sustained an injury occurring in the course of and arising out of his employment in the following manner: Johnson was engaged with other employees in laying a temporary gas main in a street in San Francisco, which work was necessitated by reason of a change of grade. At the same time Piombo Bros., a grading firm, was endeavoring to move a power pole located near by. The pole fell and struck Johnson in the back, causing a comminuted fracture of the right scapula and a compression fracture of the eighth dorsal vertebra, which injuries are permanent. Petitioner assumed liability under the Workmen's Compensation Act (St. 1917, p. 831, as amended) and placed its injured employee in a hospital for the cure and relief of his injuries. It also paid him compensation in the total sum of \$1,671.18. Shortly after the accident Johnson filed suit against Piombo Bros., alleging that he sustained his injuries by reason of their negligence. The attorney who represented Johnson, ascertaining that the public liability carried by Piombo Bros. was limited to \$10,000, endeavored to negotiate a settlement, and a figure of \$8,250 was eventually agreed upon. A controversy then arose between the representative of petitioner, Pacific Gas & Electric Company, and the attorney for the injured employee as to the former's lien on this

sum for its expenditures, the amount of which at that time was the sum of \$2,400. Upon ascertaining this fact, Johnson refused to agree to a settlement of his suit against Piombo Bros. Thereafter, further conferences were had between the parties the culmination of which was that petitioner, Pacific Gas & Electric Company, agreed to accept \$1,200 for its expenditures out of the sum of \$8,250 to be received by the employee. In consideration of its waiver to the balance of the \$8,250, petitioner, Pacific Gas & Electric Company, sought to be relieved from all further liability for compensation, medical or other treatment to which respondent Johnson would otherwise be entitled by reason of the Workmen's Compensation Act. The Industrial Accident Commission refused to approve this agreement. Thereafter, further negotiations ensued, with the final result that a settlement between the employee and Piombo Bros. was completed; the petitioner Pacific Gas & Electric Company agreeing to waive its right of lien for advancements to its injured employee upon the agreement that the employee would relinquish his right against petitioner for all benefits under the Compensation Act. This being understood, petitioner joined with Johnson in the release and settlement agreement with Piombo Bros. Thereafter, and notwithstanding this agreement, Johnson filed an application with respondent Industrial Accident Commission for adjustment of the claim against petitioner. The commission, after hearing, issued its findings and award granting Johnson compensation at the rate of \$24.22 weekly until the sum of \$5,812.80 was paid, and thereafter a life pension of \$14.91 weekly, continuing during the remainder of the life of employee, and also directed petitioner Pacific Gas & Electric Company to provide the employee medical treatment as might reasonably be required during such period. A petition for rehearing was made and denied. At the same time petitioner filed an "Application for Allowance of Credit" as provided for by section 26 of the Workmen's Compensation Act (St. 1917, p. 854, § 26, as amended by St. 1931, p. 2370) in the sum of \$8,250 to be applied against its liability for compensation. This petition was denied, as was also a petition for rehearing.

[1,2] The sole question here presented is whether or not under the circumstances the commission was justified in denying pe-

itioner credit, upon its liability of a life pension, of the amount received by Johnson from Piombo Bros., who were responsible for the accident. No claim is made that this credit affects the legal obligation of petitioner to take care of Johnson during the remainder of his life, a liability that, under the mortality tables, it is claimed amounts to a sum in excess of \$25,000. Section 26 of the Workmen's Compensation Act provides in express terms that the commission shall, upon application, allow a credit to the employer, to be applied against his liability for compensation, of the full amount of any recovery by the employee for his injury either by settlement or after judgment. Stats. 1931, c. 1119, p. 2370. Respondents, however, claimed before the commission and do here, that petitioner, in failing to file its application for allowance of the same either at the first hearing or upon its petition for a rehearing, waived its right to any credit, and that it likewise waived its right by conduct in relinquishing its lien upon the amount received by the injured employee under the settlement agreement. As above stated, petitioner, on the same day that it filed its petition for rehearing, also filed its request for a credit by reason of the settlement of the action against Piombo Bros. Notwithstanding the objection of respondents, the commission set the cause for further hearing. Thereafter, the commission denied petitioner's application. Upon this subject it found that no segregation was made in the settlement agreement as between damages on account of pain and suffering, and the compensation to which the applicant would be entitled under the Workmen's Compensation Act; that petitioner had full notice of said settlement and full opportunity to assert any lien or liens against said settlement which it might have had on account of compensation payments made to the applicant or on account of expenditures made because of applicant's injuries, and failed to protect any lien. It further found that petitioner waived its right to any portion of said third-party settlement at the time that agreement was made. A petition for rehearing was made and denied, and the present proceedings followed. Under these facts we are of the opinion that the commission erred in failing to allow petitioner a credit to be applied against its liability for compensation. Section 26 of the Workmen's Compensation Act, undoubtedly passed to prevent double recovery, makes

a distinction between a "lien" and a "credit." It provides that the employer shall have a lien against the amount of any judgment for any damages recovered by the employee. It also provides that the commission shall allow a credit to the employer to be applied against his liability for compensation. While it is true petitioner herein waived its right of lien against the amount received by the injured employee by way of settlement, it at no time waived its right to a credit upon its liability under the Workmen's Compensation Act. No claim is made that there was any express waiver to a credit on the part of petitioner, but it is argued that its conduct was such that a waiver is implied. There is nothing in the evidence to warrant such conclusion. On the contrary, it appears that at the time petitioner waived its lien on the amount of the settlement, it was expressly agreed that the employee would relinquish or waive any of his rights to proceed against petitioner under the Compensation Law. Nothing was said or even intimated about a credit, and in fact the evidence further shows that the injured employee was entirely ignorant concerning the question of a credit to which petitioner was entitled. It also shows that the employer considered his case closed for all purposes when petitioner agreed to relinquish its lien to the amount received.

The general rule is that a waiver can result only from an intentional relinquishment of a known right, and that it may be inferred only when the conduct of the parties has resulted in some prejudice by reason of a warranted belief that a waiver was intended. *Cross v. Superior Court*, 83 Cal. App. 144, 256 P. 453; *Ingram v. Department of Industrial Relations*, 208 Cal. 633, 284 P. 212. There being no representations concerning the credit to which petitioner is entitled under the statute, and no circumstances from which a waiver could be implied, there could of course be no waiver. Nor is there any merit in the contention that petitioner, in failing to claim the same upon the original hearing, waived its credit. The statute merely provides that the commission shall allow a credit for any recovery had by an employee for his injury without reference to the time of the filing of his application.

[3] And, finally, we do not think that failure of segregation in the settlement agreement with the tort-feasor,

of items of compensable damage under the Workmen's Compensation Act and items of general damage at common law, is fatal to petitioner's claim of credit. Subsequent to the case of *Ansbach v. Department of Industrial Relations*, 99 Cal. App. 677, 279 P. 224, section 26 of the Workmen's Compensation Act was amended (Stats. 1931, c. 1119, p. 2370). Since said amendment, lack of segregation is immaterial as it has eliminated the necessity for segregation between special compensation damages and general damages at common law. *San Bernardino County v. Industrial Accident Commission*, 217 Cal. 618, 20 P.(2d) 673.

Petitioner is here merely seeking the remedy the statute expressly gives it. It has done nothing to forfeit the right, and the commission should have determined the amount of credit to which it was entitled to be credited against its liability.

The award is annulled.



8 Cal.App.2d 556

**COUNTY SANITATION DIST. NO. 2 OF
LOS ANGELES COUNTY v. AVERILL**

et al.

Civ. 9300.

District Court of Appeal, Second District,
Division 1, California.

July 31, 1935.

1. Eminent domain ☞112

In condemnation action, owner, whose land is being condemned in part, may not recover damages to remainder of land caused by manner in which works are to be constructed or operated on lands of others, but detriment for which owner may recover compensation is that which will result from operation of works upon his land alone.

2. Eminent domain ☞2(10)

Oceans and other navigable salt waters under state control may be used for public purposes as state may see fit, and owners of abutting lands must suffer without compensation such damage as his lands sustain so long as acts which are cause of damage do not constitute nuisance.

3. Eminent domain ☞112

In action for condemnation of easement for construction of sewer outlet, supposition that sewer will be operated so as to become nuisance held immaterial to issue of damages for taking of land.

4. Eminent domain ☞203(1)

In action for condemnation of easement for construction of sewer outlet, defendant held entitled to damages resulting from severance of easement from remainder of land and for depreciation in value of land caused by construction and operation of proposed improvement, but not to damages arising from fact that sewer outlet was located in ocean in proximity to defendant's land, and hence evidence as to possible defilement of atmosphere and beach caused by action of winds and waves upon effluent to be deposited at sea was properly excluded.

5. Eminent domain ☞202(1)

In action for condemnation of easement for construction of sewer outlet, defendant had right to show by competent evidence market value of remainder of land without improvement and its value as affected by improvement.

6. Eminent domain ☞205

In condemnation action, damages must be established with reasonable certainty and may not be purely speculative as to amount or remote as to origin.

7. Eminent domain ☞203(2)

In action for condemnation of easement for construction of sewer outlet, evidence that value of land would depreciate 30 per cent. because of fact that location of sewer on defendant's land would be discussed by many people who would thereby become prejudiced against locality held inadmissible on issue of damages as speculative or conjectural.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by County Sanitation District No. 2 of Los Angeles County against George G. Averill, Roman D. Sepulveda, and others. From the judgment, the second-named defendant appeals.

Affirmed.

G. W. Nix and Lloyd S. Nix, both of Los Angeles, and Joe Raycraft, of San Pedro, for appellant.

Hugh Gordon, of San Francisco, and Hill, Morgan & Bledsoe, of Los Angeles, for respondent.

SHINN, Justice pro tem.

This action was brought by County Sanitation District No. 2 of Los Angeles county against the appellant Roman D. Sepulveda and others, for the purpose of acquiring a right of way for an outfall sewer into the Pacific Ocean. The property of appellant which was taken in the proceeding consists of three parcels, one designated in the record as parcel No. 3, being a subsurface easement 25 feet wide and 4,102.64 feet long, containing 2.355 acres. Another parcel, designated as parcel No. 4, consists of a surface easement and a subsurface easement 50 feet by 167 feet, containing 0.192 acres. The surface easement covers lands lying between a bluff and the ocean, and is subject to right of ingress and egress by appellant Sepulveda. The third parcel, designated as parcel No. 5, consists of a right of way to be used during the two-year period while the work is under construction, and runs from Pacific avenue to the surface and subsurface easement number four. The land of appellant, from which the easements in question were taken, consists of 381.35 acres lying along the ocean westerly of Point Fermin and San Pedro Harbor. It has a frontage on the ocean of 4,625 feet. The shore line consists of a rocky beach between the ocean and high bluffs which extend along the entire frontage.

The case was tried before a jury, which awarded appellant certain amounts as the value of the property taken and as damage to the remainder of the land caused by the severance therefrom of parcels three and four and the construction of the improvement in the manner proposed. Defendant Sepulveda appeals from the judgment and complains of alleged errors in excluding evidence tendered by him in support of a specific claim for damages, consisting of the alleged depreciation of the remainder of the land resulting from the construction, maintenance, and operation of a public sewer along said rights of way.

The sewer will consist of a concrete tunnel throughout its entire length across appellant's property, with the exception of the portion which crosses the beach, which portion will consist of a cast-iron conduit 5 feet in diameter, joined on to the end of the tunnel, and laid under the beach and which will enter the ocean 20 feet underground. This open cut will be back-filled with concrete and rock, and no part of the construction, either of the conduit or

tunnel, will be visible after the work is completed, and there will be no manholes or other openings upon the surface. The conduit will be extended into and the effluent therefrom will be discharged at the bottom of the ocean at a point 5,000 feet from the shore line.

Defendant offered evidence tending to prove the nature of the effluent to be deposited into the ocean from the sewer, the zone of contamination which would thereby be created, and the direction of the winds, waves, and ocean currents. The purpose of the evidence thus tendered was to support the contention of defendant that the atmosphere around defendant's property would be contaminated with gases blown in from the ocean, and that the shore line would be defiled with sewage. The court sustained plaintiff's objections and excluded the offered evidence relating to the question of damages. It is necessary, in stating our reasons for the conclusions we have reached as to the correctness of the rulings of the court, to briefly outline the basis of the defendant's right to compensation.

If, under plaintiff's proposed plan, gases would probably escape or sewage would be deposited from the conduit constructed on the easement, to or upon the condemned portion of the land, or the remainder of it, the damage resulting therefrom would be recoverable in the present action. *City of Pasadena v. Stimson*, 91 Cal. 238, 27 P. 604; *Page v. Oklahoma City*, 129 Okl. 28, 263 P. 448; *Richardson v. City of Centerville*, 137 Iowa, 253, 114 N. W. 1071; *Lincoln v. Commonwealth*, 164 Mass. 368, 41 N. E. 489; *Cowper Essex v. Local Board of Acton, L. R.*, 14 App. Cas. 153; *Joplin Cons. Mining Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406; *Nichols on Eminent Domain*, p. 63; *City of Omaha v. Cramer*, 25 Neb. 489, 41 N. W. 295, 13 Am. St. Rep. 504; *Board of Trade Tel. Co. v. Darst*, 192 Ill. 47, 61 N. E. 398, 85 Am. St. Rep. 288; *Lawlor v. Southern Pac. Co.*, 39 Cal. App. 97, 178 P. 165; *Gottschalk v. Chicago, B. & Q. R. Co.*, 14 Neb. 550, 16 N. W. 475, 17 N. W. 120. The evidence does not show that such conditions will be created upon the lands of defendant.

The offered evidence related solely to supposed conditions which may result from the action of the winds, ocean currents, and waves upon the sewer effluent after it has been deposited at the bottom of the

ocean nearly a mile at sea. While it cannot be doubted that the pollution of the air over defendant's property and the defilement of the beach area, if the same should ever occur, would directly interfere with the use and detract from the value of the property, the questions which would be presented in such a case are not the same as though the damage came directly from the conduit located upon the land.

Appellant advances, as one reason why the court should have received evidence of possible future damage by means of the winds and ocean currents, the rule that all damages sustained by the landowner by reason of the condemnation must be recovered in the action in which the land is taken. *East Bay Municipal Utility Dist. v. Lodi*, 120 Cal. App. 740, 748, 8 P.(2d) 532; *Sternes v. Sutter Butte Canal Co.*, 61 Cal. App. 737, 216 P. 66; *Lewis on Eminent Domain*, 1313. While the soundness of the rule may not be questioned, and while the converse of this rule relied upon by respondent is also well established, to the effect that damages not necessarily included in the issues in the condemnation action may be recovered in a subsequent action, neither rule is helpful in determining what claims are barred and what are not barred by the judgment of condemnation. More pertinent to this question is the statement found in *Lewis on Eminent Domain* (3d Ed.) vol. 2, pp. 1451, 1452, in which it is said that "damages to the remainder by what is done elsewhere than on the part taken are not to be considered. Thus, where parts of certain lots were taken for a railroad and damages assessed therefor, and the parts not taken were damaged by the railroad crossing and obstructing a street upon which the lots abutted at some distance from the lots, it was held that the latter damages were not included in the settlement and an action would lie to recover the same." To the same effect are *Atchison & N. R. Co. v. Boerner*, 45 Neb. 453, 63 N. W. 787; *Perrine v. Penn. Ry. Co.*, 72 N. J. Law, 398, 61 A. 87; *Eaton v. Boston, C. & Maine R. R. Co.*, 51 N. H. 504, 12 Am. Rep. 147.

[1] An owner, whose land is being condemned in part, may not recover damages in the condemnation action to the remainder of his land caused by the manner in which the works are to be constructed or operated on the lands of others. The detriment for which he may recover com-

pensation is that which will result from the operation of the works upon his land alone. *Keller v. Miller*, 63 Colo. 304, 165 P. 774, and cases cited; *Oregon-Washington R. & Nav. Co. v. Campbell*, 34 Idaho, 601, 202 P. 1065; *Walker v. Old Colony, etc., R. Co.*, 103 Mass. 10, 4 Am. Rep. 509; *Campbell v. U. S.*, 266 U. S. 368, 45 S. Ct. 115, 69 L. Ed. 328.

Defendant's objection to the application of this rule is that it would allow plaintiff to do indirectly what it may not do directly, and that therefore it makes no difference that the supposed injury to his lands is traceable to conditions arising at some far distant point. The rule as it should be applied here, however, goes to the question of defendant's remedy, and it is especially applicable to the facts of the present case, as we shall point out.

[2] There is a basic difference between acts committed on the land taken, which affect the owner's interests therein or his remaining lands, and acts committed by authority of the state upon lands or waters owned and controlled by the state and which are held for public use. The oceans and other navigable salt waters under state control may be used for public purposes as the state may see fit, and the owner of abutting lands must suffer without compensation such damage as his lands sustain so long as the acts which are the cause of the damage do not constitute a nuisance. Thus, while riparian owners upon a stream above tide water are entitled to compensation where their lands are damaged by the discharge of sewage into the stream, the same is not true as to riparian owners whose lands are located on a stream where the tide ebbs and flows. *Seufferle v. Macfarland*, 28 App. D. C. 94; *Stevens v. Paterson & N. R. Co.*, 34 N. J. Law, 532, 3 Am. Rep. 269; *Simmons v. Paterson*, 60 N. J. Eq. 385, 45 A. 995, 48 L. R. A. 717, 83 Am. St. Rep. 642. In *Sayre Co. v. Newark*, 60 N. J. Eq. 361, 45 A. 985, 988, 48 L. R. A. 722, 83 Am. St. Rep. 629, a case involving the discharge of sewage in the tide waters of the Passaic river, the court said: "Indeed, the history of sewers shows that from time immemorial the right to connect them with navigable streams has been regarded as part of the *jus publicum*. * * * And, whenever tidal streams could conveniently be reached, they have been employed as the medium of discharge to the sea. Such a use of public waters must neces-

sarily entail some defilement. The degree of pollution to be permitted is a matter over which the legislature has full power and control. * * * We have, therefore, the city of Newark, a public corporation, executing, within the bounds of its discretion and with care, a franchise lawfully granted to it by the legislature for a public purpose, but thereby producing consequential damage to the complainants. Such damage is a loss for which there is no remedy. It is a burden to which the sufferers must submit, as members of the community from which they receive compensatory benefits."

In *City of Hampton v. Watson*, 119 Va. 95, 89 S. E. 81, 82, L. R. A. 1916F, 189, the same question was involved. In holding that a lessee from the state of submerged lands, used as an oyster bed, could not recover for damage thereto caused by the discharge of sewage into Hampton creek, which was a large navigable body of salt water, the court said: "Since the state holds its tidal waters and the beds thereof for the benefit of all the public, we are of opinion that the city of Hampton has the right to use the waters of Hampton creek for the purpose of carrying off its refuse and sewage to the sea, so long as such use does not constitute a public nuisance, and as such be discontinued by the Legislature, which has control over the extent to which these waters may be so used. The sea is the natural outlet for all the impurities flowing from the land, and the public health demands that our large and rapidly growing seacoast cities should not be obstructed in their use of this outlet, except in the public interest. One great natural office of the sea and of all running waters is to carry off and dissipate, by their perpetual motion and currents, the impurities and offscourings of the land. The owner of any lands bordering upon the sea may lawfully throw refuse matter into it, provided he does not create a nuisance to others. And there can be no doubt that public bodies and officers, charged by law with the power and duty of constructing and maintaining sewers and drains for the benefit of the public health, have an equal right."

[3,4] It follows from the principles we have stated that defendant was entitled to an award in the amount of his damage resulting from the severance of the easement from the remainder of his land (which he received), and also for the depreciation

in value of his land caused by the construction and operation of the improvement as proposed, and that in fixing the amount of the damage it was proper that the jury should consider (as it was allowed to do) the detriment caused by the existence of the sewer conduit through defendant's land and the manner in which the conduit would be maintained and operated upon the land taken. But any damage attributable to the mere fact that plaintiff has located its sewer outlet in the ocean in proximity to defendant's land is *damnum absque injuria*, and any detriment which may be suffered by defendant in the future, occasioned by the wafting of odors from the sewer shoreward, or from the pollution of his beach lands through the use of the sewer, not discharged from that portion which crosses his land, may not be recovered in this action by way of damages to his land. The supposition that the sewer will be operated so as to become a nuisance is immaterial to the issue of damages for the taking of the land; it is a question to be settled in another action after the nuisance is alleged to have come into existence. *City of Pasadena v. Stimson*, *supra*; *Oregon-Washington R. & Nav. Co.*, *supra*. It will be readily seen that this is a rule of necessity. It would obviously be impossible to determine, with a reasonable degree of certainty, what conditions may be created along the seacoast by the deposit of sewage at a point a mile off shore.

We conclude, therefore, that the court correctly excluded the offered evidence as to the possible defilement of the atmosphere and the beach caused by the action of the winds and waves upon the effluent to be deposited at sea.

[5-7] Another ruling of the court, upon which appellant relies for a reversal, is one in which the court struck out certain of the testimony of plaintiff's witness, H. A. Laffler, who duly qualified as an expert, in which he gave it as his opinion that the remaining land of appellant would be depreciated in value in the amount of \$408,630 by reason of the location, maintenance, operation, and construction of the sewer in the manner proposed by respondent. Respondent moved to strike out all of the testimony of the witness with respect to damage to the remaining lands upon the ground that the opinion of the witness as to the amount of damage was based upon matters of conjecture and spec-

ulation, and upon other grounds. This motion was granted and the jury was directed to disregard the testimony of the witness as to severance damage in said amount of \$408,630. Thereupon the defendant offered to prove, by the opinions of two other witnesses, damages in a large amount and of the same character as testified to by the witness Laffler. It was stipulated that said witnesses were qualified and that they would testify in all respects the same as the witness Laffler; that objection would be made upon the grounds upon which the court struck out the testimony of Laffler, and that the testimony of these witnesses would be excluded by the court.

The basis of the opinion of the witness Laffler as to the severance damage given on direct examination may be briefly stated as follows: That the land as a whole was valuable for recreational purposes, for a golf club, a clubhouse, a bathing and beach resort, and for residential purposes; that the construction of the sewer would require some two years, during which time the land would be identified in the public mind as having an outfall sewer extending through it; that this publicity would be conveyed to possible and prospective buyers; that the favorable impression as to beauty and desirability of the section would be dispelled and leave play for a widespread unfavorable impression because of the construction of the sewer, and that this unfavorable impression would extend beyond possible buyers of the land as acreage to purchasers of parcels thereof after its subdivision and development.

The damage estimated by the witness was 30 per cent. of the value of the remaining land. In discussing this testimony, we think we may fairly assume that the gist of it is found in the following statement: "When White Point is mentioned I can see that the public will say, 'O yes, that is where the county is building that big outfall sewer,' and in that particular state of mind on the part of a large number of people, including possible prospective buyers, I can see there is a very great damage, which I place at \$408,000." This figure, he stated, was simply a matter of judgment based upon his experience, the magnitude of the project and the publicity it would receive over a period of two years, which he believed made a depreciation of 30 per cent. a very conservative one.

In proving damage, defendant had the unquestioned right to show by competent evidence the market value of the remainder of his land without the improvement and its value as affected by the improvement. *So. Pac. R. R. Co. v. Hart*, 3 Cal. App. 11, 84 P. 218. But the provable damage by the improvement is limited to that caused by the part of the improvement constructed on his land. He may not recover in this action because of the fact that the sewage is to be discharged into the sea in front of his land or because of the manner in which it may be discharged. If the land value is to be depreciated for these reasons, it is *damnum absque injuria* for all of the purposes of this action. The witness evidently had this fact in mind, for he stated, "I have not taken into consideration the extension into the ocean or the amount of sewage or any elements of that character." The damage would be the same, he stated, if construction should be stopped at the waters' edge and the sewer should not be used. The entire damage would result from publicity given to the matter during the period of construction. He placed particular emphasis upon the supposed fact that it would be referred to in such a way as to identify it with a location on defendant's land called "White's Point." A brief analysis of the basis of the opinion as to values will show it to be wholly intangible and fanciful. The damage to the land, as the witness visualized it, would not come from the fact that the sewer would be there and discharging its content into the ocean, but from the fact that it would be discussed by many people who would thereby become prejudiced against the locality. He did not attribute damage to the actual construction work upon the tunnel or excavation, nor did he claim that the mere existence of the deeply buried conduit would result in any measurable damage to the tract as a whole. But he undertook to attribute to the publicity the project would receive, apart from the fact of the discharge of sewage, a 30 per cent. depreciation in property values. If detriment comes to defendant's land, it will come alone from the use of the sewer and the proximity of the outlet. Manifestly these are the considerations that would influence prospective buyers. Since damage from this source is not recoverable in this action, if it is recoverable at all, we find nothing in the stricken testimony that would support a tangible

claim for damages. The testimony stricken out was fully as speculative and conjectural as that held inadmissible upon the same grounds in *Coast Counties Gas & Electric Co. v. Miller & Lux, etc.*, 118 Cal. App. 140, 5 P.(2d) 34, and *County of Los Angeles v. Signal Realty Co.*, 86 Cal. App. 704, 261 P. 536. An award of damages based upon the quoted testimony of the witness Laffler would be a departure from the sound and just rule that damages must be established with reasonable certainty and may not be purely speculative as to amount or remote as to origin. Where it is problematical whether recoverable damage exists or has been proven, no award can be made.

We are satisfied that the rulings of the court were correct, and that defendant was allowed to prove all of his recoverable damage.

The points we have disposed of are the only ones urged by appellant. It is unnecessary to discuss additional argument of respondent in support of the rulings of the court.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.



8 Cal.App.2d 532

PANHANS v. ASSOCIATED INDEMNITY CORPORATION.
Civ. 9271.

District Court of Appeal, First District,
Division 1, California.

July 30, 1935.

Rehearing Denied Aug. 29, 1935.

Hearing Denied by Supreme Court
Sept. 26, 1935.

1. Insurance ☞514½

In order to relieve itself from liability on automobile public liability policy because of insured's breach of co-operation clause in policy, insurer must show that breach affected material condition of policy and operated to insurer's substantial prejudice.

2. Insurance ☞665(3)

Whether there has been lack of co-operation on part of assured, in defense of action on liability policy brought against insurer,

sufficient to constitute breach of policy is question of fact (Civ. Code, § 2611).

3. Insurance ☞665(3)

In action on automobile public liability policy for amount of judgment obtained against assured where insurer repudiated liability under policy and withdrew its attorney from case three weeks prior to trial after notice to insured, because of disappearance of insured without notification of insurer, eight months after accident and three months after insurer had been served with summons and complaint, during which time insured had not been requested to keep insurer informed of his whereabouts, question of whether failure of insured to attend trial constituted breach of co-operation clause to prejudice of insurer *held* for jury (St. 1919, p. 776; Civ. Code, § 2611).

4. Insurance ☞514½

Repudiation of liability under automobile public liability policy and withdrawal from trial of action on policy *held* not essential to avoid waiver of right of insurer to terminate liability under policy for failure to co-operate in defense of action (Civ. Code, § 2611).

5. Insurance ☞514½

Even if insured's failure to attend trial of action on automobile public liability policy constituted breach of co-operation clause, breach *held* not prejudicial to insurer where insured's presence at trial could have served only to enable him to give testimony which would have tended to establish liability of insurer for accident on which action was based.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Ernest Panhans against Associated Indemnity Corporation. Judgment for plaintiff, and defendant appeals.

Affirmed.

John J. Taheny and John A. Sullivan, both of San Francisco, for appellant.

Arthur Joel, of San Francisco, for respondent.

PER CURIAM.

The respondent, Ernest Panhans, was severely injured when knocked down by an automobile owned and driven by George King, against whom Panhans subsequently obtained a judgment for damages in the sum of \$18,882.75. At the time the accident happened, King was covered by a policy of public liability insurance for the

principal sum of \$5,000 issued by the appellant, Associated Indemnity Company, and King being judgment-proof, Panhans brought the present action under the statutory authority of chapter 367 of the Statutes of 1919 (page 776) against appellant as King's insurance carrier, to recover the sums called for by said policy, and upon trial before a jury was awarded a verdict for \$7,655, which included interest on the King judgment. From the judgment entered on said verdict, the insurance company has appealed.

[1] The main defense urged by appellant in the trial court was the alleged breach by King of the so-called co-operation clause of the insurance policy; and one of the grounds urged for reversal on this appeal is that the trial court erred in ruling during the trial and instructing the jury to the effect that in order to relieve itself of responsibility under the policy the insurer must show that the breach, if any there was, affected a material condition of the policy and that the breach operated to the substantial prejudice of the insurance carrier. In this connection appellant cites the provisions of section 2611 of the Civil Code, which provides that "a policy may declare that a violation of specified provisions thereof shall avoid it, otherwise the breach of an immaterial provision does not avoid the policy," and calls attention to the fact that the co-operation clause of the policy in the present case concludes as follows: "The failure of Insured to co-operate as aforesaid shall terminate all liability of the Company under this Policy." The cases relied on by appellant in support of its contention are *Fountain v. Connecticut Fire Ins. Co.*, 158 Cal. 760, 112 P. 546, 139 Am. St. Rep. 214; *McKenzie v. Scottish Union & Nat. Ins. Co.*, 112 Cal. 548, 44 P. 922; *Bastian v. British American Assur. Co.*, 143 Cal. 287, 77 P. 63, 66 L. R. A. 255; *Employers' Liability Assur. Corp. v. Industrial Accident Commission*, 177 Cal. 771, 171 P. 935; *Wilkinson v. Standard Accident Ins. Co.*, 180 Cal. 252, 180 P. 607; and *Solomon v. Federal Ins. Co.*, 176 Cal. 133, 167 P. 859. In our opinion the cases cited are not in point here, however, for the following reasons: Each of them dealt with a character of policy entirely different from the one here involved. That is to say, those cases concerned policies which insured against such risks as fire, accidental death, and industrial accidents, where only two parties were interested, namely, the insurer and

the insured, and where the breach occurred prior to the happening of the event which brought about the liability of the insurer, such as the making of fraudulent statements or false representations by the insured in procuring the policy, or the failure by him to comply with the conditions imposed therein as to the operation of or protection to be given to the property insured; while in the present case we are dealing with a policy of public liability insurance which by statutory enactment is made to inure to the benefit of third persons, and where the alleged breach by the insured occurs after the happening of an event giving rise to the liability thereunder of the insurer. And there are two recent cases [*Hynding v. Home Acc. Ins. Co.*, 214 Cal. 743, 7 P.(2d) 999, 85 A. L. R. 13, and *Purefoy v. Pacific Automobile Indemnity Exchange* (Cal. Sup.) 46 P.(2d) 143] which deal directly with this class of policy; and in each case it was held in substance that before the insurer may relieve itself of liability to a third person for any breach of the co-operation clause by the insured occurring subsequent to the happening of the event which makes the policy operative in favor of such third person, it is essential for the insured to establish by evidence that a material provision of the co-operation clause was breached and that the insured suffered substantial prejudice thereby. It is true that in the *Hynding* Case the co-operation clause apparently did not contain the specific provision that failure of the insured to co-operate avoided the policy; but such provision was present in the *Purefoy* Case. It is true also that a rehearing has been granted in the *Purefoy* Case and that consequently the decision therein cannot be considered as a final adjudication. However, the precise point upon which the rehearing was granted does not appear and the reasoning used in that decision in passing upon the legal problem with which we are here confronted coincides entirely with the conclusion we have reached therein, and therefore in our opinion should be followed by us in the present case. In this regard the court therein said: "Respondent relies upon a strict and literal interpretation of the co-operation clause of its insurance contract with Austin, requiring that assured give 'immediate written notice of any accident, claim, loss or suit hereunder, * * *' and other requirements customary in such insurance contracts, which conclude with the declara-

tion that 'immediately upon a failure or refusal to perform any one or more of said conditions this policy and the liability of the Exchange, if any, thereunder shall automatically terminate.' Were such an interpretation given effect in all cases, it would open an avenue of temptation to insurers, through collusive action with judgment proof clients, to evade payment of just claims. A contract of insurance against liability is one for the benefit of unknown third parties who become known and identified upon being injured by the insured. It would be a strange and useless proceeding on the part of the Legislature to give to the injured party the right to sue the insurer (Stats. 1919, p. 776), if such action could be defeated by the insurance company and the insured without the knowledge or consent of, or any act on the part of, the injured person. *Malmgren v. Southwestern Automobile Ins. Co.*, 201 Cal. 29, 33, 255 P. 512; *Bachman v. Independence Indemnity Co.*, 112 Cal. App. 465, 483, 297 P. 110, 298 P. 57. The failure of Austin, the insured, to fully co-operate with the insurance company did not, therefore, deprive plaintiff of his right of action in this case." And in conclusion the court goes on to hold that the insurer in that case was not prejudiced by the breach of the co-operation clause, and the judgment in the action was reversed. It is our opinion, therefore, that the trial court in the present case did not err in making the rulings and giving the instructions of which appellant complains.

[2-5] Turning then to the questions of whether King did breach a material provision of the co-operation clause, and, if so, whether the breach operated to the substantial prejudice of appellant, the record discloses the following facts, which are not disputed: The clause in question provided: "The insured shall co-operate fully with the Company and aid, if the Company deems necessary, without expense to the Insured, in securing information and evidence and the attendance of witnesses and in the settlement or defense of any suit or prosecution of any appeal. In case of suit the Insured shall, at his own expense, present himself in due time for the preparation of his defense, at the office of the attorney selected by the Company to defend such suit, and shall attend the trial of such suit. The Insured shall not admit or voluntarily assume any liability or in any manner aid or abet any claimant; nor shall the Insured settle any claim, or in-

cur any expense, except for immediate surgical relief, except at the Insured's own cost. The Company shall have the right to settle any claim or suit at its own cost at any time. The failure of Insured to co-operate as aforesaid shall terminate all liability of the Company under this policy." Conforming to the foregoing provisions, King, on the day of the accident, voluntarily presented himself at appellant's office in San Francisco, where he then lived, and was interrogated fully by appellant's claims superintendent, following which he made and signed a full report of the circumstances attending the accident, which prove beyond question and as a matter of law that the accident was proximately caused by King's negligence by attempting, in violation of municipal ordinances, to drive his automobile between a westbound Market street car and the pedestrian safety zone on the northwest corner of Powell and Market streets in San Francisco, about 2 o'clock on the morning of April 16, 1930, just as Panhans and another man were running from said safety zone to board said street car. The impact threw Panhans' companion on the front bumper of the street car and hurled Panhans partly under its front trucks, with the result that Panhans' hand was badly mangled by the wheels of the street car and he sustained other severe injuries. The report goes on to state that there was no traffic at the time to obscure King's view of the safety zone and that as he was crossing the intersection he saw the men standing in the safety zone. The only possible excuse offered by him was that the men did not attempt to board the street car when it stopped opposite the safety zone, but ran out afterwards to board it as it started to move on; but he admitted that at no time while crossing the intersection or approaching or attempting to pass the street car did he slacken his speed, which he fixed at twenty-five miles an hour. His report also set forth that he was then living with his parents at 545 O'Farrell street in San Francisco, and he gave the names of his present and former employers; and he told the company's agent at that time that he believed he could obtain the names of two newsboys who witnessed the accident and would try to do so. He called again at the company's office on May 26, 1930, and was again interrogated, at which time he informed the company's agent of his inability to secure the names of said witnesses. At neither of the interviews was

he requested to do anything more than to keep the company advised as to his whereabouts in case he changed his place of residence. Some time thereafter, the date not being shown by the record, King moved to Los Angeles, and on September 18, 1930, wired the company that he was then living at 900 South Serrano street in that city; that he had been served with summons and complaint in the action for damages brought against him by Panhans, and he gave the name of Panhans' attorney. The company wrote back requesting King to forward the documents served upon him to the company and to give the date and place of service. It also requested him to send the name and address of any attorney he might desire to employ personally in the case. King replied by letter, dated September 20, 1930, giving the same address, and stated that he did not consider it necessary to employ counsel for himself; that he had no property whatever, only a small salary and many debts; and that if judgment were rendered against him he could "do nothing about it." And in a postscript to the letter he added: "*Please advise me as to outcome of trial.*" (Italics ours.) This letter was received by the insurer at its office in San Francisco on September 22, 1930, but it made no reply thereto until a month later, on October 25, 1930, at which time it advised King by letter that a motion was about to be made to set the case for trial and stating that "inasmuch" as it would be necessary for King to be present at the trial in San Francisco, he should keep the company informed of his whereabouts so that it could advise him of the trial date. The company received no acknowledgment of the receipt of that letter, nor was the letter returned undelivered. The company did not again attempt to communicate with King until January 9, 1931, at which time it sent him a registered letter to the Los Angeles address calling attention to the contents of its letter dated October 25, 1930, asking him to write at once, and stating that his co-operation was essential if he expected the company to extend protection under the policy. And a month later, February 17, 1931, the company again wrote two letters to King, by registered mail, one addressed to his San Francisco address and the other to his Los Angeles address, calling attention to its previous letters of October 25th and January 9th, and stating that it was necessary for him to be present at the trial and that

unless the company heard from him within ten days of the receipt of its letter, it would be necessary to deny him the protection of the policy for breach of the co-operation clause therein. All three letters, the one dated January 9th and the two dated February 17th, were returned to the company undelivered; and about February 20th the company learned through its Los Angeles investigators that about December 12, 1930, King left the Los Angeles address and later was confined in and released from the Los Angeles city prison; whereupon, and on March 11, 1931, the company again mailed registered letters to King addressed to San Francisco and Los Angeles, both of which were returned undelivered, wherein it stated that the case had been set to be tried on April 2, 1931 (which was the first time the date of trial had been mentioned in any of the letters) and that it had withdrawn its defense because of King's breach of the co-operation clause; and on the following day, March 12th, the attorneys it had employed served notice of withdrawal from the case. Consequently, appellant having withdrawn from the case, the trial took place on April 2, 1931, the date originally set therefor, in the absence of any legal or personal representation on the party of King or appellant, and judgment by default was entered against King for \$18,882.75.

It is held generally that the question of whether there has been a lack of co-operation on the part of the insured sufficient to constitute a breach of the policy is one of fact. 13-14 Huddy, Automobile Law, § 298, p. 378, and cases cited; see, also, Metropolitan Casualty Ins. Co. v. Blue, 219 Ala. 37, 121 So. 25; Finkle v. Western Automobile Ins. Co., 224 Mo. App. 285, 26 S.W.(2d) 843; Coleman v. New Amsterdam Casualty Co., 247 N. Y. 271, 160 N. E. 367, 72 A. L. R. 1443; Francis v. London Guar. & Acc. Co., 100 Vt. 425, 138 A. 780. In the present case, as will be seen from the undisputed facts above narrated, from the very day of the accident up to the time of King's disappearance on December 12, 1931, King was guilty of no act or omission which could be said to constitute a violation of the co-operation clause of the policy. During all that period of time he remained subject to appellant's call, and, so far as the record shows, appellant made no request whatever upon him to do anything which he refused or neglected to do. On the other hand, the admitted facts show he freely

and voluntarily co-operated with appellant in every way possible. As stated, he called at its office on the day of the accident and gave a full account thereof orally and in writing, and called again a month later. In the meantime he endeavored to secure witnesses to aid in the defense of the action and immediately upon being served with summons in Los Angeles he so notified appellant and in accordance with its instructions forwarded the papers at once to the company's office in San Francisco; and it would seem that the eight months' period elapsing between the date of the accident and King's disappearance in Los Angeles, which was approximately three months after appellant received copies of the summons and complaint, afforded appellant ample time to call on King for any assistance it desired in the preparing of his defense to the action. But, as stated, it made no request whatever upon him during that time except to keep it informed of his whereabouts.

It is clear, therefore, that King committed no breach of the policy up to December 12, 1930, the time he left the Los Angeles address without notifying appellant as to his future whereabouts, and the issue narrows down to the single question of whether under the circumstances above stated his failure to attend the trial constituted a breach of a material provision of the policy, the effect of which was prejudicial to appellant. When all of the facts surrounding his failure so to do are taken into consideration, we are not prepared to hold, as a matter of law and contrary to the conclusion reached thereon by the jury, that it did. As above pointed out, appellant elected to repudiate its liability under the policy and withdrew its attorneys from the case some three weeks prior to the date of trial. Consequently, even though King had attended the trial, his presence would have served no useful purpose. Appellant contends, however, that such repudiation and withdrawal was essential in order to avoid a waiver of its rights under the pol-

icy. But this position cannot be sustained in view of the recent decision in *McDanel v. General Ins. Co.*, 1 Cal. App. (2d) 454, 36 P.(2d) 829, which holds directly to the contrary. Even assuming, however, as appellant contends, that the law permits it in support of its repudiation and withdrawal to claim the advantage of any acts or omissions on the part of King occurring subsequent to such repudiation and withdrawal, and assuming also that King's failure to attend the trial constituted a breach of the co-operation clause, it cannot be successfully maintained that such breach operated to appellant's prejudice for the reason that King's presence at the trial could have served but one purpose, namely, to testify as to the manner in which the accident happened, and obviously his testimony, if given in conformity with the facts set forth in the written report theretofore made by him, instead of being beneficial to his case would have been wholly detrimental thereto, because as already stated the facts set forth in said report prove in themselves, as a matter of law, that Panhans' injuries were proximately caused solely by King's negligence. For the reasons stated, we find no legal ground upon which to interfere with the conclusion reached by the jury.

In furtherance of its contention that King's failure to attend the trial was prejudicial, appellant cites certain language used in the *Hynding Case*, *supra*. But the differentiating point between the two cases is this: There the decision expressly states that the "report of the accident [made by the insured] indicated that a defense existed," and the court goes on to say that "it would normally be expected that his testimony would bear this out"; whereas here the insured's report of the accident indicated just the opposite. We find no merit in the remaining points made by appellant, including those relating to the instructions and the amount of the verdict rendered against appellant.

The judgment is affirmed.

8 Cal.App.2d 590

ELLINWOOD v. McCOY et al.

Civ. 9171.

District Court of Appeal, Second District,
Division 1, California.

Aug. 2, 1935.

Rehearing Denied Aug. 30, 1935.

Hearing Denied by Supreme Court
Sept. 30, 1935.**1. Physicians and surgeons** $\Rightarrow$ 14(2)

Doctor must use same degree of care, diligence, and skill in treatment of his patients as is possessed and used by prudent, skillful, and careful practitioners of the same school practicing in vicinity.

2. Physicians and surgeons $\Rightarrow$ 18(8)

In action for malpractice, evidence *held* to sustain verdict for plaintiff.

3. Physicians and surgeons $\Rightarrow$ 18(7)

In action for malpractice against drugless practitioner, admission of testimony of physicians called by plaintiff who were not drugless practitioners *held* not error.

4. Trial $\Rightarrow$ 296(3)

In action for malpractice against drugless practitioner, negligence instruction which omitted necessary element of standard of care by which acts of practitioner were to be judged *held* not prejudicial error, where court instructed that defendant was not required to use method of treatment approved by practitioners of medicine or surgery, and that he was not liable for malpractice, regardless of outcome of treatment, unless he failed to use ordinary skill of like practitioners in same locality.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Herbert M. Ellinwood against Frank J. McCoy and another. Judgment for plaintiff, and named defendant appeals.

Affirmed.

See, also, 133 Cal. App. 597, 24 P.(2d) 549.

Barry & Boehler, of Los Angeles (Warren Lee Kinder, of Los Angeles, of counsel), for appellant.

Edwards & Taylor and Harvey D. Taylor, all of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

In an action for malpractice, a jury returned a verdict for \$7,500 in favor of the respondent and against appellant Dr. Frank J. McCoy. The appeal from

the judgment entered thereon presents principally the question whether or not the evidence is sufficient to sustain the verdict, although other points on appeal are urged.

The evidence shows that on December 14th respondent consulted Dr. McCoy, licensed to practice as a drugless practitioner, for treatment of gonorrhea. On the occasion of this first visit, Dr. McCoy inserted an ultra violet ray orificial applicator, also called a cold quartz rod, into respondent's urethra and left it there with electric current turned on for a period of seconds. Appellant also placed a diathermy electrode in respondent's rectum, with a metal plate near the small of the back. Electrical current was then applied, and the electrode heated to 102 degrees Fahrenheit. The treatment of the urethra with the cold quartz rod was given on four later days, the last on December 20th, by Dr. James E. Anderson upon the direction of appellant. Diathermy treatments were also given by Dr. Anderson during this period. Dr. Anderson, the record shows, was one of a number of chiropractors working for appellant in his offices.

On the night of December 20th, respondent consulted another physician who found him in a condition where it was impossible for him to urinate. Respondent was taken to a hospital where for twelve hours various means were used in an effort to open up the urethra so that respondent could urinate. When there was such an accumulation of urine that two surgeons felt that respondent was in great danger, an abdominal operation was performed and the bladder drained by means of a tube. This tube was kept connected through the abdominal incision until the urethra healed sufficiently to allow normal flow of urine through it, which took about three weeks.

Dr. Dowey, one of the surgeons who operated upon plaintiff, testified that respondent before the operation was suffering from acute urethritis of apparent traumatic origin from mechanical instrumentation; thermal injury of ultra-violet origin; and acute cystitis, both bacterial and traumatic. He also stated that after the operation a good deal of tissue within the urethra sloughed out in pieces from the size of a small flake to perhaps one-half to three-quarters of an inch

across. This indicated to him, he explained, that the tissue within the urethra and a portion of the bladder had been so traumatized or injured that it died and sloughed off, and that respondent had suffered third-degree burns of both the urethra and bladder. In further explanation the doctor stated that "the phenomena which presented themselves clinically in his case were not characteristic of a noncomplicated gonorrheal urethritis. They were characteristic of a case which had been traumatized through brutal instrumentation."

Dr. Willis, the other attending surgeon, testified that during the operation, an examination of the bladder showed "the so-called trigon area—a triangle shaped space between the urethral orifice and the bladder neck—was markedly inflamed and engorged" with second-degree burns; and that after respondent urinated normally the urine contained a heavy deposit of necrotic tissue. He also gave as his opinion "that the retention of urine was due to photo-thermic destruction of the lining membrane and inflammation of the cavernous urethral structure from prolonged application of the ultra-violet light."

In addition to these witnesses, respondent called Dr. McKinney, a specialist in urology, who in response to a hypothetical question embodying the treatment of the respondent by the appellant and Dr. Anderson, expressed the opinion that respondent was too vigorously treated and burned with the diathermy or the violet ray.

[1,2] From the testimony given by Dr. Dowey and Dr. Willis of the condition of respondent's penis after the treatment given by appellant, the jury was thoroughly justified in finding that respondent had suffered severe injury, and their description of what they found during the operation is further evidence of even more convincing character. The duty which the appellant owed to his patient has been thus stated: "A practitioner is, however, required by law to use the same degree of care, diligence, and skill in the treatment of his patients as is possessed and used by prudent, skillful, and careful practitioners of the same school practicing in the same vicinity." *Howe v. McCoy*, 113 Cal. App. 468, 470, 298 P. 530. See, also, *Hessler v. California Hospital Co.*, 178 Cal. 764, 174 P. 654. If the condition of the respondent was, as testified to by Dr. Dowey, a condition which in itself indicated that this was "a case which had been trau-

matized through brutal instrumentation," it can hardly be said that the appellant used the care and skill required by the law. And the jury was warranted in finding accordingly if they believed the testimony.

[3] Concerning appellant's claim that the testimony of the physicians called by the respondent should have been excluded because they are not drugless practitioners, the following is pertinent and determinative of the point: "We might add that we are cited to no rule obtaining in this jurisdiction and know of none which would preclude a physician trained in one medical school from testifying in a proper case as to the treatment rendered by a physician or surgeon trained in a different school. Such a rule might be promulgated where charges of negligence in a malpractice case are directed toward some special course of treatment to be tested by the general doctrine of a particular school, but it is not applicable to a case of this character where the alleged malpractice is based upon general charges of negligence relating largely to matters of almost common observation within the experience of every physician and surgeon." *Hutter v. Hommel*, 213 Cal. 677, 681, 3 P.(2d) 554, 556.

[4] Appellant also complains of the following instruction: "I instruct you that negligence on the part of a drugless practitioner or chiropractor consists in his doing something which he should not have done, or in omitting something which he should have done." This instruction omits the very necessary element of the standard of care by which the act of the practitioner is to be judged. However, in other instructions the court fully presented the law to the effect that there are different recognized methods of treatment for gonorrhea; and that the appellant was not required to use that method recognized or approved by practitioners of medicine or surgery; that he was only required to possess and use ordinary skill; and that no recovery could be had against him, regardless of the outcome of his treatment, unless he failed to have or use the ordinary skill of like practitioners in the same locality. In a somewhat similar situation where the instructions given in a malpractice case were under consideration, the Supreme Court said: "When the instruction complained of here is read in connection with and in the light of the other instructions in

the case, of which the defendant does not complain, it cannot be said that the instruction, though manifestly erroneous, was prejudicial to a degree which would require a reversal of this case." Hall v. Steele, 193 Cal. 602, 609, 226 P. 854, 857. The same rule applies here.

Also, there was no error in giving to the jury instructions concerning the duty of one holding himself out as a specialist. There was evidence to the effect that the appellant represented himself to be a specialist, and if the jury believed this evidence they were entitled to judge his conduct by the standard of care stated in the instruction.

The other points raised by the appellant are disposed of by what has been heretofore stated.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.



8 Cal.App.2d 622

OSBORNE et ux. v. IMPERIAL IRR.
DIST. et al.
Civ. 1087.

District Court of Appeal, Fourth District,
California.
Aug. 5, 1935.

1. Pleading ⚡200

In action against officers of irrigation district for damages for death of plaintiffs' minor daughter alleged to have been caused by dangerous condition of structure across canal, defect of complaint which did not, as required by statute, allege that deceased was using the structure with due care at time of alleged accident, *held* not cured by presumption that person uses due care for his own safety (St. 1919, p. 756).

2. Negligence ⚡113(1)

Use of due care may be alleged in general terms similar to allegation of negligence, but under statute requiring affirmative proof of due care it is not sufficiently alleged by mere allegation of negligence of defendant (St. 1919, p. 756).

3. Waters and water courses ⚡263

In action against officers of irrigation district for damages for death of plaintiffs'

minor daughter alleged to have been caused by dangerous condition of structure across canal, evidence *held* insufficient to establish, as required by statute, that injury occurred as a direct result of dangerous condition and while structure was being used with due care (St. 1919, p. 756).

4. Waters and water courses ⚡263

In action against officers of irrigation district for damages for death of plaintiffs' minor daughter alleged to have been caused by dangerous condition of structure across canal, evidence *held* insufficient to prove notice by officers of the dangerous condition as required by statute as basis of recovery (St. 1919, p. 756).

5. Negligence ⚡66(1)

Persons in charge of premises are not liable for injuries to an invitee which results from a danger which is as obvious to him as it is to them.

6. Waters and water courses ⚡260

In action against officers of irrigation district for damages for death of plaintiffs' minor daughter alleged to have been caused by dangerous condition of structure across canal, fact that the danger was not as obvious to child as to adult *held* not to relieve plaintiffs of statutory burden to prove due care on part of deceased (St. 1919, p. 756).

Appeal from Superior Court, Imperial County; Lloyd E. Griffin, Judge.

Action by E. L. Osborne and wife against Imperial Irrigation District, Ira Aten, and others. From a judgment for plaintiffs against Ira Aten and others, those defendants appeal.

Judgment reversed.

Chas. L. Childers, of Los Angeles, and D. B. Roberts, of El Centro, for appellants.

Hickcox & Trude, of El Centro, for respondents.

BARNARD, Presiding Justice.

This is an action for damages for the death of a minor daughter of the plaintiffs, the child being about six years and five months old.

A demurrer filed by the defendant district was sustained, and the action went to trial as against the individual defendants, resulting in a judgment in favor of the plaintiffs for \$5,000, from which judgment those defendants have appealed.

The respondent E. L. Osborne was employed by the defendant district and was in charge of a concrete structure extending across one of the large canals of the district, the purpose of which was to control the flow of water in the canal and to make possible the diversion of water into smaller canals. He was required to live in a house belonging to the district, and his main duty consisted of opening and closing the gates in the structure and regulating and controlling the flow of water; a telephone being maintained in the house over which he received his orders and made his reports. This house, on the east bank of the canal, was surrounded by a fence; the entrance being through an ordinary picket gate which was at the east end of the concrete structure. The only means of ingress and egress to and from the house was by walking along the top of the structure, which was about 40 feet long and some 4½ feet wide, and through this gate. An iron railing extended along the entire north side of the walk formed by the top of the structure. A concrete heading for water gates formed a bannister along the westerly half of the south side of this walk, but the easterly half of the south side was built for the insertion of "flash boards" and there was no railing of any kind along that portion of the south side. The picket gate referred to opened over this walk. It was hinged on its south side and when opened could be swung clear around parallel to the fence, in which position it would extend over the water to the south of the structure.

Osborne moved into this house with his family on October 24, 1929, and the little girl went to school regularly from that time until the accident happened. The school was some miles away and the child went back and forth in a school bus which stopped for her at a point about one-half a mile west of the house. The place where the bus stopped and the intervening road was visible from the house and it took the child from ten to fifteen minutes to walk from the bus to her home.

On May 7, 1930, the child left the bus at about 3:45 in the afternoon and, with another girl named Lyons, walked toward her home. The Lyons girl, while entering her own home which was on the west side of the canal some 300 to 400 feet distant from the structure, observed the respondents' daughter about halfway to the

canal and walking toward the concrete structure; this being the last time the child was seen alive. When the child failed to appear at home the parents instituted a search for her and a little later the water was let out of the canal and a search made without success. On the morning of May 9, the body of the child was brought to the Lyons home by a man who had found it. This man died before the trial and there is no evidence as to where the body was found. Mrs. Lyons testified that when the body was brought to her home it had the appearance of having been in the water and that the body and the child's clothes were covered with silt.

The respondents' cause of action is and must be based upon the act of 1919 (Gen. Laws, Act 5618; Stats. 1919, p. 756), which provides that no officer of such a district shall be liable for any injury resulting from the defective or dangerous condition of any bridge, work or property unless it shall first appear: (1) That the injury was the direct and proximate result of such defective or dangerous condition, (2) that such officer had notice of the same, (3) that he had authority and it was his duty to remedy the condition at the expense of the district and that funds therefor were immediately available to him, (4) that he failed to remedy the same within a reasonable time after receiving such notice and while able to do so, and (5) then only when it further appears that the injury was sustained while the structure was being carefully used and that due care was being exercised to avoid the existing danger.

[1] The appellants first contend that the complaint failed to state a cause of action under this section. The complaint alleged that the defendants were and had been maintaining this structure in a dangerous and unsafe condition, in that the top of the same was designed to be used as a footpath and bridge and was very narrow; that the waters of the canal were continually rushing in a northerly direction with a tendency to cause any person walking across the structure to lose his balance and be likely to fall into the canal; that there was no railing or guardrail along the south side of the structure; that the gate at the east end of the structure and leading to the dwelling was so constructed that it had a tendency to impel a person opening it toward the unguarded south side of the footpath, if any appreciable

amount of wind was blowing at the time; that a railing along the south side was necessary to make the bridge safe for pedestrians; that prior to the accident here in question the plaintiffs informed the defendants that a railing along the south side was necessary in order to make the bridge safe and demanded that such a railing be installed; and that with full knowledge of the unsafe and dangerous condition mentioned the defendants continued to maintain and operate the structure without a guardrail on the south side thereof.

In *Gorman v. County of Sacramento*, 92 Cal. App. 656, 268 P. 1083, 1088, in pointing out a distinction between the act of 1919 and the act of 1923 making counties, municipalities, and school districts liable for the negligence of their officers in certain cases, the court said: "An examination of the 1919 act shows that a person suing an officer for negligence has not only to plead, but also to prove, that the injury and damage complained of was sustained while such public street, highway, bridge, building, work, or property was being carefully used, and that due care was being exercised to avoid damage due to such condition, or, in other words, this act changes the general rule that the burden of showing contributory negligence is upon the defendant, and requires an affirmative showing on the part of the plaintiff that he was using the road, bridge, or street with due care."

In *Shannon v. Fleishhacker*, 116 Cal. App. 258, 2 P.(2d) 835, 837, the court said: "The appellant having failed to plead or prove that the deceased was using the 'property' with due care, she has utterly failed to make a case to go to the jury." The same principle is set forth in *Ham v. Los Angeles County*, 46 Cal. App. 148, 189 P. 462, and in *Moore v. Burton*, 75 Cal. App. 395, 242 P. 902. The complaint herein is entirely lacking in the respect referred to and contains no allegation relating to the manner in which the property in question was being used. The respondents argue that this defect is cured by the presumption that a person uses due care for his own safety. Under similar circumstances the court in *Shannon v. Fleishhacker*, supra, said:

"The only answer suggested to the foregoing is that, under the rule of *Smellie v. Southern Pac. Co.* [212 Cal. 540], 299 P. 529, the law presumes that the deceas-

ed exercised due care for his safety and hence any evidence of negligence on his part would merely create a conflict which should go to the jury. These considerations were before the court in the *Ham Case*, where it was said that to so hold 'is to offset by a legal presumption the declaration of the statute that the burden is on the plaintiff in such cases to show that due care was used by him.' Page 161 of 46 Cal. App., 189 P. 462, 468. To this it might be added that to so hold is to render that portion of the statute nugatory because, if the plaintiff can rely upon that presumption alone, there would be no need of his pleading or proving due care. The proper rule, as we understand the decisions, is that this presumption, which is available to the plaintiff generally, is not sufficient, in actions brought under this statute, to satisfy the demand that the plaintiff must plead and prove the exercise of due care in the use of the public property causing the injury.

"There is a justifiable reason for this distinction. Public property is open to the use of the public generally; and the general use of such property is a constant source of danger to the public. To encourage the exercise of due care in the use of public property, the Legislature might well limit the public liability to those who exercise such care. And, as the state and its political subdivisions and officials may not be sued for damages in such cases without the consent of the state, the Legislature may properly impose such reasonable restrictions upon actions of this character."

[2] The appellants cite the case of *Moore v. Burton*, supra, to the point that the use of due care may be alleged in general terms, similar to an allegation of negligence. While this is true and while the court held in that case that the use of due care had been sufficiently alleged, nothing therein can be considered as sustaining the proposition that there need be no allegation in that regard or that alleging negligence in general terms is a sufficient compliance with this affirmative requirement of the statute here in question.

If it be assumed that this defect in the pleading might be cured by proof that due care was used, we are here met by an entire absence of proof in this regard. There is no evidence in the record as

to the manner in which this structure was used on the occasion in question and no facts appear from which it may be reasonably inferred that due care was being used.

[3] It is next contended that the evidence is insufficient to sustain certain findings to the effect that the structure here in question was too narrow for use as a footpath; that the gate at the east end thereof, leading to the house, was so constructed and maintained as to be dangerous and unsafe because it had a natural tendency, as used in connection with the structure and in the absence of a guardrail on the south side, to impel or throw the user thereof to the south or unguarded side of the structure and into the canal, particularly when any appreciable amount of wind was blowing; that the structure was inherently dangerous for use as a footpath in the absence of a railing along its entire south side; that such a railing could have been maintained thereon without material interference with the use and operation of the structure for the purposes for which it was constructed; that the appellant Knight had actual knowledge and notice of said dangerous and unsafe condition and that each and all of the appellants had full knowledge of such unsafe and dangerous condition; that, on the occasion in question, the minor child of the plaintiffs, while attempting to cross the structure and while attempting to open the gate leading from the same to her home, was, because of the absence of a railing or guard on the south side, blown or thrown by said gate into the canal and as the direct cause and result thereof was drowned; that the death of the child was caused directly through the negligence of the defendants in failing to cause a guardrail or railing to be placed along the south side of the structure; and that the respondents were free from contributory negligence.

It was respondents' theory that when the child attempted to open the gate leading to her home a heavy wind blew the gate back against the fence and over the canal, throwing her into the water. The father of the child testified that shortly after 3:30 on the day in question he went out several times to look for his daughter; that from his door he could see where the bus stopped; that two or three times he had to go into the house to answer

the telephone in connection with district business; that one or more of these telephone conversations lasted ten minutes; that the wind was blowing very strong; that he had to push quite hard on the gate to open it; that when he got the gate partway open he had to hold on to it to keep it from blowing open; that when partly open the wind would catch it and blow it open; that when he went in to answer the phone the last time he closed the gate; and that when he came out the gate was open and back against the fence. He also testified that he followed his daughter's footprints to within thirty feet of the west end of the structure and that the condition of the ground from that point to the structure was such that tracks could not be seen.

There is considerable evidence in the record which is uncontradicted to the effect that the concrete structure here in question was built in the usual style and manner and in accordance with good engineering practice, and that because of the manner in which flash boards were used on the east half of the south side of the structure a guardrail along that portion of the south side would have interfered with the use of the structure for the purposes for which it was built. If, however, it may be assumed that negligence appears from the manner in which the structure was built and maintained and that it was maintained in a dangerous condition, no officer of the district is liable, under the statute, unless it first appears that the injury sustained was the direct and proximate result of such defective or dangerous condition. Both in that respect and in changing the usual rule of proving contributory negligence and affirmatively placing upon a plaintiff the burden of showing that due care was exercised by the injured party while using the structure, this statute requires more of a plaintiff than is required in the ordinary negligence case. In the ordinary case, it is as necessary for a plaintiff to show that the defendant's negligence was a cause of the injury as it is to show that the defendant was guilty of negligence and this element must rest upon proof and not be left to a mere surmise or guess. *Puckhaber v. Southern Pacific Co.*, 132 Cal. 363, 64 P. 480. The statute with which we are here concerned increases this burden on a plaintiff by particularly requiring proof that the injury occurred as

a direct result of the dangerous condition and while the structure was being used with due care.

The only evidence we have here is that the child was approaching the structure, that she disappeared, that her body was found somewhere the second morning thereafter, that the condition of the body and the clothes indicated that she had been in the water, and that gate leading to the house was found wide open some ten minutes after it had been closed. In order to sustain the judgment it must be assumed or inferred that the child went upon the structure, that thereafter she fell from it, that she fell from that portion which was without a guard-rail, and that she fell because a guard-rail was not there. Upon the respondents' theory it must further be assumed or inferred that she was knocked from the structure while attempting to open the gate in a heavy wind.

There was some danger in connection with this structure even under the best of conditions. It was not designed for the general use of the public but only for use by those who would be thoroughly familiar with it. While it was undoubtedly dangerous, so far as a small child is concerned, the entire situation with the open canal presented a dangerous condition whether or not a railing was on the south side of this structure. If we are left to a guess as to what occurred, a number of possibilities suggest themselves. With the natural tendency of a six year old child to play, especially when just released from school, the girl may have wandered along the bank of the canal instead of attempting to cross the structure, she may have climbed upon the railings upon the part of the structure which was thus protected, she may have attempted to swing on the gate after she had opened it, she may have stopped on the unprotected part to throw sticks in the water, or she may have attempted to recover something which was being blown into the canal. The respondents rely upon the case of *Gorman v. County of Sacramento*, supra, where a suggestion of other ways as to how the deceased in that case might have gotten into the canal was met with the statement by the court that the only reasonable inference to be drawn from the facts appearing in the record was that the boy met his death by riding his bicycle off the bridge into the water, and that all of the known circumstances point-

ed unerringly to that conclusion. In that case the position of the body and of the bicycle, when found, supported such an inference. In the case before us, facts which point unerringly to the conclusion relied on are absent. Other reasonable inferences may be drawn from such facts as we have, and regardless of what might be the situation in an ordinary negligence case, in our opinion, this evidence is not sufficient to meet the larger and more definite requirement placed upon a plaintiff by this statute.

[4] Turning to the matter of whether these appellants had notice of the dangerous condition relied upon by the respondents, the evidence is again unsatisfactory. With respect to four of the appellants who are directors of the district there is no evidence that any one of them had ever seen the structure or knew anything about it or had ever been informed of any supposedly dangerous condition with respect thereto. As to the other director, appellant Aten, the only evidence is that he had been to the structure two or three times in the five years preceding the trial. He testified that he had visited all of the headgates, that some had railings and some had not, and that he had never noticed whether or not there was a railing on this particular structure. Appellant Dowd testified that he had visited the structure frequently and knew that there was no railing on a portion of the south side. The appellant Knight, who was general watermaster of the district, testified that he was familiar with the structure and knew that there was no railing on the east half of the south side thereof. The respondent E. L. Osborne testified that after moving there he had asked Knight to install a railing and that he said he would do so as soon as possible.

While a number of cases have held, in connection with the 1933 act imposing liability upon counties, municipalities and school districts in certain cases, that notice to the governing boards thereof may be implied from dangerous conditions of long standing, and that the knowledge of any one of its responsible officers is sufficient to bind the city or district, the statute here in question relates to the liability of such officers individually, and requires that notice be brought home to a particular defendant before he can be held liable. Under this rule no notice of any

kind appears as to the appellant directors with the exception of the appellant Aten. It is not shown that he knew that any children were to use the structure and, in view of the surrounding dangers, such information as he had from seeing the structure two or three times over five years is not sufficient to charge him with notice of the particularly dangerous condition here relied upon, especially when it appears that a railing could not have been placed there without interfering with the use of the structure. The same is largely true of the two appellants last named, although Knight knew that the family of the respondents included a child. The circumstances in general were such as to place particular responsibility upon the parents of the child and, under these circumstances, we think it cannot be held that Knight's knowledge that no railing was along the south side of that portion of the structure was sufficient notice of a dangerous condition which should be remedied, within the meaning of this statute. There was a railing along the entire north side which would protect a person who was carefully using the structure as a walk, a railing along the rest of the south side would have interfered with the use of the structure as intended, the exposed portion was little, if any, more dangerous than the banks of the canal in general, and even a railing would not furnish complete protection, with respect to a small child, whose safety after all must depend upon careful use of the walk and watchfulness on the part of the parents. The respondents particularly rely upon the dangerous condition of the gate leading to their home on account of the very strong wind which was blowing on the day of the accident. There is nothing whatever to charge any of the appellants with notice of any unusual or dangerous condition with respect to this gate, which was an ordinary picket gate of the usual type. There is no evidence that any of the appellants knew that this gate had a tendency to swing over too far, that it would be affected by the wind, or, in fact, that any appreciable wind was to be expected. If such a fact existed it was better known to the respondents than to any one else and it would have been a very simple matter for them to have so fixed the gate that it could not open beyond the south line of the structure or any other desired point. The father's testimony that a high wind was blowing that day and

that he himself had difficulty in holding the gate should have been a special warning to him, and, if respondents' theory as to how the accident happened is correct, the general circumstances tend more to show negligence on his part than an especially dangerous condition which should have been known to the appellants.

[5,6] The respondents argue that while the relation of landlord and tenant existed between them and the appellants, in so far as the house occupied by them is concerned, with respect to this structure they and their daughter were invitees. If this be true it is well settled, in so far as that theory is concerned, that the persons in charge of premises are not liable for injuries to an invitee which result from a danger which is as obvious to him as it is to them. *Shanley v. American Olive Co.*, 185 Cal. 552, 197 P. 793; *Mautino v. Sutter Hospital Assn.*, 211 Cal. 556, 296 P. 76; *Weddle v. Heath*, 211 Cal. 445, 295 P. 832. While the danger in question may not have been as obvious to the child as to an older person, it was certainly as obvious to the respondents as to any of the appellants. While this point is not decisive of the case, it does not aid the respondents nor relieve them from the burden placed upon them by the statute.

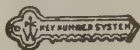
While the respondents assert that a perusal of the record will disclose evidence sufficient to sustain every finding made, the evidence relied upon is not pointed out or referred to. Omitting inferences not based upon facts shown, we are unable to find evidence to sustain the findings that the little girl met her death while trying to open the gate leading from the structure to her home, that her death was caused directly through the negligence of the appellants in failing to install a railing along the entire south side of the structure, and that all of the appellants had notice and knowledge of the dangerous condition of the structure. In addition, it was not alleged, proved, or found that the structure was being carefully used at the time of the injury.

It is the general policy of the law to limit the liability of officers of districts and other governmental agencies, without which limitation responsible persons would hesitate to accept such offices with a danger of liability arising from remote conditions of which they had little or no knowledge and with which they personally had

nothing to do. The general good of the public justifies the rather strict regulations which have been enacted for the protection of such officers. Those restrictions place a burden upon the plaintiff in such an action, which should not be lightly set aside, and their effect should not be destroyed by permitting a mere guess or surmise as to what happened, or inferences based upon other inferences, to take the place of facts established by evidence. There was a definite burden upon the respondents here which, in our opinion, they have not met.

The judgment appealed from is reversed.

We concur: JENNINGS, J.; HARDEN, Justice pro tem.



8 Cal.App.2d 146

JONES v. BOARD OF TRUSTEES OF CULVER CITY SCHOOL DIST. et al.
Civ. 10129.

District Court of Appeal, Second District,
Division 2, California.
June 27, 1935.

Rehearing Denied July 24, 1935.
Hearing Denied by Supreme Court
Aug. 26, 1935.

1. Schools and school districts ☞141(4)

Dismissal of permanent teacher of music in city school *held* within statute authorizing decrease of number of employees on account of discontinuance of a particular kind of service, where the particular service teacher rendered was discontinued, though the subject was thereafter taught by other teachers in addition to their teaching of the other subjects (School Code, § 5.710).

2. Schools and school districts ☞141(4)

Dismissal of permanent music teacher in city school based on discontinuance of particular kind of service *held* invalid, where resolution of school board stated that the subject of music was discontinued and written notice to teacher declared that school board discontinued the subject of music, and there was no suggestion that object of the resolution was merely to discontinue the particular service

rendered by the teacher (School Code, §§ 3.761, 5.710).

3. Schools and school districts ☞164

Resolution of school board "that the subject of music be discontinued" *held* beyond power of board, since music is a prescribed branch of study (School Code, § 3.761).

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by E. Gertrude Jones against the Board of Trustees of the Culver City School District in the County of Los Angeles, State of California, and others. From judgment for plaintiff, defendants appeal.

Affirmed.

Everett W. Mattoon and Ernest Purdum, both of Los Angeles, for appellants.

Tanner, Odell & Taft, of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Respondent was for some years employed as a permanent teacher of music in one of the schools of Culver City. On May 11, 1933, appellant board passed a resolution "that the subject of music be discontinued in the schools of this district at the end of this school year," and instructed the clerk of the district to notify respondent that she was dismissed; the dismissal to become effective at the end of the school year "by reason of the discontinuance of the subject of music." Respondent was given written notice of this action and was not permitted to begin teaching her subject at the opening of the following school year. She brought this action for writ of mandate to be admitted to her employment as a permanent full-time teacher of music. The trial court granted the writ and also gave judgment for the amount of her salary for the months preceding the trial, which took place in July, 1934.

It appears that during the school year of 1933-34, following the action of the school board, the subject of music was not discontinued at the school, but that the instruction in this subject was given by other teachers in addition to their teaching of other subjects.

[1] The first question raised is whether under section 5.710 of the School Code respondent could be dismissed. That sec-

tion, so far as applicable here, provides that: "Whenever it becomes necessary to decrease the number of permanent employees in a school district * * * on account of the discontinuance of a particular kind of service in such district, the governing board may dismiss such employee at the close of the school year." Does this case involve "the discontinuance of a particular kind of service"? An examination of the various passages of the School Code "shows that 'to teach' is 'to serve' and vice versa, and that 'services' of the teacher are 'teaching' and 'teaching' is 'services.'" *Fuller v. Berkeley School District* (Cal. Sup.) 40 P.(2d) 831, 833. Section 5.710 would seem, therefore, to include the discontinuance of a particular kind of teaching, and is not limited to the discontinuance of the teaching of a particular subject. Thus by a change in the method of teaching or in the particular kind of service in teaching a subject, there is a discontinuance of the former "particular kind of service." *Fuller v. Berkeley School District*, supra. The rule of the case last cited was adopted as controlling in *Davis v. Berkeley School District* (Cal. Sup.) 40 P.(2d) 835, in which the service of three traveling teachers in art was discontinued and the subject thereafter taught by other teachers. The court held that the discontinuance of the particular service of traveling art teachers authorized the dismissal of the teachers performing that service. Respondent here argues that since the teaching of music was continued and covered the same branches of the subject as the instruction previously given by her, there was no discontinuance of a particular service. This argument rests upon the premise that the instruction under one form of service is identical with the other. If this were true then there was no occasion for the creation of the service furnished by respondent in the first place; but it is more reasonable to believe that there is a substantial difference, and the creation of the service rendered by respondent is of itself evidence that the service was of a special and particular character. There appears to us an obvious difference between the service rendered by a teacher specializing and instructing in but one subject and the teaching of that subject by classroom teachers as but one of a number of subjects. The service which respondent here rendered was a "particular kind of

service" within the meaning of the School Code.

[2, 3] There remains the question as to whether the action of the school board did discontinue the service which respondent had been rendering. The resolution is, "that the subject of music be discontinued," and in no part even suggests that it is the object of the resolution to continue the subject of music under other teachers and to discontinue merely the particular service rendered by respondent. Furthermore, since music is one of the prescribed branches of study (School Code, § 3.761), a resolution to wholly discontinue the teaching thereof was beyond the powers of the board. The written notice to respondent likewise declares that the school board "did on May 11, 1933, discontinue the subject of music." There is neither a substantial compliance nor any effort at compliance with section 5.710, and the effort toward the dismissal of respondent was invalid and ineffectual.

The judgment is affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.



8 Cal.App.2d 489

MATTOCKS v. F. W. WOOLWORTH CO.

Civ. 9675.

District Court of Appeal, First District,
Division 2, California.

July 24, 1935.

1. Appeal and error ⇨882(3)

In pedestrian's action for injuries sustained when struck by sidewalk elevator, plaintiff could not complain that court should have tried case on theory that defendant was negligent in failing to prevent third persons' meddling with elevator where such theory was not presented to trial court, plaintiff offered no evidence in support thereof and was not denied right to do so.

2. Municipal corporations ⇨817(2)

In pedestrian's action for injuries sustained when struck by sidewalk elevator where plaintiff contended elevator was operated by defendant's employee and both plaintiff's and defendant's witnesses proved that elevator was operated by truck drivers

who had delivered merchandise and were operating elevator in employee's absence and without his knowledge, doctrine of *res ipsa loquitur* held inapplicable.

3. Negligence ⇨121(2)

Inference arising out of *res ipsa loquitur* doctrine may be offset by other evidence.

4. Appeal and error ⇨1011(1)

When trial court has found on conflicting evidence, review on appeal ends when it appears that finding of no negligence has substantial support in evidence.

Appeal from Superior Court, Santa Clara County; Robert R. Syer, Judge.

Action by E. J. Mattocks against the F. W. Woolworth Company and others. Judgment for named defendant, after motions of other defendants for nonsuit were sustained, and plaintiff appeals.

Affirmed.

Alfred Aram, of San Jose, and George Olshausen and John K. Hagopian, both of San Francisco, for appellant.

Archer Bowden, of San Jose, and Wright & Wright & Larson, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued the Pacific Motor Transport Company, the Woolworth Company, and the Valley Truck Lines for damages arising from the operation of a sidewalk elevator maintained on the premises of the Woolworth Company. Negligence was charged against all the defendants in the following terms: That "defendants operated a certain 'sidewalk elevator' so carelessly, negligently and without warning of any nature whatever and without regard to the safety of the pedestrians * * * as to cause and did cause plaintiff to be suddenly raised into the air several feet, and by reason thereof plaintiff fell to the sidewalk and pavement and sustained serious injuries."

When the cause was called for trial, the two trucking concerns asked for a continuance on the ground that they were unable to procure two necessary witnesses. In an affidavit of counsel for one of these defendants it was stated that they would testify that an employee of the Woolworth Company piloted the elevator up to the sidewalk for the purpose of returning the truck drivers to the sidewalk.

It was stipulated that they would so testify and the continuance was denied. Plaintiff then put in his case, but failed to prove any connection between the two trucking concerns and the accident. Their motions for nonsuit were both granted and the trial was continued as to the Woolworth Company.

Evidence was received showing without contradiction that the Woolworth Company owned the building and the elevator; that two employees of some trucking concern delivered goods to this company on the morning of the accident; that an employee of the Woolworth Company met them at the elevator entrance and piloted them with the goods to the basement where the goods were deposited and checked; and that, when this employee was temporarily absent, these truck drivers, without the knowledge or consent of the Woolworth Company, suddenly seized the elevator and ran it to the sidewalk, striking plaintiff, and causing the injuries complained of. Upon these facts the trial court found that the Woolworth Company was not guilty of any negligence and gave judgment accordingly.

[1] Appellant does not question the sufficiency of the evidence to support this judgment, but argues that the trial court should have adopted another theory and found that respondent was negligent because it failed to take sufficient means to prevent third persons from meddling with the elevator. This theory was not presented to the trial court and it cannot be criticized for not adopting it. Furthermore, appellant did not offer any evidence in support of this theory and was not denied the right to do so.

[2] Appellant also argues that he has a *res ipsa loquitur* case and should therefore have judgment. The argument is the extreme of the application of this doctrine to the ordinary action in tort. It is exceedingly difficult to follow the changing opinions of our appellate courts in reference to this doctrine, but we have not as yet found any holding that a plaintiff need prove nothing but the fact that he was injured. Throughout the trial appellant contended that the elevator was operated by an employee of the respondent. His own witnesses and those called by respondent proved that such was not the fact. Hence if there is any room here for the *res ipsa loquitur* doctrine, the occurrence

was satisfactorily explained by the showing that the instrumentality was not in the control of this respondent.

[3, 4] The only question of law raised on the appeal is one which is controlled by the settled rule that the inference arising out of the *res ipsa loquitur* doctrine is just one piece of evidence which may be offset by other evidence, and that when the trial court has found upon the conflict, our review on appeal ends when it appears that the finding of no negligence has substantial support in the evidence.

The judgment is affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.



8 Cal.App.2d 315

PEOPLE v. VICKERS et al.
Cr. 2657.

District Court of Appeal, Second District,
Division 1, California.
July 3, 1935.

1. **Brokers** ⇨3

Individual who owns block of stock, which he can deliver, can sell portion of stock without broker's permit (St. 1917, p. 673, as amended).

2. **Larceny** ⇨65

Licenses ⇨42(4)

Evidence held insufficient to sustain conviction for grand theft and violation of Corporate Securities Act (St. 1917, p. 673, as amended).

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

W. A. Vickers and John M. Jackson were convicted of grand theft and of violating the Corporate Securities Act, in two actions which were consolidated and tried together, and defendant Jackson appeals.

Reversed.

Moses C. Davis and Gerard Remington, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

ROTH, Justice pro tem.

In one action, defendants Vickers and Jackson were accused of several offenses, including grand theft as charged in count V of the information. In another action, they were accused of several offenses, including violation of the Corporate Securities Act (St. 1917, p. 673, as amended) as charged in count V of the information. Each defendant was convicted on each one of said counts V. Both defendants appealed, but the appeals of defendant Vickers have been dismissed. Therefore, we are to consider only the appeals of defendant Jackson (hereinafter called the appellant or Jackson) from the judgments against him, and from the order denying his motion for a new trial.

At the trial these two cases were consolidated and tried together. The appeals are here presented on one record and on one set of briefs.

The said grand theft count charges that the crime was committed as follows: That the defendant, on or about the 4th day of May, 1932, did willfully, etc., take away \$6,700 in money, etc., "of the personal property of one Elizabeth A. Frost."

The other count V charges that the defendants committed the crime therein named, as follows: That the defendants, on or about the 4th day of May, 1932, did willfully, etc., "sell, and offer for sale, securities of a certain corporation known as the Ultra-Violet Corporation, Ltd., to one Elizabeth A. Frost, without having first applied for and/or received a permit from the Commissioner of Corporations of the State of California so to do."

The facts as testified to by prosecution witnesses, upon which the convictions were had and which form the basis for the original ten several charges against Vickers and appellant (so far as they can be clearly crystallized from a maze of evidence confusing in the extreme, but because of the consolidation of the cases, much of it apparently relevant against one or the other of defendants, and still further complicated by the introduction and receipt of evidence on a theory of conspiracy, which evidence proved to be rank hearsay so far as appellant was concerned), appear to be as follows:

Elizabeth A. Frost, a maiden lady, seventy years old, of defective hearing and

impaired eyesight, was possessed of substantial means, consisting of real estate, stock and bonds, and some cash. She engaged one Whitehorne to sell one of her lots in Mesmer City. Appellant Jackson, it appears met Miss Frost the early part of January, 1932, while looking at one of the lots she had given Whitehorne to sell, and although it is not clear, apparently through Whitehorne. Appellant seemed pleased with the lot and telephoned Miss Frost several times about it. But in the meantime Whitehorne brought Vickers to meet Miss Frost on or about January 28, 1932, according to her testimony, who agreed to buy the lot, which he apparently did, for nothing down and the promise of deferred payments which were never made.

What specific negotiations, contacts or conversations took place between Miss Frost and Vickers from the time of the first meeting is not clear, but it appears from an abundance of evidence that Miss Frost almost immediately invested Vickers, whom she had never met before she was introduced to him by Whitehorne, with a plentitude of trust and confidence, and told him all her troubles of a financial nature. She confided to Vickers how her estate—telling him in detail the nature thereof—had dwindled, and told him how worried she was about having enough to live on through her old age, and also about some cousin or cousins for whom she felt a financial responsibility.

Vickers had formerly been an insurance broker, whose license had been revoked. He persuaded Miss Frost that she should sell her securities and thereby amass enough cash to purchase an annuity paying her \$2,000 per year; whereupon Miss Frost took her securities, and in company with Vickers and Whitehorne, delivered them to brokers for sale. Through the sale of these securities made at periodic intervals, and perhaps from other sources, Miss Frost collected a total in excess of \$17,000, and periodically, as money came into her hands, she turned the same over to Vickers, who did actually in each instance deliver the same to the insurance company to apply on the annuity in question, until the sum required for the annuity was paid in full, and the transaction was completed, exactly when does not appear.

Returning to appellant, whether Miss Frost had just one meeting (already mentioned) with him alone, or a subsequent one in the latter part of January or the first

part of February, 1932, does not appear. She recalled, however, after persistent and suggestive questioning, that when she met Jackson he made "a pleasant call" and conversed of "ultra violet"; "Doctor Strong a very eminent surgeon and scientist;" "that it certainly was a wonderful proposition, and it certainly was going to be a very paying proposition." (What was certainly wonderful or paying cannot be gleaned from her report of her conversation with Jackson.)

Questioned specifically as to Jackson's connection with the corporation, which she evidently meant when she used the term "ultra violet" (the nature of which will be discussed in more detail later), the record shows the following:

"Q. Did Mr. Jackson tell you what connection, if any, he had personally with the corporation? A. No, I would not say so.

"Q. Did he talk with you with reference to any amount you should invest? A. No.

"Q. Was the method of your investment discussed, as to whether you were to buy stock or an interest? A. No, when I did—

"Q. No, in this first conversation, was the method of your investment discussed? A. No, I think it was just a pleasant conversation with regard to what this thing was.

"Q. When was the next conversation you had with anyone of these three gentlemen with reference to the Ultra-Violet Ray investment? A. I took it up with Mr. Vickers, and I asked him to look into it for me."

To clarify the picture it should now be stated that one Dr. Frederick F. Strong was the inventor of and had obtained a patent or patents on certain "cold mercury quartz ultra-violet lamps" (which will hereafter be referred to as lamp or lamps), which patents he assigned to Radiant Holding Corporation, a Nevada corporation, organized the latter part of 1931 (hereinafter referred to as Radiant). At the same time Radiant was organized, another corporation to act as licensee was also organized in the state of Nevada called Ultra-Violet Corporation, Limited (hereinafter called Limited). The scheme of corporate operation seems to have been that Radiant was to own the patents and Limited as a subsidiary and licensee under the patents was to manufacture and dispose of the lamps. The patents in question were bona fide and were actually assigned to Radiant. The

persons participating (aside from dummy incorporators) in the organization of these corporate entities were Strong, a quartz technician called Carl Grimm, Bowers, an attorney, one Bristow, joint inventor with Strong, who was in charge of the manufacture of the lamps, and appellant Jackson. According to Strong (a prosecution witness), appellant was an expert in therapeutic application. This is nowhere denied, and seems to be the fact. Bristow, Jackson, and Strong had previously been associated in two other corporations, which apparently had been organized for the same purposes as the two Nevada entities mentioned, but because of a default in complying with legal obligations in regard to the patents, or for some other legal reason, the patents themselves and the manufacturing rights were taken from the two original corporations and vested in the Nevada corporations organized, as has been stated, in the latter part of 1931.

Inasmuch as the charges in these consolidated actions arise out of alleged dealings between Miss Frost and appellant, it is unnecessary to delve into the testimony showing the activities of the prior corporations, the newly organized Nevada corporations, or the fact that money was obtained from others, or the other suggested activities of Strong, Bristow, or Jackson. Suffice it to say that if there were other irregularities with which Jackson is not charged here, all three were equally involved. For the purpose of the charges here, it is sufficient to say that neither corporation obtained a permit from the commissioner of corporations in the state of California, and that Limited installed itself in a place of business on W. Pico street in the city of Los Angeles and commenced to manufacture lamps, or appeared to be doing so, and that Strong, Bristow, and appellant were all active in its affairs.

It appears also that Vickers knew Jackson, and it is undoubtedly inferable, although there is no direct evidence on the subject, that Jackson at some time or other or perhaps on many occasions, convinced Vickers that the lamp enterprise was going to light the way for himself and his associates and any one, who cared to participate, to an economic paradise. Be that as it may, and other than this fact or inference, with the exception of a few other circumstances, which will hereafter be made clear, there is absolutely nothing in the record to directly or inferentially con-

nect appellant with the chain of events which took place after Miss Frost, as the excerpts from her testimony show, instructed Vickers to look into the lamp proposition.

Miss Frost testified: "I asked Mr. Vickers to look into it (the lamp enterprise), as I had lost quite a bit of money in making up the annuity on my bonds and different securities, and I could not afford to lose any more. He looked it up and said it was a bona fide company, and on a paying basis, and I at that time trusted him, and entered the company."

Again she testified:

"Q. By Mr. Blalock: What did Mr. Vickers say about that corporation? A. That it was a very fine corporation, and that it was making money, because there were good men in it, and he thought it would be advisable for me to put my mortgage money into that to accumulate sufficiently to make an annuity for my cousins."

Further, she testified:

"Q. And how did you make your first investment in the Ultra-Violet Corporation, by cash or by check? A. By a check to Dr. Strong.

"Q. And at whose suggestion, if anyone's, did you write the check to Dr. Strong? A. Mr. Vickers.

"Q. Had you up to that time, seen or talked with Dr. Strong? A. Yes.

"Q. When had you first talked to him? A. I went with Mr. Vickers over to his sanitarium. * * *

"Q. After you made that visit to Dr. Strong, how long a time elapsed before you wrote your first check for an investment in the Ultra-Violet Corporation? A. I cannot say positively, but within two or three or four weeks.

"Q. Did you have a conversation with Mr. Vickers with reference to what you were to get for your money in the Ultra-Violet Corporation? A. Yes.

"Q. What did Mr. Vickers tell you? A. They brought me a written copy of what was to be given to me."

The "written copy" referred to by the witness is a letter dated May 2, 1932, in words and figures as follows, to wit:

"Pasadena, California, May 2, 1932. Dr. Frederick Finch Strong, Hollywood, California. Dear Sir: In recognition of the splendid discoveries you have made in your researches for the prevention and cure

of disease, especially as represented by your invention, the Cold-Ray Ultra-Violet Lamp, I am joining with you in your undertaking to make your invention as widely available as possible to the suffering.

"I propose to participate with you in the organization of the Ultra-Violet Corporation, Ltd., and in the organization of its board of directors on the following conditions:

"(1) That Mr. W. A. Vickers shall, at all times, have your full support for his election and re-election as a director of the corporation from year to year.

"(2) That I shall receive from you fifteen thousand (\$15,000.00) dollars par value of the shares of the corporation now standing in your name, personally owned, and the said fifteen thousand (\$15,000.00) dollars par value is represented by six (600) hundred shares of a par value of twenty-five (\$25.00) dollars each, and I understand that all of the shares of the corporation are common shares, and that the shares I am receiving are a part of a certain sixty per cent (60%) of the stock of the corporation, received by you in consideration of licenses to manufacture under rights of patents applied for.

"(3) I will at all times co-operate with the board of directors of the Ultra-Violet Corporation, Ltd., and if, at any time hereafter, the said board of directors shall deem it for the best interests of the corporation, to make application to the Corporation Commissioner of California, or any other state, for a permit to sell said corporation's securities, I will, in that event place my said six hundred (600) shares in escrow with your own shares, and the shares of the other stockholders of the corporation, in any bank which the board of directors of the corporation may elect, there to be subject to the Corporation Commissioner's order.

"On the foregoing conditions I am placing at your disposal the sum of Seven Thousand, Five Hundred (\$7,500.00) Dollars, whereof you have already received Fifteen Hundred (\$1,500.00) Dollars, and Six Thousand (\$6,000.00) Dollars are herewith. On your signed acceptance hereof, this letter will constitute a contract.

"Sincerely yours,

"Elizabeth A. Frost.

"Accepted:

"Frederick Finch Strong."

As the foregoing instrument shows, Miss Frost had prior to the date of the letter transmitted to Dr. Strong two checks, one for \$1,000 dated March 7, 1932, and another for \$500 shortly thereafter. The checks in question were not only delivered by Vickers to Strong, but were actually written by Vickers and signed by Frost.

As to Jackson's participation in these payments, or in anything leading up to them, Miss Frost herself testified as follows:

"Q. By Mr. Blalock: Did you talk with Mr. Jackson concerning the Ultra-Violet Corporation before you put any money into that corporation? A. No.

"Q. Who had you talked to first concerning it then? A. There was a general conversation with Mr. Whitehorne, Mr. Vickers and Mr. Jackson.

"Q. Did you talk to Mr. Jackson then? A. He said nothing—

"Q. Was Mr. Jackson present at a time when you talked about the Ultra-Violet Corporation— A. Yes.

"Q. —before you put any money in it? A. No."

To obtain a clear grasp of the facts with reference to the letter of May 2, it is necessary to analyze the evidence of the defense and particularly that of Jackson, as the prosecution evidence is vague on the subject, Miss Frost herself testifying that she could not "recall" whether this letter was delivered to her by Vickers or Jackson. Vickers testified he delivered it to her. Jackson testified, however, and the testimony of other witnesses, including prosecution witnesses, corroborates his version, that after reading the letter of May 2, and receiving a request from Vickers for \$2,000 (which request for \$2,000 will be referred to hereafter in more detail), of the check that was referred to in the letter, he refused to handle the money at all, on the basis set forth in the letter; that he drafted a new letter dated May 4, which recited the investment of \$1,000 and \$500 previously made by Miss Frost, acknowledged the receipt of an additional \$4,000 and not \$6,000, recited that there was a balance of \$2,000 still to be paid on account of the \$7,500 investment promised by Miss Frost and said nothing whatever about the sale of any stock, by Strong, the Nevada corporations, or any one else to Miss Frost, but referred to a "joint-un-

dertaking" Miss Frost was making with those interested in the promotion of the lamps. The original of this May 4th letter was addressed to Strong by Miss Frost, signed by Miss Frost and accepted by Dr. Strong. Jackson's name was also signed to the acceptance. This second letter was intentionally destroyed by Miss Frost. She testified she tore it up and threw it in the waste basket. At the time Jackson returned the first letter and presented the second, he testified, and there is no denial of his testimony, that:

"I told Miss Frost that Dr. Strong had passed along to me * * * her check for \$6710.15 * * * and that I had been asked by Mr. Vickers for \$2710.15 in change, and that I could not accept her tender because it represented only \$4000, whereas the instrument I had in my hand represented \$6000, and for the further reason that this letter of May 2nd represents a stock transaction, wherewith we could have nothing to do. * * * I said that if she wished us to accept the \$4000 on account, that it would be necessary for her to cancel this instrument and execute a new one.

"Q. Did she cancel it? A. She did.

"Q. Did she execute a new instrument? A. She did."

The original of the letter of May 4, held by Miss Frost and Strong, was not produced, and Jackson introduced a copy which he retained.

It clearly appears from the evidence which has been but scantily quoted that Miss Frost had been persuaded by Vickers and Vickers alone that it would be a good thing to invest up to a total of \$7,500 in the lamp enterprise, and on this feature of the case, Miss Frost testified in part as follows:

"Q. * * * Now, Miss Frost, going back to the time when someone spoke to you about the Ultra-Violet, who was it, the first one that spoke to you about that? A. As near as I can recall, it was Mr. Vickers. In fact, I know it was Mr. Vickers.

"Q. Did he bring up the subject himself, or how was it brought up? A. I knew nothing about the Ultra-Violet ray. He asked me to go over and see Dr. Strong's wonderful sanitarium, and I had been helped very materially by those lights myself, and I suppose I was a little more susceptible to going into that when they told me it was such a wonderful institution,

and on a paying basis, and the company was here in California.

"Q. Mr. Vickers, then, is the first one that mentioned anything to you about the Ultra-Violet ray? A. Yes. * * * Mr. Vickers was principally the one I confided in, about going into it, and I sent him to look into it and see if it was an absolutely bona fide business proposition on a business basis, because I could not afford to lose any more money. * * *

"Q. * * * In reference to the Ultra-Violet Corporation, at any time did Mr. Vickers, with the exception of your asking him, give you any advice with reference to the Ultra-Violet Corporation? A. I suppose the answer would be 'Yes' wouldn't it?

"Q. I am asking you. A. Yes, because he did advise me to go into that corporation."

Before the letter was written, \$1,500 had been paid on account of this amount, the remaining \$6,000 was raised by Miss Frost by placing a mortgage on her home for approximately \$6,710, the negotiations for which and the consummation of which were handled for Miss Frost exclusively by Vickers. The total check was delivered by Vickers to Dr. Strong, who indorsed it and turned it over to Jackson. Jackson deposited the same to his account and drew two checks, one for \$710 and which was handed to Vickers to return to Miss Frost and one for \$2,000 to Vickers which was delivered to Vickers and retained by Vickers.

Reverting to Jackson's alleged participation, Miss Frost, when shown the letter of May 2, 1932, testified that she could not recall whether it was brought to her for signature by Vickers or Jackson. We do not know either, but the evidence apparently indicates that it was Vickers, and as has been stated, Vickers testified he did. As stated, it appears from the evidence that Jackson gave a check for \$2,000 to Vickers. The testimony shows that Vickers demanded this check, claiming that he wanted to retain \$2,000 from the investment of \$7,500 in order to see how the business went, and thus to determine whether Miss Frost should put it in later. Vickers was the trusted agent of Miss Frost in the whole transaction and had a written power of attorney which he had previously displayed to appellant. She repeatedly asserted his agency and her trust in him throughout her testi-

mony. It may very well be that Jackson had a strong suspicion that Vickers intended to retain this \$2,000, but Jackson did not obtain the money from Vickers or Miss Frost. It was delivered to him by Dr. Strong. Nowhere is there an iota of testimony that Jackson received any part of this \$2,000 and it may very well be that, in spite of his suspicions, Jackson felt that he might endanger the entire Frost investment, if he crossed swords with Vickers. That such an assumption on Jackson's part was not unfounded is demonstrated by the fact that the money that Vickers paid to the attorney, who represented him at the preliminary hearing, was advanced to Vickers by Miss Frost after the entire matter had been thrown into the lap of the district attorney, and Miss Frost put upon full notice. Furthermore, Jackson, according to his testimony, part of which has been already referred to, not only advised Miss Frost of this \$2,000 check as pointed out, but had the following additional conversation with her: "Mr. Vickers states it is your desire to pay only \$4,000 * * * that he should receive back in change \$2,000. * * * Miss Frost says, 'He is a dear, dear boy, and he is my trusted agent. * * * Whatever Mr. Vickers does, I'm sure he does for my own best interests.'"

Furthermore, so far as appears from the evidence, the corporations in question had no corporate bank accounts. The two other checks which were delivered to Dr. Strong were by Strong turned over to Bristow and by Bristow deposited in his personal account but checked out ostensibly for the purposes of the association or the corporate purposes of Limited. It thus appearing that Bristow, in so far as the \$1,500 was concerned, was acting as trustee for these funds intended for the association or corporation. The evidence is uncontradicted that Strong, with reference to \$4,000 of Miss Frost's money and other moneys obtained from third persons, handed them over to Jackson, who deposited such funds in a personal account, but disbursed the same for association or corporate purposes in the same way. There is not any credible evidence to show that Jackson converted any of this money for his own purposes.

It is difficult for us to understand why Jackson was singled out for the instant prosecution. Strong was repeatedly ensnared in contradictions and on numerous

other occasions voluntarily corrected himself before his attention was directed to other contradictions. Strong at first did not know or remember whether he personally received the three checks in question; who, if any one, brought them to him; whether he had ever met Miss Frost or had a conversation with her; or whether he had ever seen or signed the letter of May 2. After referring to "numerous notebooks" and repeatedly in his testimony offering in explanation of the vagueness thereof his lack of business acumen, he remembers that it was Vickers who brought the checks, that he did meet Miss Frost and that he did have a conversation with her prior to the time a single cent was invested with him, and that he not only saw the letter of May 2, 1932, but actually signed it. With reference to the checks and why he turned them over to Jackson, Strong testified:

"A. I was simply a go-between, simply an agent, and it was to be endorsed by me so it could be turned over to Mr. Bristow, in order to have the matter in good faith and show the two names, the names of the patentee and the manufacturer.

"Q. And it was agreed that your name was to be on the checks, is that it? A. That was the understanding; otherwise I would not be on the check at all.

"Q. That was the understanding you had with Mr. Bristow? A. No, the understanding I had with all of them, Bristow, Jackson and Vickers.

"Q. Was there anything said as to why it should be put in your name? A. Yes, on account of that letter that Miss Frost wrote me, which is introduced in evidence.

"Q. Was that letter written to you before those checks were paid to you? A. I could not tell you."

Much more could be said about Strong and his testimony. The record also demonstrates that Bristow's participation will not bear rigid scrutiny, but it is unnecessary to the disposition of this case to go into these phases of the evidence.

Accepting the letter of May 2 as the basis of the transaction, in spite of the avalanche of evidence introduced by the defense that there was no stock sold, but that the appellant, Miss Frost and others were joint venturers, independent of the two corporations and without reference to them, in the promotion of the lamps, there is no showing whatsoever that Strong did not

have personally owned stock in the Nevada corporation issued to him, which he could have delivered. If anything, the evidence shows the contrary. Strong testified:

"A. Answering to the best of my knowledge, according to the best of my knowledge, there was some stock issued to me, as consideration for the license that the Radiant Holding Company granted to the Ultra-Violet Corporation, and that stock has never been sold or taken off the stock book.

"Q. Was it ever delivered to you? A. I think it is in the stock book.

"Q. Was it ever delivered to you? A. No."

[1] Further testimony showed that no demand was ever made for the stock, and there is no showing whatsoever that Strong could not have delivered the stock. If Strong personally had and owned a block of stock in the Nevada corporation which he could deliver, he had a right to sell a portion of it without a permit. *People v. Pace*, 73 Cal. App. 548, 238 P. 1089; *Clover v. Jackson*, 81 Cal. App. 55, 253 P. 187. There was no showing by the prosecution that Radiant granted an exclusive license to Limited to manufacture and sell the lamps. It might very well be that no such exclusive license was granted. If there was no exclusive license to Limited, then there was no legal reason why Frost, appellant, Strong, Bristow, and the others mentioned could not associate in a joint venture or partnership for the exploitation of these lamps with the permission of Radiant. There is no showing that Radiant objected, rather the evidence compels a contrary inference since all the organizers and officers of Radiant, as well as of Limited, were participating in the joint venture.

Commenting on the motion to dismiss made by appellant at the conclusion of the People's Case, the trial judge addressed a question to the deputy district attorney, in which he said: "As I remember the evidence, it shows that Mr. Vickers was Miss Frost's agent, and that she authorized him to pay this money into the business. I don't use the word 'corporation' because as I remember, the evidence is rather unsatisfactory as to the nature of this business * * * I got the idea that what she was doing was paying the money over to Dr. Strong as she thought, for the pur-

pose of investment in a business that was about to be established. I may be wrong on that, and I am not very confident that that is a correct statement, but she did that through Mr. Vickers as her agent. I think she used the expression 'her trusted agent,' at one time. What I want to know now is what connection has Jackson with that?"

[2] The court is still uninformed as to what connection Jackson had with that, or what it was that Jackson did that subjected him to the instant prosecution. We hold that the evidence is insufficient to sustain a conviction on the two charges on which appellant was convicted.

The judgment and order are reversed.

We concur: CONREY, P. J.; YORK, J.



8 Cal.App.2d 676

PEOPLE v. McNEER.

Cr. 2676.

District Court of Appeal, Second District,
Division 1, California.

Aug. 7, 1935.

Hearing Denied by Supreme Court
Sept. 5, 1935.

1. Criminal law ⇨655(1)

In prosecution for murder, statements of trial court, in presence of jury, regarding groans and outcries of defendant, that such theatricalism must stop, that expert witnesses had agreed that defendant was malingering or faking, and that defendant's show in presence of jury would necessitate recess, *held* to have so prejudiced rights of defendant as to require reversal of judgment against him, where defendant's counsel had made prompt objection to remarks on each occasion, and error was not cured by court's admonition.

2. Criminal law ⇨182

In prosecution for murder, where court announced that jury was discharged and then revoked order after short consultation with counsel for both parties, jury not having left box and judge not having left bench, defendant *held* not to have been twice placed in jeopardy so as to entitle him to discharge, since any error occurring was one of procedure not affecting defendant's rights.

3. Criminal law ⇨1166(1)

Where facts forming basis of defendant's plea of double jeopardy were undisputed and

jury was correctly instructed as to law, failure of jury to render verdict upon such plea held not to prejudice defendant.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Gray Everett McNeer was convicted of second-degree murder, and he appeals.

Reversed.

S. S. Hahn, W. O. Graf, and Lawrence L. Light, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

EDMONDS, Justice pro tem.

At midnight an automobile was found on a lonely road near Los Angeles in which was the dead body of Betty McNeer, who had shortly before obtained an interlocutory decree of divorce from the defendant. There were three bullet holes in her head. A gun with five exploded shells was lying in her lap. Also in the machine at the time was the defendant sitting in the driver's position slumped over the steering wheel. He had a bullet wound in his head, but was conscious. Charged with the murder of his wife, a jury found him guilty of murder in the second degree. He appeals from the judgment of conviction and from an order denying his motion for a new trial.

The jury was sworn, and the taking of evidence commenced on October 25th. The defendant was present in court, but as a result of the bullet wound in his head he had lost the sight of one eye, the hearing of one ear, and was partially paralyzed. A bullet in his head had not been removed. The record shows that during the examination of witnesses the defendant groaned and uttered incoherent mutterings, and repeated outcries such as "You wouldn't treat a yellow dog like you are treating me; why don't somebody give me something?" After one of these interruptions the judge said: "You will have to keep quiet; this sort of thing will not be allowed at all, Mr. McNeer. This sort of theatricalism has got to stop right now, and you might as well know it. Can't you do something with your client, Mr. Hahn?"

An adjournment was then taken until the next morning at which time counsel objected to the statement previously made by the judge and asked that the jury be in-

structed to disregard it. Thereupon the judge said to the jury: "Ladies and gentlemen of the jury, I am making this statement to you at the suggestion and with the consent of counsel for both sides, the People and the defendant. You, of course, could not help but observe the fact yesterday afternoon that the defendant was making more or less noise, talking and groaning, and the Court made some remarks about ceasing the theatricals, or something of that sort. That, of course, is something that you haven't any business to pay any attention to, and I want you to entirely disregard it. The defendant is here on trial for one specific offense, and all the jury have any right to consider whatever is the evidence in the case and nothing else. I know you will appreciate that and be able to do that, but for your information, in view of the apparent condition of the defendant, I am trying now to get hold of Dr. Blank, the jail physician, to come down here and tell us whether he thinks from his examination of the defendant there is any reason why the case should not continue. In other words, whether or not the defendant is in a condition physically and mentally that will preclude going ahead with the trial. Until we hear from Dr. Blank, we will go ahead, and if there is any demonstration on the part of the defendant, you will disregard it. You are not here to try anything except the facts in this case."

Later in the day Dr. Blank, jail physician, called by the judge to testify as to the defendant's condition, stated that the defendant had been very sick; that he was suffering more from pain at that time than previously; that he was being given sedatives more or less continuously night and day; that his calling out and groaning in the courtroom was genuine and not an attempt to malingering; that his nervous collapse was such as to make it very difficult if not impossible to control himself; and that his sanity was affected to such an extent that he should not be compelled to go ahead with the trial. The judge, in commenting on this testimony, stated: "I therefore feel the case does come directly within the provisions of section 1368 of the Penal Code, because of the Court's own observation of the defendant and his actions during the trial up to this moment, and the testimony of Dr. Blank has raised in my mind a considerable doubt as to the present sanity of the defendant, and for that reason I now order that the question

of his sanity be submitted to a jury, and the trial of this case suspended until it can be determined by the verdict of such jury. Now, that section further provides that the trial jury may be discharged, or retained according to the discretion of the Court, during the pendency of the issue of insanity. My own thought in those matters is that it is a good deal better for the trial jury to be discharged, and the matter of the present sanity of the defendant submitted to an entirely different jury, who have heard none of the facts of the case.

* * * The trial of the present case will be suspended until the question of the sanity is determined by verdict of a jury impaneled to pass on that question, and because of the fact that there may be some delay caused by preparation on either case, or on both sides of the case, including possible examination by other physicians, if either side desires that to be done, I don't think that it will be fair to keep this jury together, and therefore, I will now discharge you, ladies and gentlemen, from further consideration of this case, and set the case for an inquiry into the defendant's sanity before another jury. You are now discharged from further consideration of this case."

A conference between counsel and the judge then occurred at the bench, the jury remaining in the box at the request of the judge. He then stated that his previous order discharging the jury was revoked, and ordered the jurors to return the following Monday morning. The minute orders in connection with the foregoing are as follows: "The Court having a doubt as to the present sanity of the defendant, the Court orders the present trial suspended until October 29, 1934, at 10:00 a. m. All witnesses are instructed to return at that time. The Court orders the question of defendant's present sanity submitted to a jury. Jury is admonished and instructed. Jury is discharged. Order discharging jury is vacated. Trial is continued to October 29, 1934, at 10:00 a. m. at which time the question of present sanity of defendant will be set for hearing. Dr. Victor Parkin, Dr. Paul Bowers and Dr. Benjamin Blank are appointed by the Court as alienists to examine the defendant as to his present sanity."

On Monday morning the proceedings taken are shown by the minutes as follows: "On Court's own motion, trial proceeds at this time to determine the question of present sanity of defendant. The defendant

objects to trial of question of present sanity of defendant. The defendant objects to trial proceedings on charge of murder on the grounds of being 'once in jeopardy.' Trial of murder charge is continued to October 30, 1934, at 10:00 a. m. All witnesses are instructed accordingly. The Court instructs and admonishes the jury. The Court now proceeds to trial of question of present sanity of defendant." This trial resulted in a verdict that the defendant was sane.

The following day the trial of the defendant on the murder charge was then resumed with the same jury which had commenced the trial of the case, over the objections of the defendant's counsel. During the argument on objections, the judge stated in the presence of the jury: "Are you going to add to that that there were but three witnesses, all of whom were stipulated to be qualified experts, and that all three of them agreed that the defendant was sane, and that he was malingering or faking?" Some time later in the trial he said: "Gentlemen, apparently it is going to be impossible to go ahead with the case this morning. I am informed that the defendant has been putting on his show in the presence of the jury, and there is no use trying to go ahead with the case now, so we will have to take a recess until 2:00 o'clock."

The first point made on appeal is that the statements of the judge amounted to misconduct which prevented a fair and impartial trial.

[1] On each occurrence defendant's counsel made prompt objection to the remarks, and in two of the three cases the jury was instructed by the judge to disregard them. In one case the assignment by counsel of misconduct was not followed by any statement of the judge. In the other cases the statements made by him after the objections were urged cannot be said to have cured the effects of his remarks concerning the appellant. The defendant was the only one who testified concerning the occurrences at the time of the shooting. The credibility of his testimony was, therefore, of more than usual importance in the presentation of the defense. That the evidence in the case did not impress the jurors as being absolutely clear and convincing is evident from the fact that they deliberated for 24 hours and then returned a verdict finding the appellant guilty of murder in the second degree. Under all of the cir-

cumstances shown by the record in this case, the actions of the trial judge prejudiced the rights of the defendant, requiring a reversal of the judgment. As the Supreme Court said in the case of *People v. Mahoney*, 201 Cal. 618, 627, 258 P. 607, 610: "When, as in this case, the trial court persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses, and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge, and in other ways discredits the cause of the defense, it has transcended so far beyond the pale of judicial fairness as to render a new trial necessary. Neither can a plea for the application of the section of the Constitution save this situation. The fact that a record shows a defendant to be guilty of a crime does not necessarily determine that there has been no miscarriage of justice. In this case the defendant did not have the fair trial guaranteed to him by law and the Constitution."

[2] Appellant also urges that by the action of the trial judge in vacating his discharge of the jury and afterward proceeding with the trial of the case, he was twice placed in jeopardy and was entitled to his discharge. While the judge did announce that the jury was "discharged," the record also shows that the district attorney immediately asked if he and counsel for the defendant might approach the bench and confer with him "before this jury is discharged." The record then shows: "At which time Mr. Coleman, Mr. Hahn and Mr. Graf approached the Bench, and conferred with the Court, which conference was outside the presence of the jury, and not within the hearing of the reporter."

Following this conference, the judge stated: "Ladies and gentlemen of the jury, counsel has just had a conference with me at the Bench, out of your hearing, and it is the suggestion and the opinion apparently of both Mr. Graf, the attorney for the defendant, and of Mr. Coleman, the attorney for the People, that because of certain legal considerations, in which you are not interested, and which may or may not come up, that they desire the Court to revoke the order discharging this jury, so I do now revoke that order discharging the jury, and incidentally the record will show that the jury are still in the box, and have not left the box, and I ask you, ladies and gentlemen, to come back * * * Mon-

day morning at 10:00 o'clock, * * *

To hold upon this record that the appellant was twice placed in jeopardy would be to construe the order according to a single sentence of the judge's statements, and ignore the reasonable effect of the entire proceeding. This is particularly true when we consider the testimony of the clerk who wrote up the minutes quoted, that they were written up after the day on which the events transpired "at the insistence of the defense counsel."

There is no claim that anything occurred between the time of the announcement that the jury was discharged and the time that order was vacated which prejudiced the rights of the appellant. The judge was on the bench during all of this time, and the jurors were in the box. After his conference with counsel the judge concluded to retain the jury under the provisions of section 1368 of the Penal Code. The second order was made almost immediately after the first one, and before any adjournment of court. Under such circumstances, to hold that the first order was irrevocable would be to place the form above the substance of the proceeding. If any error occurred, it was simply one of procedure which did not affect the substantial rights of the appellant.

The case of *Brownell v. Superior Court*, 157 Cal. 703, 109 P. 91, suggests the fundamental difference between a situation where a decision is made and acted upon by the parties before it is changed, and one made and changed while the parties are yet present before the court. And in the case of *People v. Williamson*, 134 Cal. App. 775, 26 P.(2d) 681, 683, it was held that the court had jurisdiction to vacate an order discharging a single juror and recall him for further service in the case after he had left the box and the courtroom, where only a few minutes intervened and no further proceedings had been had in the meantime. In that case the court said: "No doubt the court in the stress of the moment intended to discharge the juror. However, before the latter had reached the elevator he was recalled, after it was ascertained that if the case could be continued until the following Monday, the trial could proceed. We think the jurisdiction of the court over the proceedings before it gave it the power to do as it did; that its action in effect rescinded the order theretofore made excusing the juror, while yet it could do so; and that the re-

sult of such action was to leave the case where it was before the incident occurred. * * * Furthermore, it is not claimed that any one talked to the juror or that anything happened to disqualify him other than what we have related, and we fail to see how any prejudice resulted. Even if there was a technical error, it came within the healing provisions of section 4½ of article 6 of the Constitution."

[3] The facts forming the basis for the plea of double jeopardy were undisputed, and an issue of law only was presented upon which the jury was correctly instructed. *People v. Newell*, 192 Cal. 659, 668, 221 P. 622. The failure of the jury to render a verdict upon the plea did not prejudice the appellant. *People v. Frank*, 75 Cal. App. 74, 82, 241 P. 924.

Because, for the reasons hereinabove appearing, the appellant was deprived of his right to a fair trial, the judgment is reversed, and the order denying the motion for a new trial is reversed.

We concur: CONREY, P. J.; HOUSER, J.



8 Cal.App.2d 600

PEOPLE v. FLOTH.

Cr. 1441.

District Court of Appeal, Third District,
California.

Aug. 3, 1935.

Hearing Denied by Supreme Court

Aug. 29, 1935.

1. Constitutional law ⇨250

Statute governing habitual criminals and their punishment *held* not unconstitutional as a denial of equal protection on ground that classification of crimes was arbitrary, in that under statute person convicted of issuing fictitious checks with intention to defraud, and having been twice before convicted for forgery, would be an habitual criminal, whereas, if he had been previously convicted of issuing fictitious checks and subsequently convicted of forgery, he would not be (Pen. Code, §§ 476, 644; Const. U. S. Amend. 14; Const. Cal. art. 1, § 21).

2. Criminal law ⇨1201

Statute governing habitual criminals and their punishment *held* not unconstitutional because of increased punishment imposed upon an habitual criminal, since increased punishment was not for prior conviction but solely for aggravation of a second offense (Pen. Code, § 644).

3. Constitutional law ⇨270

Statute governing habitual criminals and their punishment *held* not unconstitutional as discriminating against an alleged habitual criminal or depriving him of due process of law, since an alleged habitual criminal was arraigned and tried in same manner as any other defendant who had suffered a previous conviction (Pen. Code, § 644).

Appeal from Superior Court, Glen County; R. M. Rankin, Judge.

Fred Floth was convicted of issuing fictitious checks with intent to defraud, and, on basis of two prior convictions for forgery, adjudged an habitual criminal, and he appeals.

Affirmed.

H. W. McGowan, of Willows, and Fred Floth, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Appellant was charged with four violations of section 476 of the Penal Code (issuing fictitious checks with intent to defraud), and was also charged with two prior convictions, both for forgery, for which the defendant served terms of imprisonment in the state prison. Upon arraignment, appellant admitted the prior convictions. He was found guilty by a jury of the four violations of section 476 of the Penal Code, and was accordingly sentenced and adjudged an habitual criminal.

[1-3] Appellant does not attack the conviction on the charges brought under section 476 of the Penal Code, but does attack the judgment only in so far as it adjudges him to be an habitual criminal. He claims section 644 of the Penal Code governing habitual criminals and their punishment is unconstitutional, in that it de-

PIERCY v. ZEISS et al.

Civ. 1182.

District Court of Appeal, Fourth District,
California.

Aug. 2, 1935.

nied him equal protection of the law as secured to him under the Fourteenth Amendment to the Constitution of the United States and section 21 of article 1 of the State Constitution. His argument is that the classification of crimes set forth in section 644 of the Penal Code is arbitrary, in that he is penalized because of the chronological order of the commission of the crimes and not because of the crimes themselves. In other words, he contends that, if he had been previously convicted of issuing fictitious checks (a felony not enumerated in section 644) and had been subsequently convicted of a forgery, he could not be adjudged an habitual criminal. This is undoubtedly true, but such power lies within the discretion of the Legislature, and it is for them to determine what the interests of the public require and what measures are necessary for the protection of such interests. In re Rosencrantz, 205 Cal. 534, 271 P. 902. In that case it was held that section 644 of the Penal Code did not violate either the Eighth Amendment of the Federal Constitution nor section 6 nor section 11 of article 1 of the State Constitution. The court there further said that a wide discretion was vested in the Legislature to determine what measures were necessary for the protection of the interests of the public, and that section 644 of the Penal Code could not be said to go beyond reason, and the imprisonment imposed thereby was not illegal. In *People v. Coleman*, 145 Cal. 609, 79 P. 283, is cited numerous authorities from the Supreme Court of the United States and decisions from other states, holding that the increased punishment for an habitual criminal is not violative of any constitutional provision, either state or federal. The increased punishment is not for the prior conviction, but solely for the aggravation of a second offense which merits a greater punishment. Where the defendant is arraigned and tried in the same manner as any other defendant who has suffered a previous conviction is arraigned and tried, he is not discriminated against or deprived of due process of law.

The judgment and the order are affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

1. Automobiles ⇨181(2)

Guest is one who is invited, directly or by implication, to enjoy hospitality of driver of automobile, who accepts such hospitality by taking ride for his own business or pleasure, without making any return to or conferring any benefit upon driver (St. 1931, p. 1693, § 141¾).

2. Automobiles ⇨181(2)

Benefit accruing to driver of automobile sufficient to take person riding with him out of guest class may be in form of anticipated profit as well as direct return (St. 1931, p. 1693, § 141¾).

3. Automobiles ⇨181(2)

Woman injured in automobile collision occurring by reason of negligence of insurance agent with whom she was riding, pursuant to appointment for purpose of taking woman to her home with hope of there selling her insurance, held not "guest" within automobile guest statute, but "passenger," entitled to recovery against agent, since hope of profit was benefit to agent, although woman stated before accepting ride that she could not buy insurance at that time (St. 1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Guest" and "Passenger," see Words & Phrases.]

Appeal from Superior Court, San Diego County; H. D. Burroughs, Judge.

Action by Reba Piercy against Eugene E. Zeiss and Bert J. Schaefer. Judgment for plaintiff, and defendant Schaefer appeals.

Affirmed.

Stickney & Stickney, of San Diego, for appellant.

Renwick Thompson and Fred Kunzel, both of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for injuries sustained by the plaintiff in a collision between an automobile driven by the defendant Schaefer, in which she was riding, and another car driven by the defendant Zeiss. The defendant Schaefer,

a life insurance agent, had attempted or was attempting to sell the plaintiff an annuity policy, and the accident occurred while he was taking her to her home from her place of employment. The court found that the accident was caused by the negligence of the defendant Schaefer, and that the plaintiff was riding in his car as a passenger and not as a guest. The defendant has appealed from the judgment on the sole ground that the evidence conclusively establishes that the plaintiff was his guest and not his passenger, at the time in question.

The appellant testified that he called upon the respondent at her place of employment; that she said she was interested in an annuity policy but had no time to discuss it then; that he found out where she lived and said, "I live in that general direction and it isn't out of my way any great amount, I will be glad to drive you home some night at your convenience and when I get you home I can tell you just exactly the details"; that she replied, "That would be a good way to do"; that two or three days later he returned and told her what such a policy as she desired would cost at her age and asked her if she could afford to pay that amount; that she said she thought she could; that a few days later he made an appointment to take her home after working hours; that his purpose was to take her home and then sell her some insurance; that before she got into the car she told him she had no money to put into a policy at that time; that he replied, "Well, that is all right, you are here, I might as well run you home anyhow"; that she got into the car and said, "I would like to know something about it"; that he laughed and said, "Well, it looks like there is no profit in this, but I am going myself, and I will be very glad to run you home, and I will give you any general information that I can, but you are not in a position to buy"; that he would not have gone back to see her if he had known that she was not in a position to buy; that they did not discuss insurance on the trip except that she said she had discovered she was a year younger than she had told him; and that, so far as he was concerned, she had then ceased to be a prospect.

The respondent testified that during their first conversation she told the appellant she was not prepared to take out insurance at that time; that while she intended to

take some out she was not quite ready; that during a second conversation at her place of employment the appellant told her what the rate would be at her age; that on the night of the accident he came to the place where she was employed and asked her to let him take her home; that she replied she would not want to put him out or take him out of his way; that he said it would not take him out of his way as he went past her house to get to his own home and this would give him an opportunity of talking over the insurance and giving her information about the annuities; that she consented to go with him; that as she was entering the car she told him she did not want him to take her home under a wrong impression and that she was not prepared to take out a policy at that time; that she told him that she would not want a policy for a little while, that she intended to invest in annuities and wanted to get some information concerning the same, and that she intended to take out a policy within a short time and as soon as she could; that he said he would be glad at least of having the opportunity of going over it with her and that he wanted to give her the information anyway; that she replied she was interested and would like to have the information; that after she got in the car she told him "that I wanted him to understand that I wasn't able to put any money in it right this minute but that it might be soon; I didn't know how soon"; that she did not feel that his taking her home was an accommodation to her after he said he would like to have the opportunity of explaining and giving information concerning the policies; and that during the ride the appellant talked to her about insurance and told her he had his books and folders with him and that when they arrived at her home he would show her the form sheet regarding the rates.

[1,2] Section 141 $\frac{3}{4}$ of the California Vehicle Act (St. 1923, p. 517, § 141 $\frac{3}{4}$, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693) forbids a recovery by a guest, except under circumstances with which we are not here concerned, and defines a "guest" as one who accepts a ride in any vehicle without giving compensation therefor. In *Crawford v. Foster*, 110 Cal. App. 81, 293 P. 841, 842, this court said: "We think the meaning of the language used is that a guest is one who is invited, either directly or by implication,

to enjoy the hospitality of a driver of a car; who accepts such hospitality; and who takes a ride either for his own pleasure or on his own business, without making any return to or conferring any benefit upon the driver of the car, other than the mere pleasure of his company." It seems to be well settled that under the terms of this statute a benefit accruing to the driver of a car may be such a compensation as will take a person riding with him out of the guest class and, further, that an anticipated or prospective profit is a benefit and may be as effectual for this purpose as an immediate or direct return. *Crawford v. Foster*, supra; *Sullivan v. Richardson*, 119 Cal. App. 367, 6 P.(2d) 567; *Sumner v. Edmunds*, 130 Cal. App. 770, 21 P.(2d) 159; *Haney v. Takakura*, 2 Cal.App.(2d) 1, 37 P.(2d) 170.

The appellant argues that a further rule is indicated by these decisions, and that in order to remove a person from the "guest" class there must not only be a benefit received by the driver, but the use of the automobile itself must be necessary to the consummation of the contemplated business or transaction, and that since an insurance policy could have been written at the home of the respondent, or elsewhere, the use of the automobile on this occasion was not essential to the business in view, and no possible benefit to him can be said to have accrued from the respondent's acceptance of a ride. We are unable to agree with this contention. If a driver receives a benefit through the acceptance of a ride, the fact that a like benefit might have been obtained in some other place or manner can make no difference. The acceptance of a ride may furnish a salesman with an opportunity to interview a prospective customer which might otherwise not be accorded. An opportunity thus obtained is a direct and substantial benefit to the salesman and may well be as beneficial to him where he is selling something not necessarily connected with the ride as where he is demonstrating the car itself to a prospective purchaser or using it to take a prospect to look at a piece of land. The hope of a profit is equally present in all such cases and such an opportunity to present his wares is a real benefit to a salesman whether or not another place for his labors might have been chosen.

It is further urged that this case differs from the cases above cited in that here there was an express termination of the business relationship between these parties and an avowed declaration by the respondent to the effect that she intended to confer no benefit upon the appellant, and that the evidence conclusively establishes that the appellant was taking the respondent to her home on this occasion as a mere matter of courtesy and accommodation to her, after any relationship of life insurance agent and prospect had been definitely, completely, and finally abandoned.

[3] Any conflicts in the evidence were resolved by the court in favor of the respondent, and, with that in mind, we are unable to say that it conclusively appears that there had been an express termination of the business under consideration by these parties. While the respondent desired to make it clear that in accepting a ride she was not committing herself to the immediate purchase of a policy, she declared her intention to make such a purchase as soon as possible and probably at an early date. She expressed a desire for further information on the subject and the appellant expressed a desire to have the opportunity to give her that information, and not only sought but used the opportunity thus furnished by the trip. It sufficiently appears from the evidence that the respondent gave the appellant grounds for hoping that he might make a sale and that he took her home with that hope in mind. He testified that his purpose in going there was to take her home in order to sell her some insurance and the evidence justifies the inference that he did not abandon this purpose but that he proceeded with the expectation that the trip would assist him to that end. Applying the definition of a guest above set forth, we think the respondent did not accept the appellant's invitation for her own pleasure or on her own business without making any return to or conferring any benefit upon him, and that the court's conclusion that she was not a guest within the meaning of this statute was justified by the evidence and may not be set aside.

The judgment is affirmed.

We concur: MARKS, J.; HARDEN, Justice pro tem.

STATE FINANCE CO. v. HERSEL CALIFORNIA FRUIT PRODUCTS CO. (ALBANESE et al., Interveners).

Civ. 9530.

District Court of Appeal, First District,
Division 1, California.

July 30, 1935.

Hearing Denied by Supreme Court
Sept. 26, 1935.

1. Principal and agent ⇨124(2)

Unless only one conclusion may be drawn from evidence, agent's right to modify agreement is question to be determined by the trier of facts.

2. Principal and agent ⇨119(1)

That agent is hired to acquire certain interests and not to give them up is a presumption that may be overcome if the principal had knowledge of a change in contract made by agent and did not within a reasonable time countermand and cancel the modification.

3. Principal and agent ⇨101(1)

The authority of the agent to modify a provision of a contract may be inferred from the evidence that he was empowered to do certain things (Civ. Code, §§ 2316, 2317).

4. Principal and agent ⇨101(1)

Where agent for assignee orally authorized assignor under written assignment of moneys to become due under assignor's contract to haul tomatoes for another firm, to pay proceeds of operation of certain mortgaged trucks to mortgagee who claimed proceeds of those trucks were not included in original assignment contract, and who might bring mortgage foreclosure agent held to have authority to so authorize assignor where the oral agreement was known by assignee, was not repudiated by it, and the authorized change in payment of the proceeds was apparently for benefit of assignee.

5. Evidence ⇨397(1)

Oral agreement authorizing assignor under written assignment of moneys to become due under contract to haul tomatoes for another firm, to pay the proceeds of the operation of certain assignor's mortgaged trucks to mortgagee held executed at termination of the hauling, thus not subject to attack that written contract may not be modified by unexecuted oral agreement (Civ. Code, §§ 1661, 1698).

6. Payment ⇨68

Burden of proving a particular application of a payment by either debtor or creditor is on party claiming that such application was made.

7. Assignment ⇨137

In action by assignee of proceeds of contract where mortgagee of assignor's trucks claimed the assignment did not include proceeds from work done by assignor with the mortgaged trucks, evidence held to sustain finding that mortgagee had claim for money due him for hauling work performed by mortgagor with mortgaged trucks.

8. Principal and agent ⇨101(1)

Agent for finance company who authorized assignor, who had given written assignment of moneys to become due him under his contract to haul tomatoes for certain company, to pay certain amount to another creditor of assignor held to have authority to make modification of assignment which modification was apparently for benefit of finance company.

9. Costs ⇨32(1)

In actions at law involving direct payment of money, prevailing party by statute is entitled to recover costs unless amount of judgment is such as could have been rendered in an inferior court (Code Civ. Proc. §§ 1022, 1025).

10. Costs ⇨13

In equity proceedings question of costs is discretionary with the trial court.

11. Costs ⇨18

Interest ⇨20

In action by assignee of proceeds of assignor's contract, denial of interest and costs to assignee that recovered judgment for amount that could have been rendered in an inferior court held proper where in order directing the deposit court reserved right to dispose of question of interest and costs (Code Civ. Proc. §§ 1022, 1025).

12. New trial ⇨102(5)

New trial held properly denied assignee where ground presented was based on affidavit of agent denying that he had modified written assignment as found by court where agent was available but had not been called at trial of the case.

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Action by the State Finance Company against the Hershel California Fruit Products Company, a corporation, wherein Rocco Albanese and H. L. Randazzo intervened. From the adverse portions of a judgment, plaintiff appeals.

Affirmed.

Goldman & Altman, of San Francisco, for appellant.

O. H. Speciale, of San Jose, for defendant and respondent Hershel California Fruit Products Co.

R. V. Bressani and M. Henry Robidoux, both of San Jose, for intervener and respondent Rocco Albanese.

Victor A. Chargin and Gerald S. Chargin, both of San Jose, for second intervener and respondent H. L. Randazzo.

WARD, Justice pro tem.

This action was commenced by plaintiff, State Finance Company, against defendant, Hershel California Fruit Products Company, for the recovery of \$1,659.86. In January, 1930, one Joe Tedesco entered into a written contract, for a period of three years, with defendant to haul tomatoes from the fields of the growers to the company's plant. In December, 1931, Tedesco executed an assignment in writing to the plaintiff of moneys which would become due to him from defendant for the 1932 hauling season. Two complaints in intervention were filed; one by Rocco Albanese for \$1,336.44, and a second to H. L. Randazzo for \$400. The defendant admitted the amount due Tedesco upon the hauling contract, but asked leave to deposit the sum with the court because of conflicting claims. Two dollars less than the admitted amount was deposited. The shortage was evidently to cover defendant's filing fee. The order directing the deposit provided that if it should be determined the claim against defendant should include interest and costs, the judgment would award to the party entitled thereto, in addition to the sum deposited, such costs and interest as may have accrued prior to the date of the order. Judgment was rendered in favor of defendant for its costs; in favor of intervener Albanese in the sum of \$1,252.85; in favor of intervener Randazzo in the sum of \$400; and in favor of plaintiff in the sum of \$5.01, without interest; said judgment further directed that plaintiff and interveners should pay their own respective costs.

Tedesco was originally indebted to the Macaulay Finance Company, with an office at San Jose. The indebtedness was secured by a mortgage on Tedesco's trucks. The Macaulay Finance Company refinanced this indebtedness with the State Finance Company. In December, 1931, Tedesco was in default in a sum exceeding \$10,000. With the expectation that Tedesco would be able to pay approximately half of the

indebtedness during the 1932 season, it was agreed that Tedesco should execute an assignment, reserving unto himself the right to draw upon the defendant with the approval of plaintiff. The assignment was not absolute, but limited to paying plaintiff with the right to divert part of the proceeds to bills and labor. Plaintiff eventually obtained from the contract \$7,325, and retained its mortgage on the trucks. Mr. Thad W. Macaulay of the Macaulay Finance Company prepared the assignment from Tedesco to plaintiff. The earnings of Tedesco were to be paid direct to the State Finance Company at San Jose. Macaulay represented plaintiff in other matters at San Jose. Before the hauling season commenced, at the express request of the president of the State Finance Company, Macaulay altered the terms of the assignment by ordering the Hershel Company to make all checks payable to plaintiff and Joe Tedesco. Tedesco also owed Rocco Albanese approximately \$5,000, evidenced by a promissory note secured by a chattel mortgage on three trucks and trailers, two of which were designated as Nos. 1 and 6. There was a further indebtedness to the Seaside Oil Company, of \$400 for fuel, assigned to H. L. Randazzo. In February, 1932, the contract was renewed direct to plaintiff. When Tedesco desired to hire trucks to assist in the work, Macaulay gave such permission, and plaintiff approved by paying the bills. The license plates for the trucks and trailers were purchased by appellant through Macaulay. Tedesco drew on the Hershel account to pay for labor and other expenses. These bills were approved by Macaulay. The record shows that payments were made to Macaulay and that all bills were approved by Macaulay.

Respondent Albanese contends that trucks 1 and 6 were excluded from the December, 1931, assignment, and that if there is any doubt on this point, Macaulay, subsequently representing the plaintiff, released all moneys earned for hauling with trucks 1 and 6 and the trailers. The court found that the original contract had been modified by an oral agreement made by the duly authorized general agent of plaintiff.

[1-4] Unless only one conclusion may be drawn, the right of an agent to modify an agreement is a question to be determined by the trier of the facts. *Curran v. Earle C. Anthony, Inc.*, 77 Cal. App. 462, 469, 247 P. 236. The evidence on this subject

is conflicting, but the greater weight seems to be against plaintiff. That an agent is hired to acquire interests and not to give them up is a presumption that may be overcome if the principal had knowledge of the change in a contract and did not within a reasonable time countermand and cancel the modification. The rule is well stated in 31 Cyc. 1387: "Presumptively an agent is employed to make contracts, not to rescind or modify them, to acquire interests, not to give them up, and no power to cancel or vary an agreement is to be inferred from a general power to make it, nor has the agent any implied power to waive or give up rights or interests for his principal * * * unless the principal knew or approved of such modification by the agent." This rule has been approved in *Thomas v. Anthony*, 30 Cal. App. 217, 222, 157 P. 823, and in *Harbor Construction Company v. Walters*, 101 Cal. App. 470, 475, 281 P. 1062. The authority of the agent to modify a provision of a contract may be inferred from the evidence that he was empowered to do certain things, as in this case to change the parties to whom the money was to be paid. There is evidence in the record from which an inference may be drawn that the principal knew of the oral modification. There is no evidence to show that the modification was repudiated. Actual authority had been conferred upon the agent by the principal, and ostensibly this authority had been communicated to the interested third parties. Civ. Code, §§ 2316, 2317. " * * * The extent of an agent's authority, and the ratification of an unauthorized act, may be proved by circumstantial evidence, as from the fact that the agent signed contracts, checks and generally managed the business of his principal. * * * The existence of an agency, like the extent of an agent's authority, is a question of fact." 1 Cal. Jur., p. 696.

The modification was for the benefit of plaintiff. Some question had arisen as to whether or not trucks 1 and 6 were included in the original contract. The work was in progress. It was important to determine immediately whether the two trucks and trailers should operate. Intervener Albanese held a chattel mortgage on these two trucks. Legal obstacles might have delayed the work. Malcaulay authorized Tedesco to pay the proceeds for the use of the trucks to Albanese. The use of five trailers could be continued for

the benefit of appellant. The care, upkeep, and part of the expense was thrust upon Albanese. The executed oral agreement altering the provisions of the written contract consisted in the doing of something by Tedesco not required in the original contract; namely, that plaintiff should be relieved of the expense of purchasing license plates, etc. This burden was placed upon Tedesco, and the fact that it was Albanese's money that paid for these expenses does not alter the situation. Tedesco would have been responsible if Albanese had not paid such expenses, and at that time plaintiff was paying Tedesco's hauling bills. If Tedesco did not continue to perform, defendant would have no recourse but to terminate the hauling contract, much to the disadvantage of plaintiff.

[5] The oral agreement modifying the written contract was fully executed. At the termination of the hauling, the object of the agreement had been fully attained. In *Klein Norton Co. v. Cohen*, 107 Cal. App. 325, 330, 290 P. 613, 616, the court said: "It is well settled by an abundance of authority in this state that a written agreement may be modified by an oral agreement only when the oral agreement has been executed." The fact that Tedesco did not pay to Albanese the sum then due was a matter over which he had no control. The modification was not a change in the Tedesco-Hershel contract, but in the Tedesco-State Finance Company assignment. The failure of the defendant, not an interested party to the modification assignment except by way of receiving directions to whom to pay, cannot result in the classification of this agreement as an executory contract. Assuming that the contract had not been fully executed, plaintiff could not take advantage of a nonperformance which it had prevented by refusing to consent to the payment by defendant to Albanese for the work performed. The defendant was faced with conflicting claims, and plaintiff's contention that Albanese did not receive his money and therefore the oral contract was ineffectual to modify the written assignment is not well taken. Civ. Code, §§ 1661, 1698.

[6, 7] Appellant contends that it was incumbent upon Albanese to prove not only that \$1,252.85 was earned by Tedesco with trucks 1 and 6, but also that the sum was unpaid and still owing by defendant at the commencement of the action. "The bur-

den of proving a particular application of a payment by either the debtor or creditor is on the party claiming that such application was made." 30 Cyc. 1267; *Madera Sugar Pine Co. v. Adams*, 68 Cal. App. 111, 115, 228 P. 544. The Albanese trucks were actually operated and the amount designated in the judgment had been earned. On December 15, 1932, there was more than the amount of the claim of Albanese in the possession of defendant. If Albanese had been paid the sum of \$1,252.85 when his hauling was complete in October, 1932, then there would not have been disbursed on account of plaintiff's claim and for labor, etc., the sum of \$7,325. Perhaps plaintiff received part of Albanese's money as a result of the commingling of funds, but there was sufficient evidence to support the finding that Albanese was the holder of a claim against Tedesco for money due him from defendant for hauling work performed by Tedesco with trucks 1 and 6.

[8] The court found that intervenor Randazzo, the assignee of the Seaside Oil Company, had a valid claim of \$400, superior to plaintiff's claim, against the earnings of Tedesco held by the defendant. As noted before, the court found that Macaulay was the general agent of plaintiff, with general authority to act. This particular claim of \$400 was for fuel delivered by intervenor's assignor previous to the last hauling season. Tedesco signed an order directing Macaulay to pay to the Seaside Oil Company \$400 in weekly installments at minimum payments of \$40. This order was dated April 28, 1932, Macaulay accepted the order and indorsed over his signature: "payable every two weeks with delinquency of one week allowed." It may be claimed that the limitation in the written assignment was to pay current bills for labor, fuel, etc., but Macaulay, who directed and approved on behalf of plaintiff all financial matters in these transactions, was evidently faced with the possibility of litigation either on the agreement or on the mortgage which might have hampered plaintiff in recovery. Macaulay evidently acted wisely and his good faith in this particular transaction does not seem to be questioned. The order was directed to the Macaulay Finance Company, but Macaulay, through the Macaulay Finance Company, was the agent of plaintiff, and had the right to modify the assignment for the benefit of plaintiff.

Subsequently, respondent Randazzo brought suit upon two claims in the justice's court. Thereafter plaintiff paid one of these claims amounting to \$259.15 and received a release from all claims described in the complaint. The release clearly was intended to apply to the \$259.15 claim based upon fuel supplied by the Seaside Oil Company during the 1932 hauling season, and not to the previous claim of \$400.

[9-11] Appellant contends that, having obtained a judgment of \$5.01, it should recover interest and costs. The order directing the deposit provided that if it was determined the claim against defendant should include interest and costs, the judgment should award, etc. No objection was made to the form or substance of this order. Under the provisions of sections 1022 and 1025 of the Code of Civil Procedure, in actions at law involving the direct payment of money, the prevailing party is entitled to recover costs unless the amount of the judgment is such as could have been rendered in an inferior court. In equity proceedings the question of costs is discretionary with the trial court. In authorizing the deposit of the money the court reserved the right to dispose of the question of interest and costs. The defendant was willing to give the money to the person or persons legally entitled thereto, but efforts at settlement were in progress and the actual deposit was therefore delayed. If deposited with the court the day the money was due, no interest would have been paid. It would be quite an injustice under all the circumstances to force the defendant to pay interest. The record does not disclose that the prevailing intervenors Albanese and Randazzo made any claim for interest.

[12] Upon the motion for a new trial appellant filed affidavits, including one from Macaulay, that the written assignment had not been orally modified or qualified. Macaulay's place of business was located at the county seat and his presence at the trial could have been obtained. The record does not show that a request for a continuance for the purpose of intervening Macaulay was presented. With these facts before the court, there was no error in denying the motion for a new trial.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

8 Cal.App.2d 160

**TENNESEN v. PRUDENTIAL INS. CO.
OF AMERICA.**

Civ. 5349.

**District Court of Appeal, Third District,
California.**

June 27, 1935.

**Hearing Denied by Supreme Court
Aug. 26, 1935.****1. Courts ☞23**

Jurisdiction may not be conferred on superior court by parties to an action by failure to object thereto at the trial, when the nature of the action or amount of claim vests jurisdiction in municipal court.

2. Insurance ☞617

In action on life policy wherein complaint sought cancellation of reinstatement for fraud of insurer and wherein answer and cross-complaint sought cancellation of policy for insured's fraud in obtaining reinstatement and set up equitable defense, superior court had jurisdiction to hear and determine cause, since issues of fraud and rescission are peculiarly within jurisdiction of a court of chancery.

3. Insurance ☞617

Filing of cross-complaint for cancellation in action on life policy gave superior court jurisdiction of cause regardless of whether nature of cause as alleged in complaint conferred such jurisdiction.

4. Courts ☞472(6)

When complaint is filed in superior court and cause is not pending in municipal court, mere filing of pleadings which raise equitable defenses does not oust superior court of jurisdiction nor thereby confer jurisdiction on municipal court, since to confer such jurisdiction on municipal court cause must be pending therein (Gen. Laws 1931, Act 5238, § 29; Code Civ. Proc. § 89, repealed and re-enacted by St. 1933, p. 1811, § 13).

Appeal from Superior Court, Los Angeles County; LeRoy Dawson, Judge.

Action by Carie Tennesen against the Prudential Insurance Company of America. Judgment for defendant, and plaintiff appeals.

Affirmed.

William Ellis Lady, of Los Angeles (Webster Hazlehurst, of Los Angeles, of counsel), for appellant.

Loeb, Walker & Loeb, of Los Angeles, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

One question only is involved on this appeal. The suit is based on an insurance policy on the life of the deceased husband of the plaintiff. It is contended the superior court had no jurisdiction to determine the cause for the reason that the pleadings confer exclusive jurisdiction on the municipal court of Los Angeles county under the statutory provisions. St. 1925, p. 648, and amendments thereof, 2 Deering's Gen. Laws of 1931, p. 2925, Act 5238, § 29; section 89, Code Civ. Proc., repealed and re-enacted by St. 1933, p. 1811, § 13.

The complaint was filed by the appellant in the superior court. It contains three counts. The issuing of the life insurance policy and the death of the insured are alleged. The first count asserts full performance of the contract. The second count alleges that the company procured the insured to unnecessarily sign a written petition for reinstatement of the policy, by means of fraud, knowing that the policy had not then lapsed for failure to pay the premiums thereon. The third count asserts that the company waived the termination of the contract by subsequently accepting payments of deferred premiums. The prayer demands a cancellation of the reinstatement instrument because of the alleged fraud of the company, and for judgment in the sum of \$2,000 and interest thereon from the date of the death of the insured which occurred February 6, 1932.

The answer admits the execution of the insurance policy, but denies liability thereunder on the ground that the reinstatement of the policy was procured by the fraud of the insured. The material allegations of the complaint were denied. The answer then separately and affirmatively alleges that the policy lapsed under the express terms thereof, by failure of the insured to pay the quarterly premium which was due thereon September 2, 1931, and that the insured thereafter procured the reinstatement of the policy by making a written statement therefor, containing fraudulent declarations, that the insured was not then afflicted with any physical ailment for which he had previously received medical aid; that contrary to the written declarations of the insured in his application for reinstatement of the pol-

icy he was then suffering from serious physical ailments from which he subsequently died, and on account of which he had previously received medical attention; that the policy was thereby rendered void; that the insurance company reinstated the policy October 22, 1931, relying solely on the written statements of the insured with respect to his physical condition at that time; and that upon discovering the falsity of these statements the insurance company promptly notified the insured in February, 1932, of the rescission of the contract for such fraud, and then offered to repay to him all premiums received subsequent to the reinstatement of the policy. The answer asks for the termination of the policy for fraud, and prays for judgment that the plaintiff take nothing by his cause of action.

The cause was tried by the court sitting without a jury. Findings were adopted favorable to the defendant on all the material issues. The court found that the policy lapsed by failure to pay the premium thereon which was due in September, 1931, and that the company did not waive that breach of contract by subsequently receiving such delinquent premium; that the policy was thereafter renewed by the company solely in reliance on the written statement of the insured that he was then free from physical ailments, when, upon the contrary, he was then suffering from the serious ailments of sarcoma of the jaw and syphilis, for which he had previously received medical treatment; that the company thereafter discovered this fraud on the part of the insured and promptly rescinded the contract and offered to repay all premiums received subsequent to the reinstatement of the policy. Judgment was thereupon rendered in favor of the defendant. From that judgment, the plaintiff has appealed.

[1] It is true that jurisdiction of law cases involving demands for \$2,000 or less is vested in municipal courts under the provisions of section 89 of the Code of Civil Procedure, repealed and re-enacted by St. 1933, p. 1811, § 13, and that the municipal court shall have jurisdiction of all such cases "properly pending in such municipal courts," in which equity is pleaded as a matter of defense. It is also true that jurisdiction may not be conferred upon the superior court by the parties to an action by failure to object

thereto at the trial, when the nature of the action or the amount of the claim sought to be recovered vests the jurisdiction thereof in the municipal court. *Shipp v. Superior Court of San Bernardino County*, 209 Cal. 671, 289 P. 825.

[2] In the present case the superior court had jurisdiction to try and determine the cause. Both the complaint and the answer contain equitable issues necessary to the determination of the action which conferred jurisdiction on the superior court. The second cause of action alleges that the application for the reinstatement of the policy was procured unnecessarily by the fraud of the insurance company. We may assume the plaintiff realized the necessity of rescinding the reinstatement of the policy or the contract would be rendered void for fraud in misstating facts with relation to the physical condition of the insured in his application therefor. The plaintiff therefore sought to cancel the reinstatement of the policy on the ground of alleged fraud and to rely upon the original policy. This tendered a necessary equitable issue, which undoubtedly accounts for the plaintiff commencing the action in the superior court. Moreover, the separate affirmative allegations of the answer also set up an equitable defense to the suit. The defendant sought to cancel the policy and avoid liability thereon because of the alleged fraud of the insured in procuring the reinstatement of the contract. Both parties rely upon the cancellation of instruments necessarily incident to the suit on the policy. The issue of fraud and that of rescission are peculiarly within the jurisdiction of a court of chancery. We are therefore of the opinion the superior court of Los Angeles county had jurisdiction to try and determine this cause. *Freligh v. McGrew*, 124 Cal. App. 405, 12 P.(2d) 965.

[3] Even though the nature of a cause as alleged in the complaint confers no jurisdiction upon a superior court, the filing of an answer and cross-complaint therein, seeking to cancel an insurance policy upon which the action is based, on the ground of fraud, invokes the jurisdiction of that court so as to authorize it to determine all the issues which are tendered by the pleadings. *Brix v. People's Mutual Life Insurance Co.* (Cal. Sup.) 41 P.(2d) 537.

[4] When a complaint is filed in the superior court, and the cause is not pend-

ing in the municipal court, the mere filing of pleadings which raise equitable defenses does not oust the superior court of jurisdiction nor thereby confer jurisdiction on the municipal court. A municipal court is vested with jurisdiction over equitable issues only "when pleaded as defensive matter, in any case properly pending in such municipal courts." Section 89, subd. 3, Code Civ. Proc., repealed and re-enacted by St. 1933, p. 1811, § 13. In the present case the suit was not pending in the municipal court.

The judgment is affirmed.

We concur: PULLEN, P. J., PLUMMER, J.



8 Cal.App.2d 353

HENRY v. BANK OF AMERICA et al.

Civ. 9591.

District Court of Appeal, First District,
Division 2, California.

July 9, 1935.

1. Evidence ☞ 385

Under statute providing that establishment of accounts in joint tenancy should be conclusive evidence that depositors intended that surviving depositor should take deposits and additions thereto, evidence showing source of funds in joint tenancy account and different intent in depositors than expressed in agreement might properly be excluded, in absence of fraud or undue influence (Gen. Laws 1931, Act 652, § 15a).

2. Joint tenancy ☞ 3

Where depositors agreed to establish bank account in joint tenancy and there was no evidence that agreement had ever been canceled, all subsequent deposits to account, made with knowledge and consent of depositors, were subject to terms of joint tenancy agreement, and to statute providing that establishment of account in joint tenancy would be conclusive evidence, that depositors intended surviving depositor should take deposits and additions thereto (Gen. Laws 1931, Act 652, § 15a).

Appeal from Superior Court, San Mateo County; Franklin Swart, Judge.

Action by W. R. Henry, as executor of the last will of Anna Henry, deceased, against the Bank of America and others. Judgment for defendants and plaintiff appeals.

Affirmed.

Fletcher A. Cutler, of San Francisco, for appellant.

Hankins & Hankins, of San Francisco, for respondents Carrie H. Stuart, as administratrix of the estate of P. W. Henry, deceased, and Katherine Welch.

Tobias J. Bricca and S. J. Tosi, both of San Francisco, for respondent Bank of America, etc.

SPENCE, Justice.

This controversy involves the conflicting claims of the parties to certain money deposited in a joint tenancy account of Porter W. Henry and Anna Henry, his wife, prior to the death of either of the spouses. The cause was tried before the court sitting without a jury and from a judgment in favor of defendants, plaintiff appeals.

Said joint tenancy account was opened by said Porter W. Henry and Anna Henry, his wife, in the Peninsula Bank in Burlingame on April 1, 1925. The agreement signed by the spouses with respect to said account read as follows: "The money now deposited and all moneys which shall at any time be deposited by us or either of us in our joint account as Trustees for Savings No. 2047, with Peninsula Bank, Burlingame, Cal., is and will be so deposited by us, and is to and will be received and held by it, with the understanding and upon the condition, that the same and all dividends or interest thereon, and all accumulations, thereof, are payable to, and shall be collected by us, or either of us, during our joint lives, or to and by the survivor of either of us, or to and by the beneficiary, his (or her) heirs, executors, administrators, or assigns, in the event of the death of both of us, without reference to, or consideration of, the original or previous ownership of such moneys, or any part of same. And we jointly and severally engage and bind ourselves, and our heirs, executors, administrators and assigns, and covenant and agree to and with each other, and to and with said Peninsula Bank, Burlingame, Cal., its successors or assigns, that the

receipt of either of us during our joint lives, and the receipt of the survivor of us in the event of the death of either of us, and the receipt of the beneficiary, his (or her) heirs, executors, administrators or assigns, shall be sufficient voucher and a full acquittance and discharge of said Peninsula Bank, Burlingame, Cal., for any and all moneys drawn from or paid out of said Deposit account." It will be noted that the parties thereby agreed with each other and with the bank, "its successors or assigns." It is conceded that defendant Bank of America National Trust & Savings Association is the successor of the Peninsula Bank and that said account remained open until April 8, 1931, which was shortly before the death of Anna Henry on May 18, 1931. On said April 8, 1931, at which time Anna Henry was not expected to live, Porter W. Henry was advised to withdraw and did withdraw the entire amount on deposit in said joint tenancy account, being a sum in excess of \$12,000, and deposited it in a new account in his own name. After the death of Anna Henry, a portion of said sum was withdrawn by Porter W. Henry from the new account and placed in a joint tenancy account with his granddaughter, the defendant Katherine Welch. This action was brought by the executor of the last will and testament of Anna Henry, deceased, seeking to recover from defendants the balance remaining in the two last-mentioned accounts. Prior to the trial of the cause, Porter W. Henry died on February 12, 1932, and his administratrix was substituted in his place and stead. The judgment decreed that plaintiff take nothing by said action; that the defendant administratrix of the estate of Porter W. Henry was entitled to the money on deposit in the account in the name of Porter W. Henry; and that the defendant Katherine Welch, by right of survivorship, was entitled to the money on deposit in the joint tenancy account in the names of Porter W. Henry and Katherine Welch.

[1] We are of the opinion that the provisions of section 15a of the Bank Act (Deering's Gen. Laws 1931, Act 652) are determinative of the questions raised on this appeal and that the trial court correctly determined that appellant should take nothing by said action. Said section provides with respect to agreements, such as the one above set forth, "the making of the deposit in such form shall, in the

absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such bank or the surviving depositor or depositors may be a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors." There was no claim of fraud or undue influence in the present case, and under the terms of said section, the making of the deposit in that form was "conclusive evidence" of the intention of the parties to vest title to the deposit "and the additions thereto" in the survivor. Appellant introduced evidence relating to the source of the funds and also certain parol evidence in an attempt to show that the intention of the parties was at variance with the intention expressed in said agreement. Under the authorities, such evidence was immaterial and the trial court might properly have sustained respondents' objections thereto. *Kennedy v. McMurray*, 169 Cal. 287, 146 P. 647, Ann. Cas. 1916D, 515; *Estate of Gurnsey*, 177 Cal. 211, 170 P. 402; *Conneally v. San Francisco S. & L. Society*, 70 Cal. App. 180, 232 P. 755; *Crowley v. Savings Union Bank & Trust Co.*, 30 Cal. App. 144, 157 P. 516; *Hill v. Badeljy*, 107 Cal. App. 598, 290 P. 637.

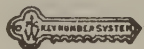
[2] Practically all the money here involved was deposited in said joint tenancy account of Porter W. Henry and Anna Henry in 1928. Appellant concedes that there would be merit in respondents' position if the joint tenancy agreement had been signed by the spouses at the time said deposit was made in 1928. We are of the opinion, however, that the original agreement governing the account applied with equal force to the subsequent deposits as well as to the initial deposit in said account. The money deposited in 1928 was deposited in said account with the knowledge and consent of the parties and their original agreement governing said account applied to "all moneys which shall at any time be deposited by us or either of us in our joint account." Said section of the Bank Act likewise applied to the initial deposit and "the additions thereto."

In view of the conclusions which we have reached, we deem it unnecessary to discuss the several contentions of appellant, which contentions are based either upon immaterial testimony or appellant's conclusions drawn therefrom. We may further state that we find no evidence to support

appellant's claim that the joint tenancy agreement was ever canceled or annulled by the parties.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



8 Cal.App.2d 495

PEOPLE v. BARR.

Cr. 2690.

District Court of Appeal, Second District,
Division 1, California.

July 24, 1935.

1. Witnesses ☞240(2)

Ruling on objection to leading questions put to defendant is within discretion of court.

2. Witnesses ☞240(2)

Rulings which allowed leading questions to be put to defendant as to formal matters to save time *held* not abuse of discretion, where no objection was made by defendant that prosecution was allowed more liberality as to leading questions than was shown defendant.

3. Criminal law ☞1120(3)

Contention that court erred in refusing defendant permission to introduce telegrams showing innocent nature of transaction involved *held* not available, where record discloses no attempt by defendant to introduce telegrams or testimony to identify telegrams so that they could be offered in evidence.

4. Criminal law ☞958(6)

Where affidavits in support of motion disclosed that newly discovered evidence urged as ground for new trial was cumulative only and mainly corroborative of testimony introduced by defendant, and no showing was made of diligence of defendant, motion for new trial on ground of newly discovered evidence *held* properly denied.

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Chris G. Barr was convicted of grand theft, and he appeals.

Affirmed.

Stoner & Gardner and L. E. Alimisis, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

YORK, Justice.

The defendant was found guilty on two counts charging grand theft of certain watermelons and bills of lading for the watermelons. We will take the numbers used by the appellant in his statement of questions involved as set forth in his opening brief in our numbering of the questions discussed in this decision, as there is confusion in the briefs as to which point is raised under which particular number.

[1, 2] Appellant's point 1 is apparently based on the rulings by the court in allowing leading questions to be put to the defendant. This is a matter entirely within the sound discretion of the court, and has always been so held. The record does not disclose any possible abuse of such sound discretion in any of the rulings objected to, and there is nothing in the record to show any prejudice by reason of allowing any of the leading questions, as each of the questions allowed was merely as to pro forma matters, and was evidently allowed to save time. There is no objection by appellant that there was any favoritism in allowing the prosecution any more liberality as to leading questions than was shown to the defendant.

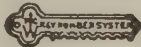
[3] Point 2 raised by appellant is that the court erred in refusing the defendant permission to introduce telegrams showing the innocent nature of the transactions involved. The record does not disclose any attempt to introduce any telegrams that would have had any such effect. In fact, it does not disclose any attempt on the part of the defendant to introduce any telegrams or to introduce any testimony identifying the telegrams sufficiently so that they could be offered in evidence.

Point 3, as stated in appellant's opening brief, is: "Is the evidence sufficient beyond a reasonable doubt to support the judgment of conviction?" A careful reading of all of the evidence submitted to us by the briefs discloses that there was sufficient evidence to justify the court in reaching the conclusion that defendant was guilty as charged.

[4] As to point 4: "Did the court abuse his discretion in denying the defendant a new trial?" This motion for a new trial was made upon certain affidavits alleging newly discovered evidence, which appellant claims would have resulted in his ultimate acquittal, if it had been introduced at the time of trial. The affidavits, however disclose that such evidence was cumulative only, and mainly corroborative of the testimony introduced by defendant himself. There is no showing of diligence on the part of the appellant in securing at the time of the trial the presence of witnesses, who made the affidavits used in support of the motion for new trial.

The judgment of conviction and the order denying motion for new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.



8 Cal.App.2d 129

PEOPLE v. WALLACH.
Cr. 2689.

District Court of Appeal, Second District,
Division 2, California.
June 27, 1935.

1. Criminal law ☞1001

Municipal court on conviction for misdemeanor has power to effect suspension of sentence only by following method prescribed in probation statute (Pen. Code, § 1203, and § 1203a, as added by St. 1933, p. 1340).

2. Criminal law ☞1001

Order of municipal court granting probation of sentence was not invalid because it was inartificial in form, since no formal order was required for granting of probation (Pen. Code, § 1203, and § 1203a, as added by St. 1933, p. 1340).

3. Criminal law ☞1202(1)

Judgment of municipal court sentencing defendant for 90 days for a misdemeanor followed by order suspending sentence and placing defendant on probation upon condition that she spend first 30 days in county jail did not constitute a judgment and sentence, nor the serving of 30 days thereunder constitute the serving of term in a penal institu-

tion so as to justify imposition of increased penalty on subsequent conviction for misdemeanor on ground that defendant had suffered a prior conviction (Pen. Code, § 1203, and § 1203a, as added by St. 1933, p. 1340).

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

June Wallach was convicted of petty theft with prior conviction therefor, and she appeals.

Judgment of conviction modified and cause remanded, with directions.

A. Brigham Rose, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

FRICKE, Justice pro tem.

Appellant was charged under section 666 of the Penal Code by information with petty theft after having previously suffered a conviction of petty theft and having served a term of imprisonment therefor in a penal institution. She pleaded not guilty and denied the prior conviction, and the court, a jury having been waived, found her guilty and sentenced her to imprisonment in the state prison.

No claim of innocence or error is asserted as to the substantive offense with which appellant was charged; her contentions relating solely to the insufficiency of proof of the allegation of a prior conviction and to the decision of the court thereon.

The proof on the issue of prior conviction consisted of a certified copy of the docket of the municipal court of Los Angeles in the case of *People v. Vera Dean*, showing that the defendant therein entered a plea of guilty to the charge of petty theft contained in a complaint filed July 29, 1931, and that after arraignment for sentence the court on August 4, 1931, made the order, "that for the said offense of petit theft the said Miss Vera Dean be imprisoned in the county jail of Los Angeles county for the term of 90 days and the said defendant be discharged at the expiration of said term. Sixty days suspended for period according to law. Defendant to report to probation officer as directed. Defendant committed." This was supplemented by the testimony of an

officer that he had arrested the defendant "Miss Wallace," that on August 4, 1931, he was present in division 6, municipal court, and that the defendant waived time for sentence; that the defendant on that occasion stated that her true name was Vera Dean; "that the court sentenced her to serve ninety days and suspended sixty days of the ninety and ordered her to report to the probation officer * * * after the thirty days had been served," and that on the afternoon of the same day and several times thereafter the witness saw the defendant in the county jail. The testimony of the officer sufficiently showed that the defendant in this case was the same person as the defendant referred to in the docket of the municipal court.

Under section 666 of the Penal Code a conviction of petty theft, an offense which standing by itself is only a misdemeanor, is made a felony if it be charged and proved that the defendant had previously been convicted of petty theft and in addition to the fact of conviction had served a term of imprisonment therefor in a penal institution. Concretely, appellant contends that detention in the county jail as a condition of probation is not the serving of a term of imprisonment.

[1,2] The only way in which a sentence can be legally suspended is by proceeding under the provisions of the Probation Law (*People v. Mendosa*, 178 Cal. 509, 173 P. 998; *Ex parte Slattery*, 163 Cal. 176, 124 P. 856; *In re Clark*, 70 Cal. App. 643, 234 P. 109; *In re Cohen*, 198 Cal. 221, 244 P. 359; *People v. Harvey*, 137 Cal. App. 22, 29 P.(2d) 787), and the municipal court had implied power (since then expressly conferred by section 1203a of the Penal Code [as added by St. 1933, p. 1340]) to effect a suspension of the sentence by following, but only by following, the form and method prescribed in section 1203 of the Penal Code. While the order of the municipal court judge as it appeared on the docket is somewhat inartificial, no formal order was required for the granting of probation. *People v. Sapienzo*, 60 Cal. App. 626, 213 P. 274; *In re Heron*, 217 Cal. 400, 19 P.(2d) 4. In the *Herron* Case the trial court, after imposing a sentence of 30 days following the defendant's conviction of petty theft, made the mere order, "Sentence suspended," and it was held that this was an order placing the defendant on probation for a term equal in length to the maximum period of

imprisonment provided as the penalty for that offense.

[3] Respondent urges that the action of the municipal court in the case at bar was in fact a judgment amounting to a straight 30-day sentence followed by a 60-day period of probation. Upon the conviction of a defendant of a single offense the court, unless probation is prohibited by the restrictions of section 1203 of the Penal Code, may sentence the defendant in accordance with the penalty for the offense in question, or may, either before or after judgment and sentence, place the defendant on probation; but the court is without authority, upon a conviction of but one offense, to grant probation to a defendant and at the same time sentence him to a term of imprisonment. *In re Nichols*, 82 Cal. App. 73, 81, 255 P. 244. Nor has it the power, where probation is not granted, to add to a sentence of imprisonment a provision relieving the defendant of a portion of the imprisonment. *In re Eyre*, 1 Cal. App. (2d) 451, 36 P.(2d) 842. It is not, however, necessary nor warranted to hold the judgment and order of the municipal court invalid, for they are obviously a judgment and sentence of imprisonment for a period of 90 days followed by an order suspending the sentence and placing the defendant on probation upon condition that she spend the first 30 days in the county jail.

The fact that the defendant spent the first 30 days of her probationary period in the county jail does not amount to her having served a term of imprisonment in a penal institution. That period of detention was imposed not as a sentence but as a condition of probation, and the granting of probation suspended the execution of the 90-day sentence previously imposed. It cannot be said that the 30 days spent by defendant in the county jail was served under the sentence, where that sentence had been suspended by the probation order. Furthermore, the order placing a defendant on probation, even though it include as a condition a period of detention in the county jail, is not a judgment and sentence. *People v. Roberts*, 136 Cal. App. 709, 713, 29 P.(2d) 432. Similarly it has been held that the imposition of a fine as a condition of probation is not a judgment imposing a fine. *In re McVeity*, 98 Cal. App. 723, 727, 277 P. 745. That a period of detention in a county jail as a condition of probation is not a sentence is also evi-

dent, when we consider that such a condition can be imposed where a defendant has been convicted of a crime which is not punishable by imprisonment in the county jail. The fact that if probation is revoked and the defendant committed to serve the sentence imposed he is, under section 1203 of the Penal Code, entitled to receive credit for time spent in jail as a condition of probation, does not affect the question before us, though the very fact that the Legislature deemed it necessary to specifically provide for such credit indicates that without such provision the prisoner would be entitled to no such credit. It might also be noted that detention in a county jail as a condition of probation is not the only form of detention provided by section 1203, for subdivision 1 thereof includes "road camps, farms, or other public work," and any time spent in detention other than in a county jail is likewise made a credit upon a subsequent imprisonment under sentence after revocation of probation.

The evidence herein fails to establish that appellant, after having previously suffered a conviction of petty theft, served a term of imprisonment therefor.

Appellant also claims that the decision of the court finding her "guilty as charged," without the further finding of the truth of the allegation as to the prior conviction, was not sufficient to support the judgment. The quotation, *supra*, relied upon is not, however, a quotation from the decision of the court, but from the clerk's minutes. It does appear from the recitals of the court at the time of judgment and sentence that the court had previously "announced its decision finding you [defendant] guilty of the offense, to wit, petit theft, with a prior conviction thereof"; and appellant's counsel in moving under section 1191 of the Penal Code for a modification of the judgment, without the granting of a new trial, to the lesser crime of simple petty theft, declared that his opinion in the matter of the proof of the allegation of prior conviction was contrary to the previously expressed opinion of the court. The record does not warrant the conclusion that the trial court did not make a decision upon the issue of former conviction.

The judgment is modified and the cause remanded to the trial court, with directions to enter a judgment against defend-

ant finding her guilty of petty theft, and to thereupon pronounce judgment and sentence as prescribed by law.

We concur: STEPHENS, P. J.:
CRAIL, J.



8 Cal.App.2d 444

HALL v. FERGUSON et al.

Civ. 1176.

District Court of Appeal, Fourth District,
California.

July 22, 1935.

1. Witnesses ⇨379(2), 397

Inconsistent statements of defendant, as to whether delivery of deed was made, were available as evidence to impeach defendant, and also as substantive proof of admission of defendant.

2. Deeds ⇨208(1)

Evidence held sufficient to sustain finding of delivery of deed by grantor so as to render property subject to execution on judgment obtained against grantee, though there was testimony that deed was to take effect only in event of grantor's death.

3. Deeds ⇨108

Unconditional grant deed made, executed, and delivered by grantor to grantee, though with intent that it operate as conveyance only upon death of grantor, passes title immediately to grantee (Civ. Code, § 1056).

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by Clarence E. Hall against W. J. Ferguson and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

John Conrad Lehner and Herbert C. Kelly, both of San Diego, for appellants.

Ray Miller and Liggett & Liggett, all of San Diego, for respondent.

HARDEN, Justice pro tem.

Action to quiet title to three pieces of real property.

W. J. Ferguson and Mary Ellen Ferguson, defendants, were formerly husband

and wife. A final decree of divorce was entered September 4, 1915, in an action between them wherein, among other things, it was adjudged that there was no community property. At that time Mary Ellen Ferguson held title to two pieces of the property involved in this action by virtue of a deed from W. J. Ferguson. By deed dated March 4, 1922, she conveyed said property to W. J. Ferguson. This deed was not recorded until March 8, 1923. On December 5, 1922 (about three months before the recording of the last-mentioned deed), he deeded the property back to her. This deed was recorded December 1, 1924. On July 21, 1931, by two separate conveyances bearing that date, Mary Ellen Ferguson deeded said property (including a third piece, a ranch which she had acquired since her divorce by patent from the government) to W. J. Ferguson. These deeds were not recorded until October 15, 1931. On October 14, 1931, W. J. Ferguson executed a deed to all of said property to Mary Ellen Ferguson. This deed was the last of the series, and was not recorded. The controversy hinges upon its validity.

We have mentioned the recording dates to indicate the practice of said parties to withhold their deeds from record for long periods. It will be seen also that in no case was a conveyance to Mary Ellen Ferguson recorded until after the execution of a reconveyance to her.

As guardian of plaintiff, defendant Mary Ellen Ferguson came into possession of plaintiff's estate and failed to account for \$1,500 thereof, by virtue whereof, on May 10, 1932, plaintiff procured a judgment against her for \$1,544.30. Pursuant thereto execution was levied upon all of the real property involved on July 22, 1932. At a sale thereof pursuant to regular proceedings plaintiff purchased said property for \$1,500.

The judgment entered herein provided that defendants might redeem the property from said sale within 90 days from the entry of judgment upon paying plaintiff \$2,350 in lawful money of the United States (or by transferring to him bonds of the Federal Home Loan Bank of an equal amount), together with interest thereon from date of judgment; that upon failure to redeem, plaintiff's title to the property should stand quieted. Defendants appeal from the judgment.

[1,2] The decision must turn principally upon a question of fact. The attorney who drew the deed of October 14, 1931, was a witness. Based upon his testimony, a finding that both defendants called at his office and requested him to prepare the deed and that he later delivered it to defendants at their home on the day of its preparation would be supported by the evidence. Mary Ellen Ferguson denied such delivery and stated that after its execution at their home it was returned by the attorney to his office; that thereafter she abstracted it from his files and burned it. In some particulars her version of the matter was corroborated by testimony of W. J. Ferguson. However, Mrs. Ferguson testified at another point in her testimony that W. J. Ferguson gave her the deed "in case of death." It was likewise established that at a hearing on proceedings supplemental to execution in the case wherein plaintiff procured the former judgment against Mary Ellen Ferguson, W. J. Ferguson testified in respect to the deed in question as follows: "Q. Did you execute that deed and give it to her? A. Yes, in case of death." The last-mentioned evidence was available not only to impeach W. J. Ferguson, but was substantive proof by way of an admission of a defendant. *Gates v. Pendleton*, 71 Cal. App. 752, 756, 236 P. 365.

The evidence, direct and circumstantial, was sufficient to justify a finding of delivery of the deed by the grantor.

[3] An unconditional grant deed made, executed, and delivered by the grantor to the grantee, though with the intent that it should operate as a conveyance only in the event of death of the grantor, takes effect immediately to pass title to the grantee. Section 1056, Civ. Code; *Mowry v. Heney*, 86 Cal. 471, 25 P. 17; *Elliott v. Merchants' Bank, etc., Co.*, 21 Cal. App. 536, 132 P. 280; *Lewis v. Brown*, 22 Cal. App. 38, 133 P. 331; *Fisher v. Fisher*, 23 Cal. App. 310, 137 P. 1094; *Hodoian v. Garabedian*, 79 Cal. App. 762, 251 P. 227.

A destruction of the deed by the grantee after delivery would not affect its validity, nor operate as a reconveyance to the grantor. *Cranmer v. Porter*, 41 Cal. 462.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

8 Cal.App.2d 401

CITY OF LOS ANGELES v. HUNT et al.
Civ. 9699.District Court of Appeal, Second District,
Division 1, California.

July 17, 1935.

1. Eminent domain ⇨265(5)

Right to recover attorney fees on abandonment of condemnation proceeding is statutory (Code Civ. Proc. § 1255a).

2. Eminent domain ⇨265(5)

Attorney fees held improperly allowed to defendant, on abandonment of condemnation proceedings, who had admitted in answer which he had signed as attorney for defendant, that he was owner in fee of property, but who claimed fees for representation of corporation for which he held title to undivided one-half interest in property but which was not joined as defendant or shown in record to have been interested in suit (Code Civ. Proc. § 1255a).

3. Eminent domain ⇨265(5)

Attorney at law sued as owner of real property, on abandonment of condemnation proceeding, cannot appear for himself and for his services to himself charge attorney fees to plaintiff (Code Civ. Proc. § 1255a).

YORK, J., dissenting.

Appeal from Superior Court, Los Angeles County.

Action by the City of Los Angeles against Lee Hunt, Ralph A. Chase, and others. From an order taxing costs, plaintiff appeals.

Reversed.

Ray L. Chesebro, City Atty., of Los Angeles, for appellant.

Harley E. Riggins and Ralph A. Chase, both of Los Angeles, for respondent.

CONREY, Presiding Justice.

In this action to condemn real property for a public use, after entry of judgment awarding compensation for the land about to be taken the plaintiff elected to abandon the proceedings, and the action was dismissed. Thereupon the defendant Ralph A. Chase filed a memorandum of costs, which included an item claimed as fees for services rendered by himself as an attorney at law in establishing the value of the property taken. The court having by its order taxed as costs a sum allowed for

such fees, the plaintiff appeals from the order.

With respect to the parcels of land in relation to which the disputed fees for service are claimed, the complaint alleged that defendant Ralph A. Chase was the owner. In his answer filed for himself and another defendant, the respondent admitted that he was the owner in fee simple of said property. The answer was signed by Ralph A. Chase as "attorney for defendant." The court made findings and entered its judgment in accordance with these admitted facts.

In support of his claim for said fees, respondent filed affidavits which, in substance, are sufficient to show that although the legal title to the land was entirely vested in himself and he had complete ownership of an undivided one-half thereof, nevertheless the consideration for the other undivided one-half of said land had been paid by the Chase Rented Homes Company, Inc., a corporation, and that in fact respondent Chase held title for the corporation as to an undivided one-half of the property. His affidavit was further to the effect that in his defense to the action, with respect to said last-mentioned undivided one-half interest, he was acting as attorney for the corporation and not for himself. It was upon this basis that the court allowed the fee.

[1-3] The right to recover fees in such cases is purely statutory, and the statute governing the recovery of attorney fees in eminent domain proceedings is section 1255a of the Code of Civil Procedure. It is there provided that upon abandonment of the action, judgment shall be entered dismissing the proceeding "and awarding the defendant his costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees." It thus clearly appears that the right to such costs and attorney fees is limited to the defendants. But in this case the corporation was not a defendant. Its interest in the property, if any it had, appears nowhere in the record, from the filing of the complaint to the entry of judgment. Whatever the equities may have been as between respondent and the corporation, they did not in any way place the corporation in the position of a party to the action or give it any right to recover costs. Respondent in his answer to the complaint chose to claim the whole

property as his own, instead of suggesting to the court and to the plaintiff that there was another owner besides himself, of the described real property. Having elected to stand in the case as sole owner, he cannot now claim attorney fees on behalf of an undisclosed owner; and it is settled law that an attorney at law sued as owner of real property in a condemnation proceeding cannot appear for himself, and for his services to himself charge attorney fees to the plaintiff. *City of Long Beach v. Sten*, 206 Cal. 473, 274 P. 968.

The order is reversed.

I concur: HOUSER, J.

I dissent: YORK, J.



8 Cal.App.2d 203

BROWN v. NEWBY et al.

Civ. 8827.

District Court of Appeal, Second District,
Division 2, California.

June 29, 1935.

Hearing Denied by Supreme Court

Aug. 26, 1935.

1. Bills and notes ⇨63

Maker's intention is essential fact involved in question of delivery of instrument.

2. Evidence ⇨151(1)

Party may testify to his own intent in doing an act where intent is material.

3. Appeal and error ⇨1058(2)

Evidence ⇨151(2)

Where makers allegedly delivered note to third party solely for his signature and third party without signing note delivered note to payee, refusal in payee's action on note to permit makers to testify that they did not intend that note should be delivered to payee without third party's signature *held* reversible error which was not cured by answer of one of makers without objection that they would not have signed note had he known that third party was going to deliver note to payee without signing it, where answer was not responsive to question.

STEPHENS, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; J. C. Needham, Judge.

Action by Bernice Brown against Nathan Newby, Jr., and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

Newby & Newby, of Los Angeles (Dee Holder, of Los Angeles, of counsel), for appellants.

Wingert & Bewley, of Whittier, for respondent.

CRAIL, Justice.

This is an appeal by the defendants from a judgment against them in an action on a promissory note. The note was drawn in favor of one of the banks of Los Angeles in the sum of \$11,250, dated July 1, 1930, with interest at the rate of 7 per cent. per annum, and signed by the defendants. The note was thereafter assigned to the plaintiff at the request of a third party who was and is the plaintiff's real party in interest. Hereafter for convenience no distinction will be made between the plaintiff and her real party in interest; both will be referred to as the plaintiff. It was the contention of the defendants at the trial that the note had never been delivered by them to the bank; that the note was to be signed not only by the two defendants, but by the plaintiff before it was to be delivered to the bank; that actual possession of the note was surrendered to the plaintiff for the purpose of obtaining his signature on it, but that without signing the note and improperly disregarding the conditions prescribed by the defendants he had delivered the note to the bank; and that therefore there was no delivery of the note which was binding upon the defendants as against the plaintiff.

The Hawaiian Airways Company, Limited, was a corporation of which the defendants and the plaintiff were directors. In the year 1929, for the purpose of purchasing an airplane, the corporation executed in favor of the bank its promissory note in the sum of \$15,000 and received in return the money thereon. The payment of this note was guaranteed by four guarantors, the two defendants, the plaintiff, and a Mr. Charles V. Eakin. This loan was renewed on three different occasions by the execution of a new note for said sum guaranteed on each occasion by the four guarantors. When the last

of these notes became due and the corporation was unable to pay it, the bank demanded payment from the guarantors and refused to grant further extensions of time unless a part payment of the principal was made, and then only in case the guarantors became the principal signers of the note. The defendants and the plaintiff had a conference in which the plaintiff informed the defendants that he was able to pay his one-fourth of the note. The defendants said they were unable to pay their portion. The plaintiff said that he would obtain an extension of time by paying one-fourth of the principal. But in the meantime the guarantor Eakin had moved away and could not be found, so from that time on he was treated as if he were of no value in the transaction except for the purpose of obtaining a contribution from him if he should be found. In the meantime also the Hawaiian Airways Company, Limited, had gone into bankruptcy. The defendant Nathan Newby went to the bank and had a conversation with the officer in charge in which he told him that the plaintiff said that he was willing to pay one-fourth of the note and the interest if the bank would renew the loan with the three signatures on the note.

After this note was prepared by the bank, the defendant Nathan Newby signed it in the bank as one of the makers and left the bank with the statement that his son, Nathan Newby, Jr., would complete the transaction and would get the signature of the plaintiff to the note and sign it himself and see that the payment of the plaintiff was made together with the note with the three signatures on it. The defendant Newby, Jr., signed the note in his office and inclosed it in a letter dated July 1, 1930, addressed to the plaintiff, which read in part: "Enclosed you will find the note signed by myself and father, which I am sending to you for your signature."

From this point on there is a sharp conflict in the evidence as to the conversations between the parties and as to the intentions of the parties. There is no conflict, however, as to what was done. The plaintiff, by his representative, paid to the bank one-fourth of the original indebtedness and delivered to the bank the note signed, not by himself, but by the defendants only. Without the knowledge of the defendants he delivered to the bank at the same time a separate agreement in writing

to guarantee the new note for \$11,250, and received from the bank the old note for \$15,000. As a part of the same transaction a cashier's check for \$11,250 was at the request of the plaintiff's representative issued by the bank in favor of the defendants. This check was delivered to the office of the defendants by the representative of the plaintiff. It was then indorsed by the defendants. No money of any kind or in any amount was paid to the defendants on account of said check. The note signed by the two defendants for the sum of \$11,250 together with the plaintiff's separate guaranty and the cashier's check were then delivered by the plaintiff's representative to the bank and the old note was surrendered to the plaintiff. After this was all done, the plaintiff's representative wrote a letter to the defendant Newby, Jr., in which he set forth substantially what had transpired and in which he said: "The note in our possession signed by you and your father for \$11,250 to the Citizens National Bank dated July 1, 1930, was delivered to the bank." But he did not say in the letter that the note had not been signed by the plaintiff, and he said nothing in the letter about the guaranty which the plaintiff gave the bank in order to consummate the transaction. The defendants contend that they did not know that the name of the plaintiff was not signed to the note as a joint maker with them and that each thought the delivery of the note to the bank was made after the fulfillment of the condition of the delivery of the note to the plaintiff, to wit, his signature. When the note for \$11,250 became due, the amount was paid by the plaintiff, and at his request the bank indorsed it to the present plaintiff who commenced the present action upon the note. It will be observed that as a result of this transaction, instead of having a right of contribution from each of the defendants limited in any event to \$5,000, the plaintiff had a joint and several obligation against each of the defendants for the amount of \$11,250.

[1-3] From what has been said above, the great importance in the case of the issue of delivery is apparent. There was evidence to sustain the findings of the trial court, but there was a sharp conflict in the matter, and this is especially true since no reason has been suggested why the two defendants should assume

the burden of severally paying three-fourths of the \$15,000 debt when it is clear that as between them and the plaintiff they were coguarantors and each liable to him for one-third only. An essential fact involved in the question of the delivery of an instrument is the intention of the maker in surrendering possession of the instrument. A party may testify to his own intent in doing an act where the intent is material. *Horton v. Winbigler*, 175 Cal. 149, 165 P. 423; *Runo v. Williams*, 162 Cal. 444, 122 P. 1082, 1086; *Barnhart v. Fulkerth*, 93 Cal. 497, 29 P. 50; *Kyle v. Craig*, 125 Cal. 107, 57 P. 791. It is the contention of the defendants that the trial court erred in excluding a series of questions on the intent of the defendants in delivering the note to the plaintiff. "The general rule is well settled that, under our system, a witness may be examined as to the intent with which he did a certain act, when that intent is a material thing in the action." *Runo v. Williams*, supra. There was a series of questions directed to this issue. We give the following for illustrations:

"Q. * * * At the time you sent the note in the letter to Mr. McAdoo, did you send it to him with the intent of the delivery of the same to him as a binding note upon him?

"Mr. Bewley: Just a minute. That is objected to as calling for a conclusion of the witness.

"The Court: Objection sustained.
* * *

"Q. * * * At the time you wrote that letter [a second letter] * * * did you believe that the signature of Mr. McAdoo appeared on the note as maker?

"Mr. Bewley: Objected to as calling for a conclusion of the witness, a state of mind.

"The Court: I will sustain the objection."

A series of rulings at the trial along this line indicated that the court was not interested in the testimony of the defendants as to what their intent was, and that it was useless for them to attempt to show it to the court. The questions were competent. The plaintiff contends on his part that this error of the trial court was cured because the "following question was asked and for some reason an objection was overlooked." "I

had no other conversation with Forker or McAdoo about this. If I had known that the promissory note, Plaintiff's Exhibit 3, was going to be delivered to the bank without the signature of Mr. McAdoo as one of the makers, I would not have signed that note." This answer was not responsive to the question asked but was inserted as a volunteer answer by an intrepid witness in spite of all barriers; and we feel sure that the trial judge received this evidence, if at all, subject to the mental reservation built up by numerous rulings sustaining objections to questions calling for evidence of similar import. The defendants were prevented from showing by their own testimony that it was their intent that the note was to be delivered to the bank with the three signatures thereon and not otherwise. We are convinced that where the question involved was so vital to the defendants' case and where such evidence was excluded, the defendant did not have a fair trial. The judgment should be reversed.

During the trial, however, the plaintiff in open court offered to reduce the judgment by the sum of \$1,250. Also in the letter above referred to, written by the plaintiff's representative to one of the defendants describing what had been done, there was the following provision: "It is further understood that, in the event that the money is never collected from the Hawaiian Airways Co., Ltd., and that no contribution is obtained from Charles R. Eakin, Mr. McAdoo will have to pay one-third of the original liability of \$15,000.00." It is admitted that no money has been received from either of said sources. The defendants on their part speak in the brief of "the agreed liability of the defendants, to wit, \$5,000.00 each." It is obvious from the above statements that the parties are very close together as to what would be ultimate justice between them, and it is also obvious that if the plaintiff would remit all of her judgment in excess of \$5,000 against each of the defendants, there would be no further prejudice to the defendants by reason of the said rulings of the trial court, and that the judgment should thereupon be affirmed in this court.

It is therefore ordered that if the plaintiff files herein within 25 days after the filing of this decision a waiver and renunciation of all of the judgment in excess of \$5,000 against each defendant, a total of \$10,000, together, with interest at 7

per cent. per annum from July 1, 1930, the judgment will be affirmed; otherwise, the judgment will be reversed; each party to pay his own costs on appeal in case the judgment is affirmed, but the plaintiff will pay the costs on appeal in case the judgment is reversed.

I concur: FRICKE, Justice pro tem.

I dissent: STEPHENS, P. J.

Final Decree.

PER CURIAM.

The court having made an order on June 29, 1935, that "if the plaintiff files herein within 25 days after the filing of this decision a waiver and renunciation of all of the judgment in excess of \$5,000.00 against each defendant, a total of \$10,000.00, together with interest at seven per cent. per annum from July 1, 1930, the judgment will be affirmed," and said waiver having been filed by the plaintiff on July 17, 1935, which was within the time limited in the court's order, the judgment of the lower court is affirmed; each party to pay his own costs.



8 Cal.App.2d 104

COYNE v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA.

Civ. 1719.

District Court of Appeal, Fourth District,
California.

June 26, 1935.

Hearing Denied by Supreme Court
Aug. 22, 1935.

1. Jury ⇨28(17)

Where plaintiff, by written notice, expressly waived jury trial after answer had been filed denying allegations of two of three counts in complaint, right to jury trial was not revived by filing of amended answer to third count, where every material fact relied on to sustain third count had been put in issue by original answer, and plaintiff took no action looking to jury trial until about two weeks after filing of amendment.

2. Annuities ⇨1

Where annuity policy was issued in consideration of cash premium of \$10,000 and insurer agreed to pay annuitant aged 66, \$90.10 monthly so long as he should live, annuitant's death by suicide before due date of first annuity payment held not to cause failure of consideration so as to entitle annuitant's administrator to recover premium, since agreement to pay monthly annuities constituted ample consideration for annuity contract (St. 1865-66, p. 752, §§ 1, 3).

3. Annuities ⇨1

Insurance company organized under statute authorizing forming of company to insure lives or health of individuals and to grant, purchase, and dispose of annuities held authorized to make annuity contract as against contention that statute does not authorize issuance of annuity policy unless policy is connected with insurance contract (St. 1865-66, p. 752, §§ 1, 3).

4. Constitutional law ⇨24

Annuity contract of insurance company held not ultra vires on ground that title of act under which company was formed referred only to insurance contracts, where act was passed prior to adoption of Constitution imposing limitations on title of act (St. 1865-66, p. 752, §§ 1, 3).

5. Evidence ⇨145

Refusal to permit witness to relate conversation between his wife and deceased insured relating to insured's state of mind held not reversible error, where question related to condition of insured's mind 20 years before policy was issued, and witness stated that conversation "was more as a joke."

6. Appeal and error ⇨1047(3)

Striking part of doctor's answer as to length of time insured had been in certain mental condition held not reversible error where doctor later stated that he did not know how long insured had been in that condition.

7. Evidence ⇨510

Refusal to permit doctor to give opinion whether, at time he examined deceased insured, insured was able to comprehend ordinary business transaction or contract held not reversible error where examination was made two weeks after annuity contract had been executed.

8. Evidence ⇨553(1)

Hypothetical question may be framed upon theory of questioning party and in accordance with facts fairly deducible from evidence, and question need not necessarily include statement of all evidence in case.

9. Evidence ⇐553(1)

Hypothetical question propounded by defendant's counsel held not erroneous as omitting certain facts where question was amended so as to include facts insisted upon by plaintiff's counsel, and such counsel, by agreeing that amendments covered his objections "in the main," and suggesting no further additions, waived objection to question.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by D. Joseph Coyne, as administrator of the estate of Augustine S. Coyne, deceased, against the Pacific Mutual Life Insurance Company of California. From a judgment for defendant, plaintiff appeals.

Affirmed.

D. Joseph Coyne, in pro. per., Roy H. Smith, and McGee & Sumner, all of Los Angeles, for appellant.

Loeb, Walker & Loeb, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

On May 9, 1932, the defendant issued to Augustine S. Coyne an annuity policy of insurance by which it agreed to pay to him \$90.10 on June 9, 1932, if then living, and a like amount on the ninth day of each and every month thereafter so long as he lived. He was then 66 years of age and the policy was issued in consideration of a single premium of \$10,000, which amount he paid in cash. He died by suicide on May 26, 1932, and before the first monthly payment became due under the policy. This action was brought by the administrator of his estate to recover the amount paid for the policy. The court found in all respects in favor of the defendant, and from the judgment entered, the plaintiff has appealed.

The first point raised is that the court erred in denying to the appellant a jury trial, it being claimed that he became entitled to this by reason of the filing of an amendment to the answer. The complaint was in three counts, the first alleging that the contract had been entered into while the intestate was mentally incompetent, the second alleging that the consideration for the contract had totally failed, and the third being a common count for money had and received. An answer was filed denying the allegations of the first two counts and omitting any reference

to the third count. On September 22, 1932, the cause being at issue, the appellant filed a motion to set, accompanied by a memorandum in which a jury trial was expressly waived. On October 3, 1932, the cause was set for trial on November 30, 1932. On November 4, 1932, by stipulation of the parties and upon order of the court, an amendment to the answer was filed by which the essential allegations of the third count of the complaint were denied. On November 17, 1932, the appellant deposited \$24 with the clerk, as a jury fee. On November 18, 1932, the appellant served notice upon the respondent that the case had been set for trial on November 30, 1932. Apparently the case was continued on November 30, 1932, and on December 23, 1932, the appellant served notice that on December 29, 1932, he would move to transfer the cause from the nonjury calendar to the jury calendar. Such a motion was heard and denied on December 29, 1932, and the cause finally came on for trial on January 10, 1933.

[1] The third count of the complaint for money had and received, is very brief, and it is fully apparent that it depended upon and arose out of the matters pleaded in the first two counts, which is confirmed by the fact that the evidence offered at the trial related entirely to the questions of mental competency and failure of consideration. Every material fact relied on to sustain the third count had been put in issue by the original answer to the first and second counts, and the amendment filed added nothing to the burden of proof resting upon the appellant. A further consideration is that any possible revival or renewal of the right to have the case tried before a jury arose when the amendment was filed on November 4, 1932. Nothing was done for about two weeks, when a jury fee was deposited and, although notice of trial was later served and the case was apparently called and continued on November 30, nothing was done to bring the matter to the attention of the court until December 23, when notice was given of such a motion. A jury was expressly waived in writing, and we think the right thereto was not revived by the amendment in question. *Deberry v. Cavalier*, 113 Cal. App. 30, 297 P. 611. In any event, any such right was waived by the subsequent delay in demanding a jury.

It is next urged that there was a total failure of consideration for this contract, since the intestate died before any payments thereunder became due. No authorities are cited except two cases on the point that forfeitures are not favored in the law, it being argued that this contract never went into effect, and that to permit the respondent to keep the money paid would constitute a forfeiture.

Annuity contracts of this nature are common and have been frequently upheld and approved by the courts. The value and purpose of such a contract are well summarized in *Hult v. Home Life Insurance Co.*, 213 Iowa, 890, 240 N. W. 218, 227, where the court said:

"With amazing accuracy, actuaries are able to determine the amounts which can be paid in the form of annuities to people of certain age, for a given specified sum. The contracts in question were so determined. It is a matter of common knowledge that great numbers of such contracts are in existence. It is difficult to conceive how the deceased could have, in a better way, protected herself than by having purchased these contracts. She was getting along in years. The physical frailties incident to age were creeping upon her. The uncertainty of her future needs faced her. She had no dependents. It remained for her to take care of herself only as best she could. She displayed excellent judgment in purchasing the contracts in controversy by which she was relieved of the worry and responsibility of keeping invested \$30,000 of her property and at the same time securing for herself, with absolute certainty, annual payments much more than she needed except for the extraordinary expenses incident to emergencies such as ill health. The fact that she died soon after the contracts were taken out has no bearing on the question under consideration. She might have lived ten or even fifteen years longer, in which event the contracts would have been unprofitable to the insurance company instead of profitable, as they turned out to be. This was one of the risks and hazards assumed by the insurance company. This is one of the elements entering into the computation of the rate.

"Experience has shown particularly in the last few years, that even those who consider themselves skilled in investments have found it impossible to recover reasonable rates of interest on their investments, and equally impossible to save much, if

any, of the principal. With her annuity contracts in her possession, the deceased was relieved of all worry about interest and likewise all worry about her original investment. Both were secured to her for the entire period of her life, whatever it might prove to be."

[2] The contention that there was no consideration for this contract because the death of the annuitant occurred before any payments to him became due, is entirely without merit. The respondent had agreed to pay \$90.10 to him each month so long as he lived and this agreement constituted an ample consideration. The fact that death occurred before any such payments became due does not change the situation and the intestate ran the risk of such an event just as the respondent ran the risk that the contract might turn out to be unprofitable to it in the event the other party thereto outlived his normal expectancy.

It is suggested that one paragraph of the policy is so worded that it might have given the deceased the understanding that upon his death something was to go to his heirs. Nothing in the paragraph referred to could have given the deceased any such impression, and the entire contract clearly sets forth a contrary intent. Further, the evidence shows that the deceased was fully informed as to the meaning of the policy and that he deliberately chose a form of contract which would give him the highest possible monthly return during his lifetime, with no remainder to his heirs.

It is next contended that an annuity contract of this nature was ultra vires as to the respondent and that, under its articles of incorporation and the statute under which it was organized, it was not permitted to make such a contract. The respondent was organized under an act approved April 2, 1866 (St. 1865-66, p. 752). Section 1 of that act authorized the forming of such a company "for the purpose of making insurance on the lives or health of individuals, or against accidents to them, and every insurance appertaining thereto or connected therewith, and to grant, purchase and dispose of annuities." In section 3 of that act it is provided that "every company organized under this Act shall have power to make insurance upon any or all of the risks and to do any or all of the business mentioned in section one. * * *" The respondent's articles of incorporation, dated December

28, 1867, provide, as permitted in the act, that its term of existence shall be 75 years, and sets forth that its object is "to make insurance upon any and all of the risks, and to do any and all of the business mentioned and provided for in the Act" referred to.

[3] The appellant first argues that a contract for an annuity is not a contract of insurance, and that the above-quoted language used in section 1 of the act does not permit the writing of an annuity policy unless the same is connected with an insurance contract. We cannot accept such a construction of the language used, and we think it sufficiently appears that it was intended to authorize both the making of insurance contracts and contracts for annuities.

[4] It is further contended that the respondent was without power to write such a contract because the act of 1866 could not grant such a power, since its title refers only to insurance contracts and not to contracts for annuities. Conceding, but not holding, that the title to that act was not broad enough to cover such contracts, it is well settled that a statute passed prior to the adoption of the Constitution of 1879 was not subject to the limitation referred to. *In re Boston Min. & Mill. Co.*, 51 Cal. 624; *Ex parte Liddell*, 93 Cal. 633, 29 P. 251; *Balzano v. Traeger*, 93 Cal. App. 640, 270 P. 249.

[5] A number of rulings on the admission of evidence are attacked as prejudicial to the appellant. These all relate to the question of the intestate's mental competency, and it may first be observed that the sufficiency of the evidence to sustain the court's finding in that regard is not attacked, and that in each instance where a complaint is made of the court's refusal to permit questions to be answered, no offer of proof was made, and there is nothing to indicate that any of the rulings, if erroneous, were prejudicial. It is first contended that one of the appellant's witnesses should have been permitted to relate a conversation between the witness' wife and the deceased. While it is now argued that this was admissible for a limited purpose, no such limitation was indicated at the time the question was asked. It further appears that the question related to the deceased's state of mind at a time some twenty years before the execution of the contract here in question and the witness did state that the conversation "was more

as a joke." Certainly no reversible error appears.

[6,7] It is next urged that the court erred in striking out a part of an answer to a question made by a doctor in his deposition. The question was as to whether the witness had formed an opinion as to the probable length of time the intestate had been in a certain mental condition about which the witness had been speaking. Five words were struck from the witness' answer, and not only are we unable to see how this in any way prejudiced the appellant, but, in his answer to the next question, the witness stated that he had not been able to determine how long the intestate had been in that condition. Error is next assigned in the refusal of the court to permit a doctor to give an opinion as to whether, at the time of his examination, the decedent was "able to comprehend an ordinary business transaction or a contractual contract and the like." Not only was this question improper (*Langenbeck v. Louis*, 140 Cal. 406, 73 P. 1086), but it appears that the examination in question was made on May 25, 1932, more than two weeks after the contract with which we are here concerned was executed. See *In re Estate of Perkins*, 195 Cal. 699, 235 P. 45, and *In re Estate of Dolbeer*, 149 Cal. 227, 86 P. 695, 9 Ann. Cas. 795.

[8,9] Finally, objection is made to a hypothetical question which the court permitted to be asked of a doctor called by the respondent, it being now claimed that the question omitted certain facts which appeared in evidence. It is well settled that such a question may be framed upon a theory of the questioning party and in accordance with facts fairly deducible from the evidence, and that it need not necessarily include a statement of all of the evidence in the case. *Treadwell v. Nickel*, 194 Cal. 243, 228 P. 25; *Perkins v. Sunset Telephone & Telegraph Co.*, 155 Cal. 712, 103 P. 190; *Hallawell v. Union Oil Co.*, 36 Cal. App. 672, 173 P. 177. Moreover, we have here the rather unusual situation that the question attacked was so amended as to include everything for which the appellant then asked, and that in its final form it contained, in effect if not in exact language, practically everything which it is now claimed was omitted. After the question was asked, counsel for appellant objected that much of the testimony favorable to him had not been in-

incorporated therein. Counsel for respondent then stated that he had attempted to set up all of the facts and offered to insert any others to which his attention was called. Counsel for the appellant then suggested a number of matters which were inserted. The trial judge then compared the question with his notes on the evidence, making some suggestions which were included in the question, and then requested the appellant's attorney to specify any further particulars in which the question was not in accord with the evidence. Counsel for the appellant finally agreed that the corrections covered his objections "in the main," and suggested no further additions. He then complimented counsel for the respondent for his fairness in drawing the question, but objected to the same on the ground that it did not cover all of the evidence, but without specifying any respect in which it was lacking. Not only do we think that the question in its final form was unobjectionable, but, under the circumstances, the appellant must be held to have waived any objection thereto.

We have carefully gone over the entire record and are unable to find any error therein which would justify a reversal of the judgment.

The judgment is affirmed.

We concur: MARKS, J.; HARDEN, Justice pro tem.



8 Cal.App.2d 440

LOWE et al. v. CITY OF SAN DIEGO.

Civ. 1159.

District Court of Appeal, Fourth District,
California.

July 22, 1935.

Hearing Denied by Supreme Court
Sept. 19, 1935.

1. Automobiles ⇨306(6)

Evidence held to sustain implied finding that motorist, suing city for injuries caused by alleged defect in street, caused to be presented to city auditor claim of her demand against city within 90 days after accident (St. 1923, p. 675, § 2; Gen. Laws 1931, Act 5149, § 1).

2. Automobiles ⇨308(11)

In action against city, conflicting evidence whether there were children playing in street, to avoid whom motorist drove on left side of street and ran over dirt pile in street, causing automobile to overturn, held for jury (St. 1923, p. 675, § 2).

3. Automobiles ⇨284

Avoidance of children at play in street could afford sufficient reason for turning to and driving on left side of street, whereby motorist ran over dirt pile in street, causing automobile to overturn.

4. Automobiles ⇨306(5)

Evidence as to knowledge of or notice to city of dangerous condition of street created by replacement of dirt in excavation held to support verdict for motorists injured thereby, where repairs were made and dirt piled up by foreman of city water department almost a month before accident (St. 1923, p. 675, § 2).

5. Negligence ⇨122(2)

Burden of proving contributory negligence is on defendant, unless contributory negligence can be shown or inferred from evidence given in support of plaintiff's case.

6. Automobiles ⇨305(10)

In action for injuries to motorists, burden of disproving contributory negligence held not cast on plaintiffs because of allegation in complaint that plaintiff was driving automobile in careful and lawful manner.

7. Pleading ⇨8(17)

Plea of contributory negligence interposed by city in action by motorists, which stated conclusion rather than facts, whereby it was claimed that driver was guilty of contributory negligence, was defective (St. 1923, p. 675, § 2).

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Harry S. Lowe and another against the City of San Diego. From judgment for plaintiffs, defendant appeals.

Affirmed.

See, also (Cal. App.) 36 P.(2d) 658.

C. L. Byers, City Atty., and James J. Breckenridge and Gillmore Tillman, Deputy City Attys., all of San Diego, for appellant.

F. L. Richardson and Edgar B. Hervey, both of San Diego, for respondents.

HARDEN, Justice pro tem.

Plaintiffs are husband and wife. On July 9, 1933, plaintiff Ruth A. Lowe was

driving a model T Ford automobile in a westerly direction on Logan avenue between Thirty-Eighth and Thirty-Seventh streets in the city of San Diego. Logan avenue is not paved at the place in question. An opening had been made in the street by defendant at a point about 14 feet north of the south curb line of Logan avenue in front of 3761 Logan avenue, to make repairs to a water service pipe. Thereafter dry dirt was placed in the excavation and damp dirt placed on top to a height of about five inches above the street level. Thus a pile of dirt was created. Said plaintiff had with her two other passengers in the automobile. All three persons testified that upon nearing the point of the accident they found the street occupied by children at play; that the driver turned to the left side of the road to avoid the children and thereby caused her automobile to run over the pile of dirt, by reason whereof it turned over on its left side. Her left arm was caught underneath the machine, was badly crushed, and as a result was amputated at a later date. She sued for damages amounting to \$30,000, under section 2, Statutes of 1923, p. 675. Plaintiff Harry S. Lowe sued for consequential damages amounting to \$5,100. Upon a jury trial, a verdict was returned in favor of plaintiff Harry S. Lowe for the sum of \$100 and in favor of plaintiff Ruth A. Lowe for \$20,000. Upon proceedings on motion for a new trial, as a condition to a denial of the motion the court required plaintiffs to remit \$6,000 of the judgment in favor of Ruth A. Lowe. The defendant has appealed from the judgment entered upon the verdict.

[1] Appellant asserts that the proof does not sustain the implied finding of the jury that within 90 days after the accident said Ruth A. Lowe caused to be presented to the city auditor a claim of her demand against the city by reason of injuries sustained. Section 110, San Diego Charter; section 1, Act 5149, Deering's Gen. Laws, 1931, vol. 2, p. 2562. A witness testified that on August 15, 1933, she presented and left at the office of the city auditor the claim in question; that it was allowed to remain there for a period of about three hours; that she then took it away and thereupon filed it with the city clerk. The city auditor and deputies testified that they had no recollection of the presentation of said claim. There is no contention that the claim is not in proper form. Upon instructions which appear to have been en-

tirely proper and to which no exception is taken, as to what would amount to a presentation of the claim, the jury decided the issue for plaintiffs. The evidence, if credible, was sufficient to establish a presentation of the claim.

[2, 3] It is contended by appellant that plaintiffs have not shown any sufficient reason for the driving of the automobile on the left-hand side of the street. No other vehicle was at or near the scene of the accident. As already stated, three witnesses testified that the street was occupied by the children at play. It is true that other witnesses said they saw no children in the street. This situation likewise raised a conflict in the evidence which was for the decision of the jury. The avoidance of the children at play in the street could afford a sufficient reason for turning to and driving upon the left side of the street. *Hagenah v. Bidwell*, 46 Cal. App. 556, 189 P. 799; *Lawrence v. Goodwill*, 44 Cal. App. 440, 448, 449, 186 P. 781; *Saylor v. Taylor*, 42 Cal. App. 474, 183 P. 843; *Straten v. Spencer*, 52 Cal. App. 98, 197 P. 540; annotation in 24 A. L. R. 1304.

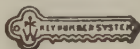
[4] The repairs were made and the dirt piled up by a foreman of the city water department on June 13, 1933, almost a month before the accident. The subject of the knowledge of or notice to the city of the dangerous condition was clearly and fully covered by the court's instructions. No exception hereto is taken. The evidence was sufficient on this point to support the verdict.

[5-7] Complaint is made of the refusal of the court to give a requested instruction on the subject of contributory negligence. By virtue of an allegation in the complaint that at the time in question the plaintiff Ruth A. Lowe was driving the automobile "in a careful and lawful manner" (which allegation was denied by the answer) an effort is made by the appellant to cast upon plaintiffs the burden of disproving contributory negligence. If given, the requested instruction would have had that effect. Unless it can be shown or inferred from evidence given in support of plaintiffs' case, the burden of proving contributory negligence is on the defendant. *James v. Frazee*, 209 Cal. 456, 288 P. 784; *Marr v. Whistler*, 49 Cal. App. 364, 193 P. 600. The allegation as to the manner in which said plaintiff was driving her automobile was immaterial (*Durgin v. Neal*,

82 Cal. 595, 23 P. 133), and did not change the burden of proof. The defendant interposed a plea of contributory negligence in its answer. This plea was defective in stating a conclusion rather than the facts by reason of which it was claimed that the driver was guilty of contributory negligence. *Crabbe v. Mammoth Channel G. Min. Co.*, 168 Cal. 500, 143 P. 714; *Hughes v. Warman S. C. Co.*, 174 Cal. 556, 163 P. 885. However, that fact is not important, since the issue was decided against the pleader. The instructions given on the issue of contributory negligence were correct.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



8 Cal.App.2d 459

HURD v. STANDARD GAS ENGINE

CO. et al.

Civ. 9723.

District Court of Appeal, First District,
Division 2, California.

July 23, 1935.

Rehearing Denied Aug. 22, 1935.

Hearing Denied by Supreme Court
Sept. 19, 1935.

1. Appeal and error ⇐938(4)

Where appellant presented bill of exceptions purporting to state in narrative form testimony of each witness accompanied by statement that foregoing evidence was all of evidence in the case, and attorneys stipulated that bill was correct, reviewing court, in support of judgment of trial court, must presume bill is full and correct.

2. Negligence ⇐26

Evidence that gas engine company was joint tenant with Diesel engine company, that Diesel engine company employed certain labor furnished by gas engine company, that both companies owned stock in each other, and that each had same manager, held not to impose liability on gas engine company for injuries sustained by plaintiff when struck by exploding engine pulley while watching demonstration by Diesel engine company in plant used by both companies.

3. Appeal and error ⇐1068(3)

In action against gas engine company for injuries to plaintiff from explosion of engine

pulley while plaintiff was watching demonstration of engine in defendant's plant, where defendant was not negligent and was not liable to plaintiff as invitee or licensee, alleged errors in instructions defining rights of invitees and licensees were harmless.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Kenneth C. Hurd against the Standard Gas Engine Company and others. From a judgment for plaintiff against all defendants except named defendant, plaintiff appeals.

Affirmed.

Elliott Johnson and Christopher M. Jenks, both of Oakland, for appellant.

Hatch & Mahl, Charles B. Morris, and A. J. Coogan, all of San Francisco, for respondent Standard Gas Engine Co.

Glikbarg & Wolf, of San Francisco, for respondents Charles A. Winslow and Standard Diesel Engine Co.

STURTEVANT, Justice.

From a judgment awarding him damages for personal injuries the plaintiff has appealed.

For many years the Standard Gas Engine Company, a corporation, hereinafter called the Gas Company, has been engaged in manufacturing internal combustion engines. It has a manufacturing plant on Dennison and King streets, East Oakland. Shortly prior to the 10th day of September, 1932, the Standard Diesel Engine Company was incorporated. On the date last mentioned the Standard Gas Engine Company, as lessor, entered into a lease with the Standard Diesel Engine Company, under the terms of which the lessor let to the lessee the right to jointly use and occupy its manufacturing plant. The rental reserved was the sum of \$125 per month. On the same day the Standard Gas Engine Company and the Standard Diesel Engine Company entered into a written contract by the terms of which the former subscribed for 67 shares of the common stock of the latter and agreed to pay therefor \$1,340 at the rate of \$223.33 per month during the period of six months. It was further agreed that the second party would use and employ certain labor to be furnished by the first party and would pay therefor the price paid by the first party. On the same date

the Standard Gas Engine Company and the Standard Diesel Engine Company entered into a third agreement in writing whereby the first party agreed to buy from the second party 33 shares of its common capital stock of no par value and agreed to pay therefor by transferring to the second party certain physical assets consisting of Diesel engines, castings, patterns, blueprints, etc., used in connection with the manufacture thereof. Thereafter, the parties proceeded to operate under said agreements. Charles A. Winslow was the manager of each corporation. The record presents no question of fraud on the part of either of the corporations, or any of the officers thereof.

Prior to the 27th day of January, 1933, the Diesel engine company had been engaged in the manufacture of multicylinder Diesel engines in the plant above mentioned. A rectangular room 17 feet by 27 feet was selected for the purpose and was known as the testroom. Within it was a test stand for testing motors. It consisted of a motor bed to which was attached a dynamometer used to apply a load to the engine or to test its horsepower. On January 27, 1933, a 4-cylinder monovalve Diesel engine was mounted on the stand and attached to the dynamometer. A pulley wheel was mounted on the shaft protruding from the side of the dynamometer away from the engine. It had only one use—to start the engine, at which time a leather belt connected it to an electric motor. When the engine started, the belt would be pushed off and allowed to coil up at one side of the testroom. After the engine started the pulley wheel revolved with the speed of the engine. The engine had been in place and had been operating day and night for a period of three weeks immediately preceding January 27, 1933. For some time prior to the date last mentioned Professor Carl A. Vogt, of the University of California, was conducting a post graduate course in mechanical engineering. He had a class in Diesel engines; the members consisting of a group of young naval officers. In the month of December, 1932, at a meeting of the Society of Automotive Engineers, a paper was read regarding the monovalve Diesel engine which had come to be known as the Winslow type. The students of Professor Vogt were not present at the reading, but the paper was discussed in his classes. At times the classes visited various factories. One of the students asked Professor Vogt whether it

would be possible to visit the Standard Gas Engine Company plant to see the Winslow Diesel engine. Professor Vogt thereupon telephoned to Mr. Winslow asking for permission, and the request was granted. At 2 o'clock on January 27, 1933, Professor Vogt, together with the plaintiff and other members of the class, went to the plant. After the class arrived the Diesel engine was demonstrated to them. During such demonstration the pulley wheel, hereinabove mentioned, exploded injuring several, including this plaintiff. For the injuries sustained he commenced this action, and named as defendants the Standard Gas Engine Company, the Standard Diesel Engine Company, and Charles A. Winslow. The jury returned a verdict in favor of the plaintiff against Standard Diesel Engine Company and Charles A. Winslow, but in favor of the defendant Standard Gas Engine Company. From the whole judgment entered on that verdict the plaintiff appealed. Because of a stipulation of the parties on file in this court the appeal presents solely an attack on the judgment in favor of the Gas Company.

Before the action was submitted to the jury the plaintiff filed amendments to his complaint. The substance of those amendments was to charge, in effect, that on the 7th day of January, 1933, the Gas Company and Charles A. Winslow, its manager, acting on the request of Standard Diesel Engine Company and Charles A. Winslow, its manager, selected from the equipment owned by the Gas Company the above-mentioned pulley for the use of the Diesel Company. That at the time of the selection all defendants knew the Diesel Company would attach the pulley to the Diesel engine and that it would thereafter operate the Diesel engine at a speed in excess of 1,000 revolutions per minute; that at said time defendants knew the maximum speed at which said pulley could safely be operated was 600 revolutions and no more; that thereafter the Gas Company permitted the Diesel Company to install the pulley and operate it continuously at a speed of 1,000 revolutions per minute and sometimes at a speed as high as 1,800 revolutions; and that at all times the Gas Company knew how the Diesel Company was operating the engine and allowed it to continue to do so.

[1] The plaintiff attacks several instructions as not being correct statements of the law. The defendants reply that said attacks are immaterial because the Gas Com-

pany committed no act of negligence and the verdict must necessarily have been for that defendant. To that reply the plaintiff makes two replies. He asserts that the record as presented does not authorize an inquiry as to whether the Gas Company was or was not negligent. We think it does. The verdict was against Mr. Winslow and the Diesel Company. It was in favor of the Gas Company and in favor of the plaintiff. The latter appealed from the entire judgment. He has presented a bill of exceptions in which the testimony of each witness is purported to be stated in the narrative form. Then follows the statement, "The foregoing was all the evidence in the case." To the bill is attached the stipulation of all of the attorneys for all of the parties that the bill "is correct." Under these circumstances, in support of the judgment of the trial court, we must presume the bill is both full and correct.

We will now take up the point that the record does not disclose any act of negligence on the part of the Gas Company. As noted above, the plaintiff alleged that on January 7, 1933, the Gas Company selected the pulley and delivered it to the Diesel Company. There is no conflict in the evidence. Said allegation has no support whatever. The written instruments did not provide for any deliveries or selections to be made at any time by the Gas Company, except the delivery of possession of joint occupancy on September 15, 1932, the date of the commencement of the term of said lease, and there is no evidence that any other was made. There is not a particle of evidence that the covenants of the lease were departed from. There is not a particle of evidence that the selection of the pulley was but an incident in accepting the lease. It was alleged that the Gas Company permitted the Diesel Company to operate its engine too rapidly. Under the lease it had no control over the Diesel Company and, so far as the record shows, never attempted to exceed its rights or duties in that regard. It had no interest in the manufacture or operation of Diesel engines, except as a minority stockholder in the Diesel Company.

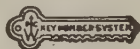
[2] The evidence disclosed that one of the spokes in the pulley had been cracked and that the defective spoke was the cause of the explosion. But the evidence also showed that the spoke was cracked about 30 days prior to the accident. There was

no evidence that there was any defect in the wheel September 15, 1932, the date of the lease. We therefore conclude there was no evidence of negligence on the part of the Gas Company.

[3] As the Gas Company committed no act of negligence, it was not liable whether, under the facts, the plaintiff was a licensee or an invitee. The instructions which the plaintiff attacks under exceptions Nos. 2-8, inclusive, defining the rights of invitees and licensees, were therefore immaterial. And, as there was no evidence that in doing what he did Mr. Winslow performed any act for the Gas Company, it follows that exception No. 1, defining the liability of the Gas Company for the acts of negligence of its employees, is without merit.

The judgment is affirmed.

We concur: NOURSE, P. J.;
SPENCE, J.



8 Cal.App.2d 672

ZIMMER CONST. CO. v. WHITE et al.

Civ. 10288.

District Court of Appeal, Second District,
Division 2, California.

Aug. 6, 1935.

Rehearing Denied Aug. 30, 1935.

Hearing Denied by Supreme Court
Oct. 4, 1935.

1. Trusts ⇨261

In action on contract for construction of building on property, title to which was in defendant as trustee, complaint *held* to state cause of action against defendant personally, since it alleged that defendant acting upon behalf of himself entered into contract.

2. Contracts ⇨179

Party signing contract "as trustee" is individually liable thereon unless he has stipulated that he is not to be personally liable.

3. Pleading ⇨225(2)

Where complaint states a cause of action, it is error to sustain demurrer upon any ground without leave to amend.

4. Appeal and error ⇨193(1)

Judgment for defendant rendered after sustaining a demurrer without leave to amend, no request having been made for

leave to amend, *held* appealable, where plaintiff had no opportunity to make such request and there was no merit in demurrer.

5. Principal and agent ⇨188

In action on contract defendant, who was alleged to be agent of other two defendants, *held* properly joined, where such party was joined because he was alleged to have entered contract on his own behalf.

6. Appeal and error ⇨671 (5)

Contention that conditional offer by letter and conditional acceptance by letter does not constitute contract if conditions have not been complied with could not be considered on appeal, where "letters" were not pleaded in complaint and did not appear in record; any such letters being matter of defense which should have been used as such.

7. Trusts ⇨261

Complaint need not state that trustee is individually liable under terms of trust in order to hold trustee liable for acts under trust.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Zimmer Construction Company against Esther H. White, W. H. Douglas, and others. Judgment for defendant Douglas rendered after the sustaining of a demurrer without leave to amend, and plaintiff appeals.

Reversed.

Henry O. Wackerbarth, of Los Angeles, for appellant.

W. H. Douglass, of Los Angeles, in pro. per.

CRAIL, Justice.

This is an appeal from a judgment against the plaintiff rendered after the sustaining of a demurrer without leave to amend. The demurrer was interposed to the second amended complaint by the defendant W. H. Douglass.

[1,2] The allegations of the complaint are sufficient to state a cause of action against the respondent unless it be for the reason that the plaintiff, in setting forth the facts upon which he relies, alleges that the building for the construction of which the parties were contracting was to be built upon a certain piece of real property the title to which was in the name of the respondent as trustee. The contention of the respondent is that since he is merely a trustee of the real property

he is not personally liable under the contract. There is no merit in this contention, for two reasons: First, the allegation of the complaint is that "the defendant W. H. Douglass [respondent] acting on behalf of himself" entered into the contract; and, second, even if the respondent had signed a contract "as trustee," still he would be liable individually unless he had stipulated that he was not to be personally responsible. This is the rule as between the trustee and third persons even where the terms of the trust agreement exempt the trustee from personal liability. *Goldwater v. Oltman*, 210 Cal. 408, 292 P. 624, 631, 71 A. L. R. 871, and cases cited. In that case the Supreme Court quoted with approval from the case of *Taylor v. Davis' Adm'x*, 110 U. S. 330, 4 S. Ct. 147, 28 L. Ed. 163, as follows: "A trustee is not an agent. An agent represents and acts for his principal. * * * When an agent contracts in the name of his principal, the principal contracts, and is bound, but the agent is not. When a trustee contracts as such, unless he is bound, no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee. * * * He is personally bound by the contracts he makes as trustee, even when designating himself as such. * * * If a trustee contracting for the benefit of the trust wants to protect himself from individual liability on the contract he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the trust estate." For a recent expression of this court to the same effect, see *Andrews v. Horton* (Cal. App.) 47 P. (2d) 496. We are mindful of the case of *Charles Nelson Co. v. Morton*, 106 Cal. App. 144, 288 P. 845; but that was an action in which the defendant had signed a negotiable instrument as trustee, and that decision should be differentiated from the other decisions because of certain sections of the Code, following the uniform negotiable instruments law, which restrict the liability upon negotiable instruments to the person who signs the same and the capacity in which it is signed.

[3] The demurrer upon which respondent relies was both general and special. It is likewise true that there is no merit in any of the grounds set forth in the special demurrer and the special demurrer should

have been overruled. Even if there had been merit in the special demurrer, it would have been error under the circumstances of this case to sustain the demurrer without leave to amend. *Schaake v. Eagle Automatic Can Co.*, 135 Cal. 472, 63 P. 1025, 67 P. 759.

Since the judgment of the trial court is to be reversed, there remain to be answered certain contentions of the respondent. He first contends that the appeal should be dismissed because of the failure of the appellant to set forth in the briefs the judgment appealed from. The appellant has substantially complied with the rules of the court in this regard.

[4] The respondent next contends that an appeal will not lie from an order sustaining a demurrer without leave to amend where no request was made for leave to amend. To sustain this contention respondent relies upon *Martinsen v. Ford Motor Co.*, 140 Cal. App. 734, 35 P.(2d) 1034, 1035, and *Brown v. Butler* (Cal. App.) 39 P.(2d) 244, 248. From the first of said cases he quotes the following: "An order sustaining a demurrer without leave to amend is not appealable." Certainly, the appeal must be from a judgment; and in the instant case the appeal was from a judgment. The second of said cases was one in which the plaintiff elected to stand upon the complaint just as filed. But the respondent herein relies upon the following quotation found therein: "Under such circumstances this court cannot order a reversal *simply* because the demurrer was sustained without leave to amend." It would be quite different, however, if as in the instant case, the plaintiff was given no opportunity to make such an election and if also there was no merit in the demurrer.

[5] The respondent next contends that there is a misjoinder of parties where a known principal is joined with his alleged agent in a single cause of action. While it is true the respondent is alleged to be the agent of the other two defendants, yet he is not joined as a defendant because of such relationship, but because he is alleged to have entered into the contract also on his own behalf, and all three of the parties are made defendants as principals to the contract.

[6] The respondent next contends that a conditional offer by letter and a conditional

acceptance by letter does not constitute a contract if the conditions have not been complied with. It is a sufficient answer to this contention to say that the "letters" are not pleaded in the complaint and nowhere appear in the record. If the defendant has such letters he should use them as a part of his defense.

Respondent next asks the following question: "Can an individual trustee employ himself individually as an agent for himself as trustee?" This is a puzzling question and possibly an interesting one. Respondent contends its solution is an answer in the negative, but as it has no relation to the facts before us we shall not take time to discuss it.

[7] The respondent next asks: "In order to hold the trustee individually for acts as trustee, must the complaint state that under the terms of the trust the individual is responsible?" It is not necessary for the complaint to so state.

Judgment reversed.

We concur: STEPHENS, P. J.;
FRICKE, Justice pro tem.



8 Cal.App.2d 504

KITTLE MFG. CO. v. DAVIS et al.

Civ. 9143.

District Court of Appeal, Second District,
Division 1, California.

July 25, 1935.

Rehearing Denied Aug. 20, 1935.

Hearing Denied by Supreme Court
Sept. 23, 1935.

1. Patents ⇨216

Right of patentee to terminate for non-payment of royalties contract which granted exclusive right to manufacture camp beds to company which was to pay patentee royalties on beds sold *held* waived by suit for recovery of royalties.

2. Contracts ⇨275, 346(2)

Court will not compel one party to perform contract and excuse performance by other party, although generally plaintiff in action on contract must allege and prove his performance of all conditions precedent to or concurrent with right he seeks to enforce in

order to show defendant is bound by contract.

3. Contracts ⇨275

Rule that court will not compel one party to perform contract and excuse performance by other party must be applied to entire relation of parties.

4. Patents ⇨216

In action on contract providing for payment of royalties by plaintiff to patentee of camp bed in return for grant of exclusive right to manufacture such beds, plaintiff's failure to pay royalties as provided in contract *held* not bar to suit for breach of such contract where defendant had recovered judgment against plaintiff for amount of royalties due.

5. Conspiracy ⇨1

Only that which is done under conspiracy, and not conspiracy itself, is actionable.

6. Conspiracy ⇨1

Where defendant in action for conspiracy owed plaintiff no other duty than performance of contract, activities of such defendant were actionable only when contract rights of plaintiff were violated.

7. Judgment ⇨585(4)

Failure to file counterclaim where defendant had right to counterclaim for causes arising out of same transaction as that which is basis for plaintiff's action *held* bar to further action on such claim (Code Civ. Proc. § 439).

8. Judgment ⇨585(4)

Reciprocal rights flowing from common source must be determined in single action thus avoiding unnecessary vexatious litigation and contingency of conflicting judgments (Code Civ. Proc. § 439).

9. Set-off and counterclaim ⇨29(1)

"Counterclaim" need only tend to defeat or diminish plaintiff's claim and consist of claim of defendant against plaintiff as between whom several judgment could be given.

10. Judgment ⇨585(4)

Previous action on contract brought by one of codefendants against plaintiff *held* bar to action for damages for breach of contract which accrued prior to trial of previous action, but not bar to action for damages which accrued subsequent to trial of previous action (Code Civ. Proc. § 438, as amended by St. 1927, p. 1620; § 439).

11. Judgment ⇨951(1)

In action for conspiracy to violate contract granting plaintiff exclusive right to manufacture and sell camp beds, defendant *held* required to show that all sales alleged

to have been made in violation of contract were made before trial of previous action on contract between parties in order to sustain defense that entire issue as to damages was involved in such previous action.

12. Judgment ⇨951(4)

In action for conspiracy to violate contract granting plaintiff exclusive right to manufacture and sell camp beds, plaintiff *held* required to show affirmatively that entire claim was not barred by failure to prosecute such claim by counterclaim in former action on contract.

13. Judgment ⇨632

In action for conspiracy to violate contract, previous action on contract brought by one of codefendants against plaintiff *held* not bar to claim of plaintiff against codefendant who was not party to previous suit.

14. Conspiracy ⇨21

In action for conspiracy to violate contract, finding that defendant took out patent in order that codefendant might stand harmless as to contracts which existed between such codefendant and plaintiff *held* insufficient as finding on issue of fraudulent conspiracy between defendant and codefendant.

15. Judgment ⇨256(1)

Judgment must be supported by sufficient findings.

16. Appeal and error ⇨1071(6)

In action for conspiracy to violate contract, failure of court to make sufficient findings on issue of defendant's guilt of conspiracy and fraud *held* not to warrant reversal of judgment entered in favor of defendant on erroneous grounds if it appeared from evidence that facts necessarily would have been found in defendant's favor.

17. Conspiracy ⇨19

In action for conspiracy to violate contract, evidence *held* to warrant findings sufficient to support judgment against defendant who was not party to prior action in contract between plaintiff and codefendant.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Action by the Kittle Manufacturing Company against Mansell A. Davis and Frank A. Adkins. Judgment for defendants, and plaintiff appeals.

Judgment reversed in part with directions as to defendant Davis and reversed in its entirety as to defendant Adkins.

See, also, 133 Cal. App. 599, 24 P.(2d) 550; 134 Cal. App. 254, 25 P.(2d) 253.

Hearing denied by Supreme Court; THOMPSON, J., dissenting.

Freston & Files, of Los Angeles, for appellant.

Roscoe R. Hess, of Los Angeles, for respondents.

SHINN, Justice pro tem.

Plaintiff brought this action against the defendants, charging them with a conspiracy, pursuant to which it is alleged defendant Davis violated certain contracts between himself and plaintiff, and defendants Davis and Adkins wrongfully engaged in business in competition with plaintiff, in violation of its contract rights. Plaintiff sought judgment for certain profits alleged to have been made by the defendants and damages and certain other relief in addition thereto. This appeal is taken by plaintiff from a judgment in favor of the defendants.

Davis was the inventor of a folding type camp bed and certain improvements thereon, for which he had filed an application for letters patent. On March 2, 1923, after certain of the patent claims had been allowed, but before patent had issued, Davis entered into a contract with plaintiff, Kittle Manufacturing Company, which we will refer to as "Kittle." By the terms of that agreement Kittle was given the exclusive license "to manufacture and sell camp beds made under or covered by any and all patents which party of the first part (Davis) now has or may hereafter obtain, whether upon the original device or on any improvement thereon or any form or style of camp bed or improvement thereon." Under this agreement the territory in which Kittle was to sell was restricted, but by later modification it was made to embrace the entire United States.

Davis agreed to continue to prosecute his patent application with all possible diligence and to bear all expenses connected therewith; subsequent patents or improvements were to be taken in the name of Davis, the expense thereof to be shared equally by the contracting parties, as well as the expense of obtaining subsequent patents and of prosecuting infringement suits. Kittle agreed to use all reasonable diligence in prosecuting the sale of the bed, agreed not to manufacture or sell any other camp bed which could be considered a modification of the patented bed, and agreed to pay Davis monthly stipulated royalties on all beds sold and delivered.

Davis subsequently amended his first application and filed two other applications

for patents upon camp beds. Kittle engaged in and continued the manufacture of camp beds under its agreement with Davis and paid all royalties falling due prior to December 1, 1925, at which time it discontinued all royalty payments. Kittle, however, continued to manufacture and sell a camp bed differing from the original Davis invention. Kittle claimed to be the inventor of this bed and caused application to be made for letters patent thereon, but in proceedings before the patent office, the claims of Kittle as inventor of the bed were denied and the rights of Davis therein were sustained. All of the camp beds we have referred to which were sold by Kittle after December 1, 1925, were either sold under its license contract so as to carry a royalty or in violation of that contract so as to give rise to a liability to Davis for damages.

On March 22, 1928, Davis brought suit against Kittle in the superior court of Los Angeles county, alleging the manufacture and sale by Kittle of a large number of beds covered by said several patent applications of Davis, praying for an accounting thereof and the recovery of the stipulated royalty upon such sales. The defendant Kittle answered, alleging that the first bed invented by Davis was impracticable and unmarketable; that the second bed manufactured by Kittle was invented jointly by Kittle and Davis; and that a third bed manufactured by Kittle was invented by it, its agents and employees, this being the bed upon which Kittle had applied for a patent. It alleged the contract with Davis had been mutually abandoned and denied all liability for royalties.

This answer further alleged that in January, 1927, Davis organized a corporation under the laws of Illinois, known as Champion Folding Bed Company, with its principal office in Illinois; that Davis was a stockholder therein and president and general manager from the time of its organization until September 15, 1927, when he became and thereafter continued to be the corporation's representative in the city of New York. The answer further alleged "that plaintiff, by and through said corporation, has ever since the organization of said corporation manufactured and sold and is now manufacturing and selling to the public generally throughout the territory described in said agreements of date March 2, 1923, and December 22, 1923, those certain camp beds described in and covered

by said letters patent Nos. 1577204 and 1577205 in said application No. 75995 (the Davis patents), hereinabove and in plaintiff's complaint referred to, or modifications of said camp beds therein described." The prayer of this answer was that plaintiff take nothing and that defendants have judgment for its costs. Kittle also filed in that action an amendment to its answer and a cross-complaint and amended cross-complaint. Each of these pleadings contained further allegations regarding Davis' activities in connection with the Chicago corporation and the business done by Davis through the corporation in competition with Kittle. It was alleged that Davis conspired with Adkins to develop and patent the "Champion" bed substantially the same as the one covered by Davis' last application, No. 75995, and that plaintiff and Adkins, well knowing of the rights of Kittle under its contract with Davis, and for the purpose of defeating its rights thereunder, perfected said bed and Adkins applied for and received in his own name letters patent thereon, although it was agreed between Davis and Adkins that upon Adkins being reimbursed for moneys he had advanced in developing the bed and certain profits, Adkins would turn over the patent to Davis or his nominee. It was further alleged that the corporation acquired an assignment of the patent application from Adkins and issued to Davis stock of the value of \$20,000, and that the corporation thereafter manufactured and sold beds in competition with Kittle and in violation of its contract with Davis and made a profit therefrom of \$25,000. By its cross-complaint Kittle sought to recover \$20,000 as the value of the stock in the Illinois corporation, the sum of \$25,000 as profits made by the corporation, and the sum of \$50,000 on account of Davis' breach of his agreement with Kittle. Davis answered the cross-complaint, denying generally the allegations thereof. Upon these pleadings the case was tried. At the conclusion of the introduction of evidence by Kittle under its cross-complaint, Davis moved for judgment in his favor on the cross-complaint, upon the ground that the evidence introduced by Kittle was insufficient to prove the allegations thereof. This motion was granted. Kittle moved the court for leave to withdraw its cross-complaint and later, but before judgment, moved to withdraw the amendment to its answer, both of which motions were granted. Findings were made in favor of

Davis and judgment was given against Kittle for royalties due Davis in the sum of approximately \$16,000. Among other facts, the court found as follows: "The court further finds that it is not true that the plaintiff, by or through said corporation or in any manner or by any means, has at any time manufactured or sold in any territory the camp beds described in or covered by said letters patent Nos. 1577204 and 1577205 or by said application No. 75995. That it is true that said Champion Folding Furniture Company, after its incorporation, manufactured certain camp beds which were in several respects similar to the camp bed described in said application No. 75995 but were different therefrom in that the side rails of said bed made by said Champion Folding Furniture Company have the open side of the channel facing upward and that the end arms or extension arms of said bed have their open sides facing downwards, and that the plaintiff herein was not the inventor or patentee of said bed manufactured by said company."

That action was tried on April 23, 1929. Findings and judgment were signed and filed on January 11, 1930. Kittle appealed from this judgment, which has been affirmed by the District Court of Appeal of the Third District. *Davis v. Kittle Mfg. Co.*, 134 Cal. App. 254, 25 P.(2d) 253. (The fact of the affirmance of this judgment is not shown by the record but is before us by reason of statements in the briefs of counsel calling our attention thereto.)

Kittle instituted the present action July 23, 1929. The complaint herein contains the same allegations as the amendment to the answer and the cross-complaint filed by Kittle in the former action which were withdrawn before judgment. Adkins, co-defendant with Davis in the instant action, was not a party to the action of *Davis v. Kittle Mfg. Co.* In the present action both defendants answered, substantially denying the allegations of the complaint. As a further defense they set up the pendency of the action of *Davis v. Kittle Mfg. Co.*, as a plea in abatement and asked that trial of the present case be abated pending final judgment in the case of *Davis v. Kittle Mfg. Co.* The entire record in *Davis v. Kittle Mfg. Co.* was introduced in evidence in support of the plea in abatement. This plea was overruled and the case proceeded to trial. The court found

in the instant case that Kittle had paid all royalties and had complied with its contracts with Davis up to and including December 1, 1925, but that on or about December 29, 1925, plaintiff notified defendant Davis that it would not pay any further royalties "and thereby such refusal was without cause on the part of defendant Davis." The court then found that Davis and Adkins worked together to develop another camp bed and to patent the same and place it upon the market; that Adkins loaned Davis \$500 to be used in said work; that the bed was developed and a patent issued thereon to Adkins, which patent was assigned to Champion Folding Furniture Company, Davis receiving therefrom 500 shares of the preferred stock and 5,000 shares of the common stock of said company; that thereafter and prior to June 22, 1932, the corporation manufactured and sold 60,000 to 70,000 camp beds under the Adkins' application and patent; that said bed was substantially the same camp bed covered by Davis' patent application No. 75995; that it was a mere modification of the former bed and that it was covered by and within the terms of the Kittle-Davis contracts; and that therefore all rights to manufacture and sell the same were vested in Kittle Manufacturing Company. It was further found that the bed was developed and patented under an agreement between Davis and Adkins that Adkins would claim to be the sole inventor, but that Davis would pay the fees of the patent attorney for obtaining the patent and that Adkins would assign the patent to Davis or his nominee upon repayment of the money he had loaned Davis, and that Adkins would receive an undetermined share of the profits. The court found that the bed for which patent had issued to Adkins was the sole invention of Davis. It was further found as follows: "The court finds that the application for said patent by defendant F. A. Adkins and in his name was pursuant to a plan and agreement made and entered into by and between the defendants Davis and Adkins, under the terms and conditions of which the defendant Davis would invent and develop said bed and the patent would be applied for in the name of the defendant Adkins in order that the defendant Davis might stand harmless as to the contracts then existing between himself and plaintiff as set forth in finding No. II hereof." The court further found the facts we have heretofore stated, relating to the issues raised and tried and the procedure

followed in the trial of Davis v. Kittle Mfg. Co., and that Davis recovered judgment in said action for the sum of about \$16,000. It was found that the issues in the instant action were not those involved in the previous action.

From the foregoing recital, it will be seen that the trial court in the first case found that Davis was not the inventor or patentee of the bed manufactured by Champion Folding Furniture Company and that that bed was not the same as any of the beds embraced within either of the three said patent applications of Davis. Upon the trial of the instant case the court found that Davis was the sole inventor and the equitable owner of the patent of the bed manufactured in Illinois and that that bed was substantially the same bed as the one described in Davis' patent application No. 75995, and that the right to manufacture and sell such bed was vested exclusively in Kittle. In each of the actions it was held that the Davis-Kittle contract was subsisting and unrescinded. As a result of the two judgments, plaintiff herein has been held to a liability for the payment of royalties to Davis as stipulated in the contract and at the same time has been denied the right to recover from Davis damages sustained through Davis' breach of the same contract.

[1-4] The conclusion of the trial court that plaintiff could not maintain this action because of its failure to pay royalties was erroneous. It was expressly found that the contract was not terminated. If Davis had the right to terminate it, he waived that right when he sued for the recovery of royalties. Having enforced performance from Kittle, he could not rely upon nonperformance by Kittle as an excuse for his own failure to perform. It is true generally that it is necessary for a plaintiff to allege and prove, in an action based upon a contract, that he has performed all conditions precedent to or concurrent with the right he seeks to enforce. But this is because he must show the defendant to be bound by the contract and obliged to render to the plaintiff the consideration sued for. The court will not compel one party to a contract to perform it and excuse performance by the other. That is the rule which the trial court attempted to follow and which respondent relies upon in support of the judgment. But the rule must be applied to the entire relations of the parties under

the contract. When Kittle failed to pay royalties, Davis had the right to treat the contract as terminated and sue for damages, or he had a right to sue for the royalties. *Adams-Campbell Co. v. Jones*, 71 Cal. App. 723, 236 P. 322. He could not do both. He made his election and having exacted performance from Kittle he cannot justly escape responsibility for his own nonperformance. The contract must be enforced against both parties or against neither. Therefore, Kittle's unwillingness to pay royalties, for which Davis has recovered a judgment for the sum due and interest thereon, was no defense to the present action against Davis for damages, and the case should not have been decided against plaintiff upon that ground.

[5, 6] The anomalous situation presented by the two judgments has been brought about by the action of Kittle in failing to file a counterclaim in the former action and in dismissing its cross-complaint in that action instead of submitting to a judgment thereon and appealing therefrom. That course was taken, no doubt, in the belief that the issues tendered by the cross-complaint in *Davis v. Kittle Mfg. Co.* could be again litigated in an independent action. In this we think plaintiff was mistaken. Its proper course would have been to appeal from the judgment of nonsuit on the cross-complaint. Its claim against Davis was triable only in the action which Davis brought to recover royalties. The case falls within the provisions of section 439, Code of Civil Procedure, which provides that "if the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor." The transaction set forth in Davis' complaint as the foundation of his right to recover royalties was the one in which Kittle was licensed to manufacture and sell beds under the Davis patent applications and in turn obligated itself to pay royalties to Davis. There was no other transaction between Davis and Kittle. Undoubtedly the rights of Kittle to recover damages for a violation of its rights arose out of the same transaction. *Stoddard v. Treadwell*, 26 Cal. 294. Kittle had no rights whatever except those that were grounded in the contract. Davis owed Kittle no duty other than performance of the contract

upon his part. The allegations of conspiracy between Davis and Adkins are material only to the question of the liability of Adkins. They add nothing to the cause of action against Davis. A conspiracy itself is not actionable, but only that which is done under the conspiracy. Whatever form the activities of Davis assumed, they became actionable only when they transgressed the contract rights of Kittle. Kittle's claim could not have arisen out of rights which were independent of its contract rights with Davis.

[7, 8] The right of a defendant to counterclaim for causes arising out of the same transaction as a plaintiff's claim has always been recognized by statute in this state. Ever since the adoption of the Codes, the failure to file a counterclaim in such cases has been a bar to any further action upon the claim. The policy of the law is so obvious as to require little comment. It is to require reciprocal rights flowing from a common source to be determined in a single action, thus avoiding not only unnecessary vexatious litigation, but also the contingency of conflicting judgments, of which those involved in the instant case are conspicuous examples. Section 438, Code of Civil Procedure, preserves the right of recoupment which at common law was available to a defendant in any action on contract. "Recoupment looks through the whole contract, treating it as an entirety, and regarding the things done and stipulated to be done on each side as the consideration of the things done and stipulated to be done on the other; and when a plaintiff seeks redress for the breach of the stipulations in his favor, it sums up the grievances on each side, strikes a balance, and gives him a judgment for only such difference as may be found in his favor." *Finney v. Cadwallader*, 55 Ga. 75. To hold that the two claims in question did not arise out of the same transaction would be in effect to hold that a claim for the enforcement of a contract and a claim to recover damages growing exclusively out of its breach arise out of separate transactions, which is clearly not the case.

A common form of counterclaim in an action on contract is for damages for negligence of the plaintiff in performing or failing to perform the contract. *Pomeroy's Remedies* (5th Ed.) 1061. Plaintiff's alleged damage resulted from an eviction from its exclusive privilege granted by the

contract. *Wilfley v. New Standard Concentrator Co.* (C. C. A.) 164 F. 421. In an action for rent a tenant is required to set up a counterclaim for damages resulting in a constructive eviction and if he fails to do so he cannot assert the same in another action. *Baker v. Eilers Music Co.*, 175 Cal. 652, 166 P. 1006.

[9,10] The court below found that the present action sounded in tort and therefore could not be a proper subject of a counterclaim in an action on the contract. We think the court must also have been of the opinion that the two claims did not arise out of the same transaction, but whether the court so believed or not, it very clearly did not give effect to the amendment of section 438, Code of Civil Procedure of 1927 (St. 1927, p. 1620), which governs in this case. *Terry Trading Corp. v. Barksy*, 210 Cal. 428, 292 P. 474. A counterclaim need only tend to defeat or diminish the plaintiff's claim and consist of a claim of the defendant against the plaintiff as between whom a several judgment could be given. Plaintiff's claim against Davis and Adkins charged them with a joint and several liability. *Proper v. Sutter Drainage Dist.*, 53 Cal. App. 576, 200 P. 664. The fact that the claim existed also against Adkins rendered it none the less a proper counterclaim against Davis. It met all the requirements of section 438, Code of Civil Procedure. We conclude, therefore, that such damages as were sustained by Kittle up to the trial of the action of *Davis v. Kittle Mfg. Co.* could have been asserted against Davis only in that action. The breach was a continuing one and damages accruing after April, 1929, would not be so barred. If, therefore, any of the damages sustained by Kittle, for which a recovery is sought in this action, accrued after April, 1929, the judgment should be reversed.

We are therefore faced with the question whether the judgment should be reversed to allow a retrial as to damages that may have been sustained since the trial of the first case. We have pointed out that the cross-complaint in *Davis v. Kittle Mfg. Co.* alleged profits earned by Champion Folding Furniture Company in the sum of \$25,000 and damages sustained by Kittle in the amount of \$50,000. The complaint in this action contains the same allegations, but by a supplement to the complaint it was alleged that profits were earned and damage sustained down to June

22, 1932. Our attention is not directed to any evidence in the case showing sales of the Champion bed later than the month of April, 1929, when the first case was tried. An examination of the voluminous record has disclosed no such evidence. It shows only that from 60,000 to 70,000 beds were sold, prior to the taking of the deposition of the witness N. S. Harter on June 22, 1932. The findings are to the same effect.

Kittle's claim for damages on account of sales made between March, 1926, when Davis and Adkins became associated, and April, 1929, when the first case was tried, is barred. But some of the beds may have been sold between April, 1929, and June, 1932, as of which latter date sales amounted to 60,000 to 70,000.

[11,12] It was necessary in this case for Davis to show that all sales were made before the trial of the first action, in order to sustain his defense that the entire issue as to damages was involved in that case. This he failed to do. Upon the other hand it is the duty of plaintiff upon this appeal to show affirmatively that its entire claim is not barred by failure to prosecute it by counterclaim in the former action. It may be that no damage accrued after April, 1929, in which case there is no issue to be retried.

We have reached the conclusion that we should not affirm the judgment as to Davis upon the basis that Kittle's claim is barred by the former adjudication. The record before us does not affirmatively show the entire claim to be so barred. To affirm the judgment would bar the recovery by Kittle of any part of its claim accruing after April, 1929. The only course open to us, which will avoid this possible injustice, is to reverse the judgment as to Davis for the purpose, alone, of allowing a retrial of the issue of damages suffered by plaintiff herein, subsequent to the trial of the case of *Davis v. Kittle*, No. 247843 in the superior court of Los Angeles county.

[13-17] We now have to consider the appeal from the judgment in favor of Adkins. The former judgment does not bar the further prosecution of plaintiff's claim against Adkins, who was not a party to the first action. The other defenses having failed, the present judgment can stand as between Kittle and Adkins only upon findings that Adkins was not guilty of the acts with which he was charged, or upon an absence of substantial evidence of his liability. The findings as to plaintiff's

allegations are wholly insufficient to determine the issues that were tried between these parties. The complaint is replete with allegations of conspiracy and fraud upon the part of Adkins and yet there are no definite findings thereon. The findings relate the circumstances under which Adkins undertook to work with Davis in the development of a different bed and detail their activities thereafter. It is found that Adkins took out the patent in his name "in order that defendant Davis might stand harmless as to the contracts then existing between himself and plaintiff, as set forth in finding No. II hereof." This surely cannot be accepted as a finding nor does it admit of the inference that Adkins acted innocently in the transaction or that his conduct was free from fraud and collusion with defendant Davis. It is not sufficient to negative the allegations of the complaint upon those issues and they therefore remain undetermined. A judgment must be supported by sufficient findings. 2 Cal. Jur. 1032. Here there are no findings which support the judgment in favor of Adkins. The failure to make findings upon these issues does not furnish a reason for reversal of the judgment if it appears from the evidence that the facts would necessarily have been found in Adkins' favor. It has been necessary for us to examine the record in order to determine whether findings in plaintiff's favor would find support in the evidence. We have read at length the testimony of defendants Davis and Adkins. Although there is no direct evidence that Adkins knew of the terms of the Davis-Kittle contracts, there is circumstantial evidence strongly tending to establish such knowledge. Adkins was president of a company in Chicago that had been handling the beds manufactured by Kittle. He knew the latter was about to bring out a light-weight bed called the Davis Light-Weight Bed, and that Davis claimed to be the inventor of that bed as well as of the first one. He loaned Davis \$500 with which to develop a bed to compete with the new bed made by Kittle and agreed to apply for and take the patent in his name and to assign it to the nominee of Davis. The evidence amply shows that Davis was the inventor and that he and Adkins discussed some changes in the bed they were developing which might prevent infringement of the Davis patents. The bed was sold in violation of the rights of Kittle and the court found

Kittle to have been damaged thereby, without finding the amount of the damage. The court might reasonably have concluded that Adkins acted fraudulently and for the purpose of profiting thereby, in thus assisting Davis to violate his contract. The evidence, we think, would have warranted findings sufficient to support a judgment for damages against Adkins.

The judgment in favor of defendant Davis is reversed for the purpose of allowing a retrial of the issue of damages suffered by appellant herein subsequent to the trial of the case of Davis v. Kittle, No. 247843 in the superior court of Los Angeles county; as to the defendant Adkins the judgment is reversed in its entirety.

We concur: CONREY, P. J.; YORK, J.



8 Cal.App.2d 580

**CITY OF LOS ANGELES v. INDUSTRIAL
ACCIDENT COMMISSION OF STATE
OF CALIFORNIA et al.**

LOS ANGELES COUNTY v. SAME.

Civ. 10220, 10221.

District Court of Appeal, Second District,
Division 1, California.

Aug. 1, 1935.

1. Master and servant ☞364

In ordinary circumstances a "relief worker" in employment of a governmental agency is not entitled to compensation under Workmen's Compensation Act for injuries received by him in course of and arising out of such employment (St. 1917, p. 831, as amended).

2. Counties ☞85

Municipal corporations ☞214(1)

At common law "straw boss" working for county or city possesses no authority to commandeer services of any person for any purpose.

3. Officers ☞103

Powers of public officials are limited by constitution or statute, and their acts to be valid must find warrant in the law expressly or by fair implication; but, generally, in exercise of powers conferred upon them public

officers may appoint agents to discharge ministerial duties.

4. Sheriffs and constables ☞27

In proper case, sheriff can summon to his aid in performance of his duty the whole power of the county, and persons so called are bound to aid the sheriff.

5. Master and servant ☞364

"Relief worker" for county and city of Los Angeles, who sustained injury while fighting brush fire at request of "straw boss," held not compensable under Workmen's Compensation Act on theory that, when he was commandeered to fight fire, disability as to rights under Compensation Act was removed, since "straw boss" had no authority either at common law or by statute to commandeer services of "relief worker" (Pen. Code, § 150, and § 384, subd. 11; Pol. Code, § 3345; St. 1919, p. 263, § 4).

6. Courts ☞89

Precedents in form of rulings made by Industrial Accident Commission in cases decided only by it held not authorities for decision of court of appeals.

Proceeding under Workmen's Compensation Act by Alex Wolf, employee, opposed by City of Los Angeles and County of Los Angeles, employers. From an order of Industrial Accident Commission, employers separately petition for writs of review.

Award annulled.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Floyd S. Sisk, Deputy City Atty., all of Los Angeles, for petitioner City of Los Angeles.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for petitioner Los Angeles County.

Everett A. Corten, of San Francisco (Arthur I. Townsend, of San Francisco, of counsel), for respondent Industrial Accident Commission.

HOUSER, Justice.

In response to separate petitions filed in this court by the city of Los Angeles and by the county of Los Angeles (each under a separate number), writs of review were issued herein as to an order for award theretofore made by said respondent commission by which, in effect,

one Alex Wolf was adjudged to be entitled to compensation for injuries theretofore sustained by him while engaged as an alleged employee of each of said petitioners.

Briefly stated, it appears that on a certain date, under administration of the county of Los Angeles of so-called relief funds, Wolf was constituted a "relief worker" who, in accordance with an arrangement then existing between the county of Los Angeles and the city of Los Angeles, had been assigned to "made work" in Griffith Park, which was a property then owned and maintained by said city of Los Angeles. During such employment, at a point located about one mile from the place where Wolf was performing his labor, a disastrous brush fire occurred in one of the canyons of Griffith Park. Whether at his own instance Wolf voluntarily left his place of employment to assist in extinguishing said fire, or whether he did so in response to an order given to him by a fellow relief worker who was a "straw boss" in charge of the group of which Wolf was a member, is in dispute; but the fact is clear that from no other possible authority or source did Wolf receive a direction or an order to assist in attempting to extinguish such fire. However, it was in the course of such endeavor on the part of Wolf that he sustained the injuries that formed the basis for the award made by the respondent commission to him and which award furnishes the subject-matter of the present inquiry.

[1] Under the provisions of the Workmen's Compensation Act (St. 1917, p. 831, as amended), as far as concerns the general question that relates to the right of a "relief worker" in the employment of a governmental agency to compensation for injuries received by him in the course of and arising out of such an employment, the leading case in this state of *McBurney v. Industrial Accident Commission*, 220 Cal. 124, 30 P.(2d) 414, is so squarely in point to the effect that in ordinary circumstances of the nature of those here present no such right exists, that the basic question suggested by the facts herein is no longer debatable. Notwithstanding variations in the facts of the several cases from those that appeared in the leading case, the principle announced in the latter has been followed in the following cases:

Martin v. I. A. C., 137 Cal. App. 771, 30 P.(2d) 527; *Rico v. I. A. C.*, 137 Cal. App. 772, 30 P.(2d) 584; *Hartford Accident, etc., Co. v. I. A. C.*, 139 Cal. App. 632, 34 P.(2d) 826; *County of L. A. v. I. A. C. and Hauser*, 140 Cal. App. 727, 728, 35 P.(2d) 1035; *County of San Bernardino v. I. A. C. and Barnes*, 1 Cal. App. (2d) 598, 37 P.(2d) 122; *County of L. A. v. I. A. C. and Jones*, 2 Cal. App. (2d) 614, 38 P.(2d) 828; *City of Long Beach v. I. A. C. and Evans*, 2 Cal. App. (2d) 641, 38 P.(2d) 850; *County of L. A. v. I. A. C. and Munguia* (Cal. App.) 39 P.(2d) 477; *Board of Education v. I. A. C. and Stout* (Cal. App.) 39 P.(2d) 521 (December 31, 1934); *State Compensation Ins. Fund v. I. A. C. and Christensen* (Cal. App.) 39 P.(2d) 870 (January 9, 1935). It would therefore appear to be a useless occupation on the part of this court to devote attention to that phase of the issue herein presented.

The argument presented by respondent commission in support of its award in the premises appears to be that, by reason of the assumed fact that a "straw boss," who was in charge of directing the labor of the "relief worker," ordered the latter to assist in extinguishing the fire, his services were commandeered and the character or nature of his employment was immediately thereafter changed from that of a "relief worker," with its attendant disabilities as far as any right, under the provisions of the Workmen's Compensation Act, to compensation for injuries received in the course of and arising out of his employment, was concerned, to that of any other person, however or by whomsoever employed, whose services as a fire fighter might have been similarly and for a like purpose requisitioned.

In considering the question thus suggested, it may be well first to devote some attention to elemental or foundational law. It is clear that the asserted right must arise either because of its recognized existence at common law, or because of some constitutional or statutory provision, or of some ordinance, by which such right is either expressly or impliedly created, and that as a consequence the "relief worker" could have been employed only by or through some legally authorized representative of either the county of Los Angeles or the city of Los Angeles. In that regard, search of available common-law authorities has revealed nothing other than of a negligible character that will serve in a determination of the question of the as-

serted authority of one in a position such as was occupied by the "straw boss" in the instant case to requisition the services of any person, whether because of an existing emergency, or for any other reason. In 4 Blackstone's Commentaries, p. 122, various misprisions which affect the king and government, which are "generally denominated contempts or high misdemeanors," are noted; and in connection with such contempts against the king's prerogative provision, appears to have been made for the punishment of a person who has refused "to assist him (the sheriff) for the good of the public; either in his councils, by advice, if called upon; or in his wars by personal service for defense of the realm, against a rebellion or invasion. * * * Under which class may be ranked the neglecting to join the posse comitatus, or power of the county, being thereunto required by the sheriff or justices, according to the statute 2 Hen. V, c. 8, which is a duty incumbent upon all that are fifteen years of age, under the degree of nobility, and able to travel." In 1 Blackstone's Commentaries, p. 343, it is also said that "he (the sheriff) is also to defend his county against any of the king's enemies when they come into the land; and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called the posse comitatus, or power of the county; and this summons every person above fifteen years old, and under the degree of a peer, is bound to attend upon warning, under pain of fine and imprisonment."

[2] If by a liberal construction of such language it may be said to include within the implied service which the king may demand of his subject a requirement that the subject render assistance to his king in extinguishing fires that may occur within the realm, it also is equally apparent that the regal agents who possess authority to summon the subject to such a task are expressly limited to "the sheriff and justices." It therefore may not be improperly concluded that, in the instant case, at common law the asserted agent of either the county of Los Angeles, or the city of Los Angeles, to wit, the "straw boss," possessed no authority at common law to commandeer the services of any person for any reason or purpose whatsoever. It would therefore seem to follow that in this state, a right such as has been asserted

to exist by the respondent commission, if it have any reality, must arise from the creative words contained either within the Constitution of this state, or of some statute or ordinance therein.

[3] As is stated in 21 California Jurisprudence, p. 872: "The powers of public officers are limited either by the Constitution or by statute, and their acts, to be valid, must find warrant in the law, either expressly or by fair implication. * * *" But as a general rule, in the exercise of powers conferred upon them, public officers may appoint agents to discharge ministerial duties. *Id.*, p. 881. To the same effect, see 46 Corpus Juris, 1031, 1033, 1035, 1036, and authorities therein respectively cited.

A reference to the several statutes of this state in terms discloses the employment of no express language by which any officer thereof, in person (much less his accredited deputy), of either the county of Los Angeles, or of the city of Los Angeles, for the purpose of extinguishing a fire, as in the instant case, would be authorized to commandeer the services of either a "relief worker" or any other person. For example, the provisions of section 150 of the Penal Code, which relate to "posse comitatus," or the power of the county, limit the exercise of such power to "any sheriff, deputy sheriff, coroner, constable, judge, or justice of the peace, or other officer concerned in the administration of justice"; and the subject-matter of such prerogative is confined generally to the making of arrests, or preventing a breach of the peace, or the commission of a criminal offense.

By subdivision 11 of section 384 of the same Code, punishment is provided for a person who may fail "to render assistance in combating a forest fire at the summons of the state forester, deputy state forester, assistant state forester, or any state forest inspector, state ranger, or state fire warden, unless prevented from so doing by sickness or other physical disability."

By section 3345 of the Political Code it is provided: "Whenever the woods are on fire any justice of the peace, constable, or road-overseer of the township or district where the fire exists, may order as many of the inhabitants liable to road poll-tax, residing in the vicinity, as may be deemed necessary, to repair to the place of the fire and assist in extinguishing or stopping it."

And by section 4 of the Statutes of 1919, pp. 262, 263, "power to summon help for suppression of fires" is conferred upon the state forester, or his deputy, or an assistant state forester.

[4] The general rule is recognized in 35 Cyc. p. 1526, where, with appropriate authority therefor, it is stated that: "In a proper case the sheriff can summon to his aid in the performance of his duty the 'posse comitatus,' or the whole power of the county, and persons so called upon by the sheriff are bound to aid and assist him. * * *"

In 26 Corpus Juris, p. 590, the following is noted: "Under some statutes the fire warden may call upon any person within the town or district to aid in extinguishing a fire in fields or woods, and a person who renders such assistance or who has been ordered to the place of the fire may receive a certain compensation for his services; but a person is not entitled to such compensation where he renders his services voluntarily, *or where he renders his services at the instance of one who has no authority to order such assistance.*"

In *Matter of Stokes*, 33 Misc. 448, 68 N. Y. S. 439, 440, the reason for the rule to which reference has been had is thus stated: "A person going to a fire can very readily see the fire warden and arrange for compensation, if his services are desired. On the other hand, if a request, express or implied, by the fire warden is not necessary, a town may be subjected to great expense for unnecessary services. If people might go to a fire in any number, upon their own motion, it is probable that their services would not be very systematic or valuable, and certainly a town would be subjected to burdensome liabilities."

See, also, *Baker v. Warren County*, 11 Pa. Super. 170.

[5] Assuming that no constitutional provision, or statute of this state, or county or city ordinance, other than those respectively to which reference hereinbefore has been had, has application to the situation herein involved, it becomes manifest that neither by the rules of common law, nor by statute, did the "straw boss" in charge of the group of men of which the "relief worker" was a member possess any authority to commandeer the services of either Wolf, or any other person, for any reason or purpose whatsoever.

Notwithstanding the apparent lack of either common law, or express statutory or other authority for the purported commandeering of the "relief worker," on the part of the respondent commission it is urged that "it was the legal duty of the various workers in Griffith Park, whether unemployed relief workers or regularly employed employees, at the time this emergency fire arose to assist in controlling and extinguishing this brush fire. * * * If this applicant in [was] performing a legal duty required of him by virtue of his citizenship and the fact that he was available and cognizant of the dangers immediately present, [that] he is entitled to a status which will afford him some protection as against any disability he may have sustained in his efforts to protect property belonging to the taxpayers in the city of Los Angeles and the county of Los Angeles and citizens and property owners adjacent to Griffith Park."

[6] In support of its position in the matter, the respondent commission cites as authority therefor the cases of *County of Monterey v. Industrial Accident Commission*, 199 Cal. 221, 248 P. 912, 47 A. L. R. 359, and *Village of West Salem v. Industrial Commission*, 162 Wis. 57, 155 N. W. 929, L. R. A. 1918C, 1077. In addition to such authorities, certain precedents in rulings theretofore made by the respondent commission are cited. But manifestly, such latter precedents merely record the position of the respondent commission with reference to cases theretofore decided by it only, and cannot be regarded as authorities as far as this court is concerned. Moreover, the facts of such cases considered, each of them is clearly distinguishable from the facts herein. Likewise in the case of *County of Monterey v. Industrial Accident Commission*, 199 Cal. 221, 248 P. 912, 47 A. L. R. 359, where it appeared that for the purpose of assisting him in making an arrest of certain persons, the sheriff of the county had commandeered the services of an individual who in the course of rendering such services sustained certain injuries which later caused his death, and which action on the part of the sheriff would appear to have been authorized by the express provisions of section 150 of the Penal Code, to which reference hereinbefore has been had. And the other case, to which the respondent

commission has referred, for similar reasons is inapplicable to the facts of the instant case.

From the foregoing it is concluded that since neither by any rule at common law, nor by any constitutional provision, or express statute, or ordinance, nor by implication derivable therefrom, was the "straw boss" authorized to commandeer the services of the "relief worker," the latter may not be legally considered as having been an employee of either of the petitioners herein; and consequently that in law he was not entitled to be compensated by either of his so-called employers for the damages which he sustained by reason of the injuries of which he here complains.

The award is annulled.

We concur: CONREY, P. J.; YORK, J.



8 Cal.App.2d 607

CARLSON et ux. v. MURPHY et al.

Civ. 1161.

District Court of Appeal, Fourth District,
California.

Aug. 3, 1935.

Hearing Denied by Supreme Court
Sept. 30, 1935.

1. Fraud ☞9

Misrepresentations for which redress is given must be made for purpose of inducing another party to act, must relate to and be directly connected with transaction in question, and not confined to other and distinct transactions in which parties are concerned.

2. Fraud ☞46

Complaint which alleged that defendants who were deceased debtor's wife and salesman for purpose of retaining creditor's patronage, represented debtor's mortgage business was incorporated, and that creditor was injured because he failed to file claim against debtor's estate held not to state cause of action for fraud since it was not alleged that such misrepresentation induced creditor to fail to file claim against estate (Civ. Code, §§ 1572, 1709, 1710).

3. Appeal and error ☞1176(1)

Where plaintiff cannot truthfully amend complaint so that it will state cause of action, judgment should be ordered for defendants.

Appeal from Superior Court, San Diego County; Vaughn N. Thompson, Judge.

Action by C. A. Carlson and wife against Bertha M. Murphy, also known and doing business under the fictitious name of the Joseph W. Murphy Mortgage Company, and others. Judgment for plaintiff, and defendants appeal.

Reversed with directions.

J. C. Hizar and T. D. McLean, both of San Diego, for appellants.

Frank B. Erzinger and John H. Bowlby, both of San Diego, for respondents.

HARDEN, Justice pro tem.

Joseph W. Murphy was engaged in the business of buying and selling mortgages in San Diego under the fictitious name of Joseph W. Murphy Mortgage Company. On June 14, 1929, he made, executed, and delivered to plaintiffs a written guaranty for the payment of principal and interest on a \$4,000 note which he caused to be assigned to plaintiffs. After Murphy's death, on September 18, 1929, the business was carried on for a time by his wife, the defendant Bertha M. Murphy, and thereafter was continued by defendant Walden. Defendant Lytle was employed as salesman for the business during all three administrations. The principal sum of the note became due May 1, 1932, but was not paid. No claim was filed against Murphy's estate upon his guaranty.

Suit was brought against the defendants for damages for alleged misrepresentations. After a jury trial and verdicts for plaintiffs, judgment was entered against all defendants for actual and exemplary damages. Defendants appeal from the judgment.

The cause of action is predicated upon alleged false representations on the part of the defendants, in reliance on which plaintiffs failed to file a claim against Murphy's estate, whereby plaintiffs lost the value of the note and guaranty. The alleged misrepresentations were to the effect that Joseph W. Murphy Mortgage Company was a corporation or other legal entity, the obligations and existence of which continued after Murphy's death. The purpose and intent of the defendants in the making of said false representations is set forth in the complaint as being "to thereby retain and continue to receive the continued patronage and business of these plaintiffs * * * and profit thereby."

It is not stated in the complaint that the alleged misrepresentations were made with the intent of inducing plaintiffs not to file a claim upon said guaranty against Murphy's estate. In fact, in plaintiffs' brief their counsel concedes that the misrepresentations were not made for that purpose, nor for any other purpose than to retain the patronage of plaintiffs and to profit thereby. It is alleged that said representations (to retain the patronage, etc.) were made "willfully, knowingly, fraudulently and with intent to deceive and defraud plaintiffs"—allegations of actual fraud as distinguished from constructive fraud. There is no allegation of confidential or fiduciary relations between plaintiffs and defendants, nor any other allegation of circumstances to establish constructive fraud.

The question is whether the complaint states a cause of action. By demurrer and at all appropriate stages of the proceedings objection was made by defendants to the sufficiency of the complaint, for lack of an allegation that defendants intended to induce plaintiffs to forbear filing a claim against the estate.

This is an action for legal relief only, founded upon allegations of actual fraud. We are not concerned with what allegations would suffice to state a cause of action for constructive fraud under section 1573, Civil Code; nor with actions for equitable relief from fraudulent conduct. As to the latter, and for discussion of fraud at law and fraud in equity. Pom. Eq. Jur. (4th Ed.) vol. 2, § 873, p. 1804, note 2.

We think we may warrantably review the holdings of several of the authorities upon the subject (*italics ours*):

In Packard Phoenix Motor Co. v. McCruer, 41 Ariz. 450, 19 P.(2d) 332, the Supreme Court of Arizona listed the elements of an action for fraudulent representations as follows: (1) A representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) *his intent that it should be acted upon*; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his injury.

"The pleading must not only allege damage, but it must also appear that the damage claimed was sustained by reason of the fraud. In other words, it must appear from the pleading that the rela-

tionship of cause and effect existed between the alleged fraud and the damages sought." *Timmer v. Leonard*, 139 Or. 274, 9 P.(2d) 1048, 1050.

In *Butterfield v. Barber*, 20 R. I. 99, 37 A. 532, defendant made representations to plaintiff to be communicated to defendant's creditor, to obtain extension of time on a claim which was subsequently transferred to plaintiff. It was held the plaintiff could not recover for deceit, as the representations were not made with intention to induce action on his part.

In *Schwab v. Mabley*, 47 Mich. 572, 11 N. W. 390, it was said:

"The allegation of a mere conspiracy need not, perhaps, in all cases, show the specific means which the conspirators intend to use, because they may reserve some latitude as to choice of expedients.

"But the illegal purpose which they mean to accomplish must be described accurately, because unless the object is illegal, or means agreed upon are illegal, there is no wrong chargeable."

Likewise, in *Huston v. Ohio, etc., Smelting & Refining Co.*, 63 Colo. 152, 165 P. 251, 253, the court said:

"But these alleged false representations were made, if at all, long prior to the time plaintiff made his election, and were made, as he says, to induce him and his wife to purchase additional shares. They were not made with the purpose or intention of influencing plaintiff to accept an assignment of the shares in the manner pleaded, and plaintiff cannot base an independent cause of action upon such alleged misrepresentations."

In *Cheney v. Dickinson* (C. C. A.) 172 F. 109, 112, 28 L. R. A. (N. S.) 359, misrepresentations were made in a prospectus with an intention of inducing the purchase of treasury stock of a corporation. In reliance thereon, plaintiff bought stock in the open market. In support of a holding that plaintiff had no cause of action for the misrepresentations the court stated, quoting from another federal case (*Hindman v. First Nat. Bank* [C. C. A.] 112 F. 931, 57 L. R. A. 108):

"It has never been a ground of action that the defendant made a dishonest representation, and that the plaintiff had relied upon it and sustained injury. The moral obligation to speak the truth is not ground for a civil action unless the misrepresentation was intended to induce the

very action by the plaintiff which has resulted in his damage."

See, also, *Ashuelot Savings Bank v. Albee*, 63 N. H. 152, 56 Am. Rep. 501, where in commenting on the failure of proof to establish the different elements of the case, including the failure to establish that the representations were made with "any expectation of their coming to the defendants' knowledge, or with any belief or reason to believe they would induce *any one to become a surety of the treasurer*," the court said, "The necessary privity is not shown."

"There can be no redress for misrepresentations made without intent to induce the particular action taken by the hearer." 26 Cor. Jur. 1120, § 45.

Pomeroy's *Equity Jurisprudence* (4th Ed.) volume 2, § 879, states:

[1] "It is an essential requisite, both in equity and at law, that the representation, whatever be its form, must be made for the purpose and with the design of procuring the other party to act,—of inducing him to enter into the contract or engage in the transaction.

"It must therefore be, of necessity, preliminary to the actual conclusion of the transaction, and in the great majority of instances it is made during and forms a part of a negotiation between the parties, which terminates in the contract or other transaction. * * *

"Such being the object of the representation, it must relate to and be directly connected with the very contract or other transaction in question; must deal with its subject-matter or other material terms, and not be confined to other and distinct relations, transactions, or matters in which the parties are concerned."

In *Harding v. Robinson*, 175 Cal. 534, 539, 166 P. 808, the complaint was held to be insufficient for lack of an allegation of an intent to deceive Lombard or of an intent to induce him to enter into the contract. In *Ayers v. S. P. R. R. Co.*, 173 Cal. 74, 79, 159 P. 144, 146, L. R. A. 1917F, 944, it is said:

"It is not alleged that the so-called promise was made without any intention of performing it, nor even that it was made with intent to deceive or defraud the plaintiff, or to induce her to buy the property. Such allegations are necessary in pleading false representations as fraud."

"A fraudulent representation is an antecedent statement made as an inducement to the contract, but is not a part or element of the contract." *Griswold v. Morrison*, 53 Cal. App. 93, 99, 200 P. 62, 65.

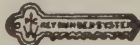
[2] From the foregoing authorities and from the language of section 1572, Civil Code, defining actual fraud, and of sections 1709 and 1710, defining fraudulent deceit, we conclude that to state a cause of action for legal relief, based upon actual fraud, a plaintiff must allege an intention on the part of the defendant to induce the particular action which resulted in the damage.

[3] The complaint does not state a cause of action.

The frank admission of plaintiffs' counsel is commendable. The effect is to concede that the plaintiffs cannot truthfully amend to make the complaint state a cause of action. Under such circumstances, judgment should be ordered for the defendants. *Oakland Paving Co. v. Bagge*, 79 Cal. 439, 21 P. 855; *Schroeder v. S. L. T. V. G.*, 60 Cal. 467, 44 Am. Rep. 61.

The judgment is reversed; and it is ordered that judgment be entered in the trial court in favor of the defendants.

We concur: BARNARD, P. J.; JENNINGS, J.



McCANDLESS v. CITY OF LOS ANGELES.*

Civ. 10241.

District Court of Appeal, Second District,
Division 2, California.

Aug. 5, 1935.

Rehearing Granted Aug. 30, 1935.

1. Eminent domain ⇨106

Abutting owner's easement of ingress and egress to street may not be taken away, destroyed, or substantially impaired for public purposes without just compensation (Const. art. 1, § 14).

2. Eminent domain ⇨307(3)

In action against municipality for damages to real property caused by construction of subway, which obstructed sidewalk in

front of plaintiff's property, instruction that right of municipality to regulate carries with it right to control and limit use of private property so as to amount to destruction, and where police power is legitimately exercised property owner is not entitled to damage to property arising therefrom, held properly refused as contrary to law and irrelevant to facts.

3. Appeal and error ⇨1099(6)

In action against municipality for injury to real property caused by construction of subway in front of plaintiff's property, contention that allegation and proof of presentation of claim for damages to board of public works was prerequisite to sustaining cause of action held not available on second appeal where not advanced in trial court or on first appeal, and Supreme Court on first appeal decided that complaint stated cause of action.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Elizabeth McCandleless against the City of Los Angeles. Judgment for plaintiff, and defendant appeals.

Affirmed.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Thatcher J. Kemp, Deputy City Atty., all of Los Angeles, for appellant.

Wendell W. McCanles, of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal from a judgment entered on a verdict in favor of the plaintiff in an action for damages to real property. The defendant city, through its city council at a regular meeting, passed a resolution adopting the report of its tunnels, bridges, and viaducts committee and instructed its board of public works "to prepare plans, consider and enter into a contract" for the construction of an underground subway in the street in front of the plaintiff's property. This order was executed by its board of public works, resulting in an obstruction in the sidewalk in front of plaintiff's property consisting of an open cut and stairway approximately 20 feet in length, paralleling plaintiff's front property line and about 7 feet distant therefrom, around which iron railings were constructed above the surface of the sidewalk. The stairway and railings were built opposite the center portion of the plaintiff's property.

[1] This is not the first trial nor the first appeal of the case, but the second. In the first trial a judgment was entered in favor of the defendant on the theory that the complaint did not state a cause of action. On appeal to the Supreme Court the decision of the lower court was reversed and the case remanded for further proceedings (*McCandless v. City of Los Angeles*, 214 Cal. 67, 4 P.(2d) 139, 140), and the opinion therein became the law of the case. In that opinion Mr. Justice John W. Shenk, who is especially learned in law affecting municipalities, speaking for the court, said:

"Section 8 of article 1 of the Constitution of 1849 provided that private property should not be taken for public use without just compensation. Section 14 of article 1 of the Constitution of 1879 enlarged this protection to the property owner by providing that private property shall not be taken or damaged for public use without just compensation. This enlargement of the constitutional provision first came before this court for consideration in *Rear-don v. San Francisco*, 66 Cal. 492, 6 P. 317, 56 Am. Rep. 109, wherein the term 'damaged' was held to assure a right to compensation in addition to that theretofore obtaining; that is, 'a guaranty against damage where none previously existed.'

* * *

"In *Brown v. Board of Supervisors*, 124 Cal. 274, at page 280, 57 P. 82, 83, the court said: 'The property which an abutting owner has in the street in front of his land is the right of access and of light and air, and for an infringement of these rights he is entitled to compensation * * * and any infringement thereof gives him a right of action. * * * Any act of the municipality by which that easement is destroyed or substantially impaired for the benefit of the public is a damage to the lot itself, within the meaning of the constitutional provision, for which he is entitled to compensation.'

"In the case at bar it cannot be questioned that the plaintiff, as an abutting property owner on Sunset boulevard, possesses not only the right to the use of the street in common with all other members of the public, but also a private right or easement for the purposes of ingress and egress to and from her lot, which right may not be taken away or destroyed or substantially impaired or interfered with for public purposes without just compensation therefor."

[2] It is the first and fundamental contention of the defendant that the trial court erred in refusing to give the following instruction: "You are instructed that though it is true that the power of a municipality to regulate is not the power to destroy in its absolute sense, it is nevertheless true that the right to regulate frequently and as a necessary sequence carries with it the right so to control and limit the use or enjoyment of private property as to amount to its destruction, and in such cases private interests must yield to the public advantage, and, accordingly, where the police power of the municipality is legitimately exercised, uncompensated submission is exacted of the property owner, if his property be damaged." It is obvious from what has heretofore been quoted from the language of the Supreme Court in the first appeal of this case that said instruction is not in line with the law of the case, and also it is obvious that the instruction has no relevancy to the facts which confront us.

Appellant complains also of other instructions, some of which the court gave and some of which the court refused to give when requested so to do by the defendant. But its complaints are built upon the same contention and are without merit.

[3] The defendant's final contention is that a prerequisite to stating and also to sustaining a cause of action against the defendant under the facts of this case is an allegation and evidence to prove it, that a claim for damages has been presented to the board of public works of the defendant city. It should be said that this contention of the defendant was not urged at the first trial, nor on the first appeal, nor even at the second trial, but was urged as a definite issue for the first time on this appeal. The Supreme Court on the first appeal, in deciding whether or not the complaint stated a cause of action, said: "In addition to the foregoing, it was alleged in the amended complaint * * * that a demand for such compensation duly made to the city council was rejected. * * * We are satisfied that the complaint herein states a cause of action and that the extent of the alleged damages is a question of fact." In this connection it should also be noted that as late as the second trial the defendant formally stipulated that plaintiff's claim was filed in due time and form with the city clerk of the

city of Los Angeles and was rejected. We find no merit in the appeal.
Judgment affirmed.

I concur: STEPHENS, P. J.



8 Cal.App.2d 650

**LEE v. STEPHENS et al. (CALIFORNIA
CASUALTY INDEMNITY EX-
CHANGE, Intervener).**
Civ. 9692.

District Court of Appeal, First District,
Division 2, California.
Aug. 6, 1935.

1. Automobiles ⇨206

Driver of motorcycle who was obeying traffic laws and who observed automobile approaching intersection some distance away and did not know whether its driver was obeying traffic laws held not contributorily negligent in collision occurring between vehicles at intersection merely because he did not watch approaching automobile but presumed its driver would obey the law.

2. Automobiles ⇨206

Where driver of automobile is obeying the law and while doing so observes another automobile approaching intersection, but some distance away, observer is entitled to presume that driver of such automobile will obey the law and need not stop or keep watching approaching car.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Clifford A. Lee against William A. Stephens and others, wherein the California Casualty Indemnity Exchange intervened as plaintiff. From an order granting new trial, defendants appeal.

Affirmed.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellants.

A. Brooks Berlin, of San Francisco, and Frank Thompson, of Eureka, for respondent.

John C. Siebert, of San Francisco, for respondent in intervention.

STURTEVANT, Justice.

On the morning of September 11, 1933, at the intersection of Fourth and Townsend streets in San Francisco, the motorcycle driven by the plaintiff collided with a Ford coach driven by the defendant William A. Stephens. Lee suffered severe injuries and commenced this action to recover damages. The action was tried before a court sitting with a jury. The jury returned a verdict in favor of the defendants. Thereafter the plaintiff made a motion for a new trial. The motion was granted, and from the order granting a new trial the defendants have appealed.

[1,2] Just prior to the accident the plaintiff was driving his motorcycle with a side car attached on the south side of Townsend street easterly between Fourth and Fifth streets. Stephens was driving the Ford car on the westerly side of Fourth street southerly toward Townsend street. The plaintiff introduced evidence to the effect that before reaching Fourth street he was traveling less than 20 miles an hour and that before he entered Fourth street he reduced his speed. He further testified that before entering Fourth street he looked to his left and saw the Ford car proceeding in a southerly direction. He was not asked and did not state the speed at which the Ford was traveling. However, he indicated on the diagram which is a part of the record that the Ford was at the time in question 40 or 50 feet north of the northerly line of Townsend street. The plaintiff proceeded into Fourth street and when he was about 6 feet from the center line thereof he saw a passenger car going north in the easterly portion of Fourth street. At that time he applied his brakes and slowed down to 10 miles per hour. At that moment he looked again and the Ford car was going 40 or 45 miles an hour and, as the witness testified, "was right on top of him." From the time he saw the Ford car the first time he did not look at it again until the time of the collision. The defendant Stephens testified that as he proceeded south on Fourth street he had been going 20 miles an hour. As he approached Townsend street, he slowed down for the purpose of observing traffic. After he did so, he noted a

truck to his right traveling along the south side of Townsend street and approximately 125 feet west of the intersection. The plaintiff's motorcycle was not in sight. The witness drove forward at about 15 miles an hour. When he had reached the middle of the intersection, he then saw the motorcycle 50 feet to his right. It was traveling between 35 and 40 miles an hour. The witness stepped on his accelerator in an attempt to get out of the way. The motorcycle was going on a curve slightly toward the south. The collision occurred. The motorcycle ran into the Ford. It hit the right side of the Ford about the front of the windshield. The witness applied his brakes and came to a stop on the northerly track of the Southern Pacific Company. There was additional evidence in support of the case as made by each party. It is conceded at once that the question as to whether the defendant Stephens was negligent was a question for the jury, and, as the evidence was conflicting, the record presents no question for a court of review. However, the defendants assert that the plaintiff was guilty of contributory negligence. They point to the evidence to the effect that after the plaintiff Lee looked to the north and saw the Ford car 40 or 50 feet north from the property line of Townsend street that the plaintiff paid no more attention to it but proceeded on his course and did not notice the Ford car again until it was "on top of him." They cite and rely on several cases in which the facts clearly showed that the defendant had the right of way and that the plaintiff attempted to appropriate it. Of course, those are not the facts in the instant case. They also cite cases in which the plaintiff observed the defendant's car, noted that it was disobeying the law and if it continued to do so a collision would follow and nevertheless the plaintiff drove into such danger without making further observations. But in the instant case such facts do not appear. There is no evidence that at the time the plaintiff first saw the Ford car or at any time thereafter until the moment of the collision the plaintiff had any information that the Ford car was disobeying the law. Where, as here, the driver of one car is obeying the law and while doing so he observes a car approaching an intersection but some distance away, he is entitled to presume that the driver of such car will obey the law and the ob-

server is entitled to direct his attention to other conditions of traffic and to the safety of other persons. He is not bound to stop. *Wynne v. Wright*, 105 Cal. App. 17, 20, 286 P. 1057. Nor is he bound to keep looking at the approaching car. *Simonsen v. L. J. Christopher Co.*, 186 Cal. 786, 200 P. 615.

The order appealed from is affirmed.

We concur: **NOURSE, P. J.;**
SPENCE, J.



8 Cal.App.2d 478

MILBURN v. FOSTER et al.

Civ. 9376.

District Court of Appeal, Second District,
Division 1, California.

July 23, 1935.

1. Appeal and error ⇨204(1), 237(2)

Competency of evidence admitted without objection or motion to strike could not be questioned for first time on appeal, especially where evidence was of such unimportance that, had objections or motions been properly made and overruled, there would have been no reversible error.

2. Automobiles ⇨200

Liability of owner of automobile for injuries caused by another's negligent operation of automobile is joint and several, except that owner's liability is limited to amount fixed by statute (Civ. Code, § 1714¼).

3. Automobiles ⇨234

Under statute imposing liability on owner of automobile for another's negligent operation of automobile, when ownership of automobile and permission to operate automobile has been proved, owner becomes directly liable for damage suffered in amount limited by statute, and such liability is not dependent upon a judgment against operator of automobile; hence it is not necessary to sue operator if plaintiff is satisfied with limited judgment he may obtain against owner (Civ. Code, § 1714¼).

4. Appeal and error ⇨1151(2)

When single verdict returned against owner and operator of automobile fails to limit owner's liability to amount fixed by statute, appellate court may modify judgment by reducing judgment to statutory limits (Civ. Code, § 1714¼).

5. Appeal and error — 1070(1)

Where verdict of \$25,000 was returned against operator and owner of automobile for injuries sustained in automobile accident, action of trial court, entering order granting new trial unless plaintiff consented to reduction of judgment to \$10,000, and limiting owner's liability to \$5,000, held to cure error in original verdict where plaintiff consented to reduction (Civ. Code, § 1714¼).

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Carl S. Milburn against Lucille Foster and another. From a judgment for plaintiff, defendant J. Arthur Foster appeals.

Affirmed.

W. I. Gilbert, W. I. Gilbert, Jr., Lewis D. Collings, and David W. Johnson, all of Los Angeles, for appellant.

Phil S. Gibson, of Los Angeles, for respondent.

ROTH, Justice pro tem.

[1] In this action to recover damages for personal injuries suffered by respondent as result of being struck by an automobile operated by appellant Lucille Foster with permission of the owner, appellant J. Arthur Foster, upon request of appellant, a doctor was appointed for the purpose of giving medical testimony. After some preliminary questions, the court said to the doctor: "Now, will you state to the jury what your examination consisted of and what you found as a result of your examination?" In the course of his testimony, the doctor referred to some matters clearly hearsay which could not be properly classified as medical history within the rule announced in *Sherwood v. Thomas*, 124 Cal. App. 450, 12 P.(2d) 676, and which testimony may be conceded to be inadmissible, and also repeated a statement made to him by respondent as to the manner in which the accident happened, which statement was also inadmissible. *St. Louis, etc., R. Co. v. Williams*, 108 Ark. 387, 158 S. W. 494. Appellants, however, made no objection to any of the statements made by the doctor, nor did they make any motions striking any portions of his testimony of which they now complain and to which they direct this court's attention. Under such circumstances, appellants cannot now be heard to complain. *Perry v. McLaugh-*

lin, 212 Cal. 1, 6, 297 P. 554. Furthermore, the inadmissible matters to which our attention has been directed are of so little importance that had objections or motions been properly made and overruled or denied, there would be no showing of such error as to warrant a reversal of the judgment.

[2-5] The jury in the case brought in a verdict "against Lucille Foster as operator, * * * and against J. Arthur Foster as owner * * * in the sum of \$25,000.00." Judgment was entered on the verdict in that amount. Subsequently on proceedings on the motion for new trial, respondent consented to a reduction of the judgment to \$10,000, limiting the liability of appellant J. Arthur Foster to the sum of \$5,000. Appellant contends that the verdict and judgment were against the law because the amounts due from each defendant were not segregated, and that the court could not cure the error by its modification of the judgment. The liability of the defendant J. Arthur Foster is based upon section 1714¼ of the Civil Code. This liability is joint and several [*Pascoe v. Payne*, 124 Cal. App. 528, 531, 12 P.(2d) 1091; *Broome v. Kern Valley Packing Co.* (Cal. App.) 44 P.(2d) 430, hearing by the Supreme Court denied], except that the liability in so far as defendant owner is concerned, being created by statute, is limited to the amount fixed by statute. In cases which predicate liability of an owner defendant under this section when ownership of the automobile and permission to operate the same has been proved, the owner becomes directly liable for damage suffered in an amount limited by the statute, and this liability is direct and several, as well as joint, and is not dependent upon a judgment against the operator. It is not necessary to sue the operator if the respondent plaintiff is satisfied with the limited judgment he may obtain against the owner. *Broome v. Kern Valley Packing Co.*, supra. When both the operator and owner are joined as defendants, some confusion has been created because of the limited liability of a defendant owner. *Snodgrass v. Hand*, 220 Cal. 446, 31 P.(2d) 198; *Bradford v. Brock*, 140 Cal. App. 47, 50, 34 P.(2d) 1048. Separate verdicts have caused as much confusion as a single verdict against both classes of defendants. *Harveld v. Milani*, 1 Cal. App. (2d) 157, 160, 36 P.(2d) 393; *Webster v. Harris*,

119 Cal. App. 46, 52, 6 P.(2d) 88. The foregoing cases suggest that the problem is to determine from the verdict or verdicts which are brought in what the jury had in mind as the total sum to be allowed. When the verdict is single as against both operator and owner, there can be no ambiguity on this subject. Ambiguity as to the total sum to be allowed is created only when there are separate verdicts as against the separate defendants. The cases clearly hold that when a single verdict is brought in against both classes of defendants, and such verdict by its terms fails to limit the liability of owner defendants to those amounts fixed by the statute (section 1714 $\frac{1}{4}$, Civ. Code), and an appellate court may modify the judgment by reducing the same to the statutory limits as against owner defendants. *Webster v. Harris*, 119 Cal. App. 46, 52, 6 P.(2d) 88; *Harveld v. Milani*, 1 Cal. App. (2d) 157, 160, 36 P.(2d) 393. Such a verdict, therefore, as well as any judgment entered thereon, is not void, but may be corrected and reduced. In the instant case the court acting on a motion for new trial made an order granting a new trial unless respondent within five days consented to a reduction of the judgment to \$10,000, limiting the liability of appellant J. Arthur Foster to \$5,000. Respondent consented to the reduction and in our opinion error in the original verdict and judgment entered thereon was cured by the order of the trial court and the consent of respondent.

Judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.



8 Cal.App.2d 655

PEOPLE v. RAUCHO et al.

Cr. 2726.

District Court of Appeal, Second District,
Division 2, California.

Aug. 6, 1935.

Hearing Denied by Supreme Court
Sept. 5, 1935.

1. Robbery $\Rightarrow$ 24(1)

Evidence held sufficient to support conviction of robbery.

2. Rape $\Rightarrow$ 51(4)

Evidence held sufficient to support conviction of forcible rape.

3. Robbery $\Rightarrow$ 24(1)

Evidence held sufficient to support conviction of attempt to commit robbery.

4. Kidnapping $\Rightarrow$ 5

Evidence that defendants seized complaining witnesses with intent to rob them and after superficial search and taking of some articles from pockets of one witness carried them away in automobile held to support conviction of kidnapping for purpose of robbery based on findings either that defendants seized victims with intent to rob or seized and carried away victims with intent to rob (Pen. Code, § 209, as amended by St. 1933, p. 2617).

5. Robbery $\Rightarrow$ 10

"Robbery," a combination of crime of assault with that of larceny, includes the element of asportation and this taking away is a transaction which continues as the perpetrators depart from place where property was seized.

[Ed. Note.—For other definitions of "Robbery," see Words & Phrases.]

6. Kidnapping $\Rightarrow$ 1

Acts of taking away of victim who had been robbed for purpose of removing him from scene of robbery to place where he could less easily raise alarm were committed in perpetration of robbery (Pen. Code, § 209, as amended by St. 1933, p. 2617).

7. Kidnapping $\Rightarrow$ 1

Act of compelling persons who had been robbed by defendants to accompany defendants from place victims were first accosted held to have constituted kidnapping and carrying away (Pen. Code, § 209, as amended by St. 1933, p. 2617).

8. Kidnapping $\Rightarrow$ 5

Where defendants accosted victim and after display of force and announcing intention to rob her forced her to accompany them across street to automobile and to accompany them in automobile, acts held to show kidnapping with intent to rob although at same time defendants had intent to commit rape on victim (Pen. Code, § 209, as amended by St. 1933, p. 2617).

9. Criminal law $\Rightarrow$ 723(5)

Robbery $\Rightarrow$ 23(2)

In robbery prosecution where victim of robbery had described assailants as Mexicans, fact that defendants were Mexicans held competent, relevant, and proper subject of proof and comment in argument.

10. Robbery  11

Possession of a dangerous or deadly weapon is proper subject of proof on trial for robbery and when established fixes crime as that of first degree.

11. Robbery  23(3)

In robbery prosecution proof of possession of deadly weapon is not limited to cases where weapon is openly displayed, but includes evidence of facts, circumstances, and conduct from which jury may infer that the robber was armed.

12. Criminal law  720(8)

In robbery prosecution where there was evidence that defendants appeared to have guns in their pockets, and victims had previously testified without objection that defendants had their hands in their pockets as if they had guns, leading questions asked victims as to whether defendants had hands in pockets simulating possession of guns *held* not misconduct on part of prosecuting attorney.

13. Criminal law  692

Objection that question is leading is of no weight where witness has previously given same testimony given as answer to leading question, in response to previous proper question.

14. Criminal law  1037(1)

Contention that district attorney was guilty of misconduct in robbery prosecution because he showed police officer on witness stand gun which officer identified as one which had been found in rooms occupied by defendants *held* not available on appeal since not assigned as misconduct at trial.

15. Criminal law  348

Possession by defendant of means such as were used to commit crime charged renders such means admissible even though not identified in any way by eyewitness to offense.

16. Criminal law  706

In robbery prosecution where prosecuting attorney knew that gun had been found in rooms of defendants and was justified in believing that gun and its discovery in room of two defendants was competent and material evidence, act of showing gun to officer who identified it as gun found in rooms of defendants was not misconduct.

17. Criminal law  706

Neither mere mistake by prosecuting officer relative to admissibility of proffered evidence nor the displaying of an exhibit not thereafter introduced in evidence is misconduct in absence of showing that prosecutor was not acting in good faith.

18. Criminal law  706

In prosecution for rape, introduction of evidence that when prosecutrix returned from hospital after treatment for attack made on her by defendants she discovered body lice on her person and that she never had anything of that kind prior to attack *held* not misconduct since evidence was admissible as showing condition of prosecutrix after attack and no objection was made to evidence except to question calling for name of insects and no assignment or objection on ground of misconduct was made at trial.

19. Criminal law  706

In prosecution for robbery, attempt to rob, kidnapping for purpose of robbery and forcible rape, introduction of card bearing license number of automobile used by defendants and handed to victim by passing motorist after robbery had been committed *held* not misconduct where there was no objection to admission of card and defendants expressly consented that card be received, and no assignment or objection on ground of misconduct was made at trial.

20. Criminal law  1037(1)

Statement in opening argument to jury in which district attorney referred to defense counsel as hirelings of defendants *held* not available as ground of reversal in absence of objection to argument at trial and showing of prejudice to defendant.

21. Criminal law  364(1)

In prosecution for rape, evidence that in addition to act of sexual intercourse forced on prosecutrix defendant put his private parts in her face and made obscene proposal *held* admissible as *res gest *.

22. Criminal law  369(2)

Where evidence is otherwise admissible, mere fact that it tends to show that defendant had committed offense not charged in indictment, information, or complaint does not affect its admissibility.

23. Witnesses  52(7)

In prosecution for robbery, attempt to rob, kidnapping for purpose of robbery and rape, ruling of court which sustained objections to questions asked prosecutrix to show that witness to be called later was not her husband in fact in order to show competency of purported husband as witness *held* not error since competency of husband of prosecutrix as witness was not affected by marital status.

24. Criminal law  406(1)

Admissions as distinguished from confessions are competent evidence either as proof tending to establish case of prosecution,

or as impeachment of declarant, whether or not made freely and voluntarily.

25. Criminal law Ⓒ609

Ruling of court which permitted extrajudicial written statements of defendant to be used in cross-examination of defendant without showing that such statements were voluntary *held* not error where such statements amounted to admissions only and did not constitute confession.

26. Criminal law Ⓒ1130(3)

Appellate court is not required to examine portions of record which are neither printed in briefs nor disclosed by reference to page or place in record where same may be found.

27. Criminal law Ⓒ1141(2)

Burden of disclosing error on appeal is on appellant and in absence of such disclosure it must be assumed that no error exists.

28. Criminal law Ⓒ783(2)

Ruling which permitted use of parts of written statement signed by defendant before trial and which could be construed as confession to impeach defendant on witness stand *held* not error where jury was instructed that extrajudicial statements of defendant could be considered if found to have been voluntarily made, and then only for impeachment of testimony of defendant by whom statement had been made, and where conclusion that statement was voluntarily made was supported by evidence.

29. Criminal law Ⓒ531(3)

Rule that confession not shown to have been voluntarily made is inadmissible not only as evidence tending to prove crime confessed, but also to impeach testimony of defendant who made it, *held* inapplicable where there is ample support in record for conclusion that confession was free and voluntary.

30. Rape Ⓒ59(16)

In prosecution for rape, refusal of instruction that before defendant could be convicted jury must find entire absence of consent on part of victim and resistance to full extent of her power until consummation of act *held* not error since instruction was not sufficiently complete to constitute correct statement of law, and instruction might have caused jury to believe erroneously that in spite of threatened bodily harm should she resist no conviction could be had unless prosecutrix resisted to full extent of her power.

31. Criminal law Ⓒ829(3)

In prosecution for rape where court had instructed jury correctly as to elements necessary to constitute crime of rape and as to law of rape as applicable to case at bar, re-

fusal to again instruct on law of case in language preferred by defense *held* not error.

32. Criminal law Ⓒ622(1)

Ruling on motion of defendants for separate trials *held* within discretion of court.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Ramon Raucha, Ernest Ramirez, Cecilio Licon, and Ramon Pena were convicted of robbery, attempt to commit robbery, kidnapping for purpose of robbery, and forcible rape, and they appeal.

Affirmed.

Ernest N. Clark, Vernon Cruickshank, J. Harvey Hearn, G. M. Grant, and J. O. Hughes, all of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty. of Los Angeles County, and Jeremiah J. Sullivan and Howard R. Hinshaw, Deputies Dist. Atty., all of Los Angeles, for the People.

FRICKE, Justice pro tem.

Defendants were convicted under two counts in an information charging robbery, one count charging an attempt to commit robbery, two counts of kidnapping for the purpose of robbery, and eight counts of forcible rape.

[1] The evidence under count 1 showed that on the evening of December 10, 1934, J. N. Carter, while walking on Euclid avenue in Los Angeles, was attacked by three Mexicans, who struck him over the head with some object, knocking him down, took his hat, address book, glasses, and about \$2, and then struck him some more. The three men then got into an automobile standing on a side street, in which a fourth man was waiting. Shortly thereafter some people in another car stopped and gave to Carter a card bearing an automobile license number which might be interpreted as being 2M1586 or 2M1506. The police officers to whom the card was next given interpreted the number as 2M1506, which was the number of the license on the automobile in which the four defendants were admittedly riding that evening before and after the incidents herein set forth; a radio police officer saw Carter at 10:29 p. m. on Euclid avenue, which was very shortly after the robbery, and at 11:50 p. m. saw a man who later turned out to be the de-

fendant Pena running down a hill in the district in which the Carter robbery occurred. It might be here mentioned that the defendants first met Mrs. Vogel, the victim involved in the rape charges, also on Euclid avenue. As she identifies all of the defendants, her testimony places them in the immediate vicinity of the Carter robbery shortly after its commission. Evidence given later in the trial showed that the incident of Pena running occurred after the conclusion of the incidents giving rise to the rape charges in which the four defendants were involved. The defendants admitted being together in the automobile during the evening, and some of the acts of sexual intercourse are admitted by them, with the qualification that they claim that these occurred with the consent of the prosecutrix. Defendants Ramirez, Raicho, and Licon were arrested about midnight, riding in the automobile above mentioned, and they and Pena, who was arrested later, were identified by the prosecutrix, Mrs. Vogel, named in the rape charges. In searching defendant Licon the police found in his pocket the pair of glasses which had previously been taken from Carter by the men who robbed him. When asked whose glasses they were, Licon at first stated that they belonged to him, but at the police station he said that they had obtained the glasses in the robbery of Carter.

This evidence was sufficient to sustain not only the conclusion that a robbery had been committed, but also that the defendants were the perpetrators thereof.

[2] The remaining counts involve a series of crimes connected in their commission. Shortly after 10:30 p. m., a matter of minutes after the Carter robbery, Ferdinand Modersitzki and Mrs. Leota Vogel left the home of some friends whom they were visiting and walked down Euclid avenue to Seventh street. As they turned east, a car approached, proceeded to Euclid, turned, and came back, stopping across the street from them. Defendants, identified by both the victims, got out, crossed the street, and one made the statements, "Stop, stick them up or we'll plug you. This is a holdup." One of the defendants had his hand in his pocket as if he had a gun in it. They searched Mr. Modersitzki, took his money and some other things, including a pocket knife, and ordered him into the front seat of the automobile. As to Mrs. Vogel, it appears that

one of the defendants directed specially toward her the demand, "Give me your money," and when she responded that she had neither purse nor money, he replied: "Don't scream or I'll plug you." Defendant Raicho had his arm around her waist, sticking a knife into her side, and defendant Licon had his hand in his pocket with the appearance of having a gun there. Mrs. Vogel, under this persuasion, was compelled to cross the street and was there pulled and lifted into the rumble seat of the automobile, between the two last-named defendants. The car, Ramirez driving, then proceeded to Dakota street, where it stopped, and Pena took Modersitzki to the back of a lot, forced him to get over a fence, and then lie face downward, ordering him not to move or he would club him. Pena then returned to the car, which then drove away. There is no occasion for detailing the events which then occurred. The evidence fully sustains the verdict of the jury that each of the defendants performed two acts of forcible rape upon the person of Mrs. Vogel, displaying and threatening her with knives, and that Raicho suggested that they cut her throat and kill her. As a final act in the series of bestial attacks, Pena declared he would take the woman up on a hill and knock her in the head with a rock when he got through, got her out of the car and the others drove off. The threatened ultimate assault was averted by the approaching headlights of an automobile manned by police officers, and Pena fled.

Appellants make no serious contention as to the sufficiency of the evidence to sustain their conviction under count II of the robbery of Modersitzki. The evidence is obviously sufficient.

[3] It is claimed there is no evidence whatever of an attempt to rob Leota Vogel. The evidence clearly shows that the defendants approached Mrs. Vogel, displayed a knife, and gave evidence of at least one of them being armed with a gun, declared that it was a holdup and demanded her money. The intent to rob is manifest from the circumstances. The fact that the victim had no money of which she could be robbed alone prevented the consummation of the obvious purpose of the defendants. A clearer case of an attempt to commit robbery could scarcely be found.

[4] Appellants' principal attack predicated on insufficiency of the evidence is directed against the verdicts under counts

IV and V of the information, which charge the defendants under section 209 of the Penal Code, as amended by St. 1933, p. 2617, with kidnapping for the purpose of robbery. That section, so far as applicable to this point, reads: "Every person who seizes * * * kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or robbery * * * is guilty of a felony." Appellants' argument is largely predicated upon the claim that to constitute a violation of the statute there must be both a seizing and a carrying away of the victim, whereas the statute plainly declares that either the seizing or the kidnapping or carrying away is a felony under its provisions, where the intent to commit robbery appears. The section was amended in 1933, in the light of the epidemic of kidnappings then prevalent, and the known *modus operandi* of kidnappers. By that amendment the word "seizes" was added to the section as one of the specific enumerated acts constituting the substantive crime punished by the section. This addition changed the offense theretofore described in section 209 from one which required the asportation of the victim to one in which the act of seizing for ransom, reward, or to commit extortion or robbery became a felony. Obviously, Mr. Modersitzki was seized with intent to commit a robbery. An affirmation of a conviction under count IV does not, however, depend alone upon the ground just stated. It appears that the property taken from Mr. Modersitzki consisted of a pocket knife and about 75 cents in change. No loot was secured from Mrs. Vogel. The declared object of the defendants when they approached Modersitzki and Mrs. Vogel was robbery. Had they loaded their victims into the car without any search for property the facts would warrant the conclusion that the carrying away was for the purpose of robbery. The total failure to search Mrs. Vogel and the superficial search of Mr. Modersitzki and the attendant circumstances, defendants having declared no intent other than the intent to commit robbery, are not inconsistent with the theory that the carrying away was with the intention of a more complete search and, as instanced by a number of recorded cases, adding the clothing of the victims as a part of the loot. The fact that no further effort toward robbery was made after the automobile was driven away

does not render this conclusion untenable. The jury may well have believed that the original intent to rob, which existed when the victims were first accosted, continued after they were placed in the automobile, but that in the bestial lust which subsequently arose in their degenerate hearts the thought of robbery was forgotten.

[5-7] Again, it must be remembered that the perpetration of a robbery is not completed the moment the stolen property is in the possession of the robbers. Robbery, a combination of the crime of assault with that of larceny, includes, as does larceny, the element of asportation, and this taking away is a transaction which continues as the perpetrators depart from the place where the property was seized. Thus in *People v. Boss*, 210 Cal. 245, 290 P. 881, 883, the defendants entered a store and, under the threat of displayed firearms, seized the money in the cash container and left the store. An employee of the establishment pursued them a short distance when he was killed by a shot fired by one of the fugitives. The court there said: "Robbery, unlike burglary, is not confined to a fixed locus, but is frequently spread over considerable distance and varying periods of time. The escape of the robbers with the loot, by means of arms, necessarily is as important to the execution of the plan as gaining possession of the property. * * * The defense of felonious possession which is challenged immediately upon the forcible taking is a part of the plan of robbery, or, as the books express it, it is *res gestæ* of the crime." The court holds that the shooting of the pursuing employee was a murder "committed in the perpetration" of robbery, and hence a murder of the first degree. Even if we were to assume that the purpose of taking Mr. Modersitzki away in the automobile was to remove him from Euclid avenue to a place where he could less easily raise an alarm and summon aid, such acts would, under *People v. Boss* and the cases there cited, have been committed in the perpetration of the crime of robbery. Furthermore, the act of compelling Mr. Modersitzki and Mrs. Vogel to accompany the defendants from the place where they were first accosted to the automobile of itself constituted a kidnapping and carrying away. There is nothing in the law which requires that the victim of a kidnapping shall be transported a mile, a furlong, or any particular distance; and it is only required that there be an actual asportation of the

victim without regard to the extent or degree of such movement. See *People v. Tanner* (Cal. Sup.) 44 P.(2d) 324.

[8] What has just been said applies with equal force to count V, under which appellants were convicted of kidnapping Mrs. Vogel with intent to commit robbery. As to this offense, we have also the further fact that no search was made of her person after the avowal of defendants that they were robbery bent and the demand for her money. The fact that the defendants may have had the intention of ravishing at the time they moved her across the street or when they compelled her to go away with them in the car, if such intent then existed, does not eliminate their expressed intent to rob her. The asportation of the victim for the double purpose of robbery and rape would of necessity support the conclusion that she was seized, kidnapped, and carried away with intent to commit robbery.

[9-13] Various assignments are made of misconduct of the district attorney. In view of the fact that the victim of the robbery charged in count I described his assailants as Mexicans, the fact that the defendants were Mexicans was clearly competent and relevant and a proper subject of proof and comment in argument. Neither was there any misconduct in the asking of leading questions of the victims of the crimes as to whether the defendants had their hands in their pockets simulating the possession of guns. Evidence was received that the defendants appeared to have guns in their pockets. The possession of a dangerous or deadly weapon is a proper subject of proof upon a trial for robbery, and when established fixes the crime as of the first degree. Such proof is not limited to cases where the weapon is openly displayed, but includes evidence of facts, circumstances, and conduct from which the jury may infer that the robber was thus armed. Furthermore, it appears from the record that the victims gave testimony without objection, prior to the alleged leading questions, of the defendants having their hands in their pockets as if they had guns. The objection that a question is leading is of no weight where the witness has previously, in response to a proper question, given the same testimony subsequently adduced by the leading question.

[14-17] Misconduct of the district attorney is assigned because he showed to a police officer on the witness stand a revolver

which the officer identified as having found on the morning after the commission of the crimes behind the cardboard lining of the clothes closet of a room occupied by defendants Pena and Rauch. That portion of the testimony of the witness to the effect that the room was occupied by those defendants was stricken out as a conclusion of the witness. The court also sustained an objection to a question requesting the officer to relate a conversation between himself and such defendants concerning their place of residence with respect to where the gun was found. The failure of any appellant to assign the incident as misconduct is of itself sufficient to preclude the question being raised here for the first time. We are not, however, at all convinced that there was any misconduct. It appears from the portion of the officer's answer which was stricken that he had information that the room where the gun was found was the room of two of the defendants, and, while the conversation was excluded from evidence, that he had a conversation with these defendants concerning the place where the gun was found. The record warrants the conclusion that the prosecutor had knowledge of these facts and of the further fact that between the time of the robbery and the arrest one of the defendants had returned to the place where the gun was found. It must also be remembered that in the perpetration of their crimes one or more of the defendants had their hands in their pockets in a manner indicating that they were holding guns. As it has been consistently held that the possession by a defendant of means such as were used to commit the crime charged renders the same admissible even though not identified in any way by an eyewitness to the offense (see *People v. Radovich*, 122 Cal. App. 176, 9 P.(2d) 542; *People v. Nakamura*, 136 Cal. App. 582, 29 P.(2d) 320), the prosecutor was fully justified in believing that the gun and the testimony concerning its discovery in the room of the two defendants were competent and material evidence. Neither a mere mistake by a prosecuting officer relative to the admissibility of proffered evidence (*People v. De Vries*, 69 Cal. App. 201, 230 P. 982; *People v. Dingle*, 56 Cal. App. 445, 205 P. 705), nor the displaying of an exhibit not thereafter introduced in evidence (*People v. Cox*, 76 Cal. 281, 18 P. 332) is misconduct in the absence of a showing that the prosecutor was not acting in good faith.

[18] Appellants also claim that the prosecutor was guilty of misconduct because of the introduction of evidence that when Mrs. Vogel returned from the hospital after treatment for the attack made upon her by the defendants she discovered upon her person some body lice, and that she never had anything of that kind prior to the attack. Not only was the evidence admissible as showing her condition after the attack, but it was received without objection, except to one question calling for the name given the unwelcome insects.

[19] It is also claimed that the introduction of the card bearing the license number of the car used by defendants and handed to Mr. Carter by a passing motorist was misconduct. Here again, not only was there no objection to the admission of the evidence, but also the express consent of the defendants that the card be received in evidence, and no assignment or objection on the ground of misconduct was made to either of these incidents.

[20] Appellants mention a statement in the district attorney's opening argument to the jury in which it is claimed he referred to defense counsel as hirelings of the defendants, but they wholly fail to either print that portion of the argument in their brief or disclose the place in the transcript where the incident may be found, and we have been unable to find it in the record. We do find, however, that no objection was made to any portion of the prosecutor's argument in the trial court, which circumstance, together with the absence of any showing of prejudice, eliminates the point as a possible ground of reversal.

[21, 22] Error is assigned in the admission of evidence that in addition to the acts of sexual intercourse forced upon the prosecutrix by defendant Pena the latter put his private parts in her face and made an obscene proposal. This evidence, forming as it did a part of the *res gestae*, was clearly admissible. Where evidence is otherwise admissible, the mere fact that it tends to show that the defendant had committed an offense not charged in the indictment, information, or complaint does not affect its admissibility.

[23] Error is assigned, without quotation or reference to the transcript, because the court sustained objections to certain questions put to Mrs. Vogel by defense

counsel on cross-examination. It appears to be appellants' contention that had they been able to prove by this examination that Mrs. Vogel was not in fact the wife of Mr. Vogel they could have called the latter as a witness. As the competency of Mr. Vogel was in no degree affected by his marital status, the point is of no weight.

[24, 25] Appellants contend that the court erred in allowing the prosecutor to use certain written statements of the defendants in the presence of the jury. The statements were not introduced in evidence but were first used during the cross-examination of the defendant Rauch, who admitted making the statements, but declared from the witness stand that they were in part untrue and had been made under coercion. Appellants assert in their brief that the prosecutor read to the jury the statements in the confessions which Rauch admitted were true, over the objection of defendants. The transcript, however, discloses, and this appellants fail to mention in their brief, that the so-called objection consisted of the statement of counsel's contention that before the statement be introduced "we should be permitted to examine to see whether it were or were not a voluntary statement," before it would be admissible, and expressly withdrew all objection as to those portions of the statement which the witness had conceded to be true. After reading those portions of the statement, and still during the cross-examination of the defendant Rauch, who had underlined in pencil those portions of the written statement which he claimed were not true, the prosecutor declared that he desired to read the underlined statements. Defense counsel then stated that he renewed his objection, and being asked to state the basis of the objection, declared that the statement was in the nature of a confession or admission which to be admissible must first be shown to have been free and voluntary. The court ruled that it would sustain the objection until the necessary foundation was laid. The witness had previously indicated, as among the true statements, a declaration that he had not been promised any immunity or reward, and the signed statement itself contained the declaration that it was made freely and voluntarily. The statement itself was never introduced in evidence and is not before us. Though not printed in appellants' brief, we have read the cross-

examination of defendant Raicho to which page references are made in the brief, and while the record is at times confusing, it contains nothing which would warrant a conclusion other than that the statements there presented amounted to admissions only and not confessions. As it is well settled that admissions are competent evidence, either as proof tending to establish the case of the prosecution or as impeachment of the declarant, whether made freely and voluntarily or not [People v. Luzovich, 127 Cal. App. 465, 16 P.(2d) 144; People v. Shannon, 203 Cal. 139, 263 P. 522; People v. Johnson, 203 Cal. 153, 263 P. 524], the authorities cited by appellants relating to the admissibility of confessions are not in point and the claim of error is without merit.

[26-28] While it appears that the defendant Raicho was, subsequent to the occasion referred to in appellants' brief, recalled for further cross-examination; and while that brief suggests without reference to where the same may be found in the record that the other defendants were also questioned on cross-examination upon their extrajudicial statements, we again call attention to the fact that it is not incumbent upon an appellate court to examine portions of the record which are neither printed in the briefs nor disclosed by reference to the page or place in the record where the same may be found. The burden of disclosing error is upon the appellant, and in the absence of such disclosure it must be assumed that, the claim being supported only by bald assertion, no such error exists. We have, however, read the remainder of the cross-examination of Raicho, and it there appears that some of the declarations in the last-mentioned portions of the written statement might be construed as a confession. The decision of the trial court permitting the use of the confession to impeach the defendant upon the witness stand was not erroneous. It should be noted that the trial judge fully and clearly instructed the jury that evidence of an extrajudicial statement of a defendant could be considered by the jury if they found that it was freely and voluntarily made, and then only for the sole purpose of impeaching the testimony of the defendant by whom such statement was made. It must be assumed that the jury followed this instruction, and that if they concluded that the defendants made the statements in-

roduced in evidence, such statements were considered by them solely as impeachment, and that they also concluded that such statements were free and voluntary, a conclusion which finds ample support in the evidence in spite of there being evidence to the contrary.

[29] Appellants' contention that a confession not shown to have been freely and voluntarily made is not only inadmissible as evidence tending to prove the crime confessed but also inadmissible to impeach the testimony of the defendant who made it, is sustained by authority (People v. Bate-man, 80 Cal. App. 151, 251 P. 335; see, also, People v. Clifton, 186 Cal. 143, 149, 198 P. 1065); but that rule is not applicable where, as here, there is ample support in the record, taken as a whole, for the conclusion that the confession was free and voluntary.

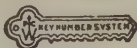
[30, 31] Error is assigned because of the refusal of the court of an instruction that before the jury could convict a defendant of rape they must find that there was an entire absence of consent on the part of the victim and resistance to the full extent of her power and until the consummation of the act. The instruction is not sufficiently complete to constitute a correct statement of the law applicable to this case. The case of the prosecution disclosed that the acts were accomplished under threat of death and violent assault with a deadly weapon. To have given the instruction requested might well have caused the jury to believe that, in spite of the threatened bodily harm should she resist, no conviction could be had unless the prosecutrix resisted to the full extent of her power. Such is not the law. Furthermore, the court correctly instructed the jury as to the elements necessary to constitute the crime of rape and the law of rape as applicable to the case at bar. Having instructed the jury as to the law it was not incumbent upon the court to again state it in language preferred by the defense.

[32] There was no error in the denial of the motions of defendants for separate trials. The question was one within the discretion of the trial judge and there was no abuse of that discretion. People v. Bonner (Cal. App.) 43 P.(2d) 343; People v. Fontana, 138 Cal. App. 379, 32 P.(2d) 160; People v. Tinnin, 136 Cal. App. 301, 28 P.(2d) 951; People v. Goold,

215 Cal. 763, 12 P.(2d) 958; *People v. Erno*, 195 Cal. 272, 232 P. 710.

The judgment and order denying the motions for a new trial are affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



8 Cal.App.2d 360

WINCHESTER et ux. v. GENERAL CAB

CO. et al.

Civ. 10348.

District Court of Appeal, Second District,
Division 1, California.

July 10, 1935.

Rehearing Denied Aug. 6, 1935.

Hearing Denied by Supreme Court
Sept. 5, 1935.

1. Appeal and error ⇨357(1)

Notice of intention to move for new trial, filed by attorney for contesting defendant, but by mistake reading in favor of defaulting defendant, could not be amended to read in favor of contesting defendant, so as to extend time for appeal, and hence appeal filed more than 60 days after judgment would be dismissed as not taken in time (Code Civ. Proc. § 939).

2. Appeal and error ⇨357(1)

Where, through inadvertence or mistake of party or attorney, notice of intention to move for new trial or notice of appeal is not made in time, court will not afford relief directly by permitting tardy notice nor indirectly by allowing amendment or alteration.

Appeal from Superior Court, Los Angeles County; Henry O. Wackerbarth, Judge.

Action by Rufus T. Winchester and wife against the General Cab Company and another. From the judgment, the Mercer Casualty Company appeals. On motion to dismiss appeal of defendant Mercer Casualty Company.

Motion granted and appeal dismissed.

Elbert E. Hensley, of Los Angeles, for appellant.

Lasher B. Gallagher, of Los Angeles, for respondents.

CONREY, Presiding Justice.

Respondents have presented their motion to dismiss defendant Mercer Casualty Company's appeal from the judgment, and make their motion upon the ground that the notice of appeal was not filed until more than sixty days after the entry of judgment. This motion must be granted unless the time had been extended by reason of pendency of proceedings on motion for a new trial. Code Civ. Proc. § 939.

The only record in this case of any notice of intention to move for a new trial is a notice found in the reporter's transcript, page 478, of intention of the defendant General Cab Company to make such motion. Eight months before trial of the case, default judgment had been entered against defendant General Cab Company. The only contested issues at the trial were those raised by the pleadings between the plaintiffs and defendant Mercer Casualty Company. The attorney of record of Mercer Casualty Company served and filed in the name of General Cab Company the above-mentioned notice of intention to move for a new trial. In support of his opposition to dismissal of the appeal, said attorney has filed herein his affidavit, which in substance is to the effect that he was not the attorney of General Cab Company, and that the notice of intention to move for a new trial was by mistake of his secretary written in the name of the wrong defendant, and further, by his own mistake, was by him signed without discovery of the error.

[1, 2] Appellant now asks for an order authorizing withdrawal of the reporter's transcript, and instructing the trial court to amend said transcript by striking therefrom the words "General Cab Company" and substituting therefor the words "Mercer Casualty Company," in the copy of said notice of intention as now contained in said transcript. If the Mercer Casualty Company was entitled to any such relief, the application therefor should have been made to the superior court, and the corrected record might then be certified to this court. We are of the opinion, however, that in face of the admitted fact that the record does not show and cannot truly be made to show that any notice of intention of Mercer Casualty Company to move for new trial, was

ever served or filed in the name of the company or under any description in which it could be included, the conclusion must follow that there was no proceeding on motion for new trial, and that the notice of appeal from the judgment was filed too late to give jurisdiction thereof to this court. In *People v. Lewis*, 219 Cal. 410, 414, 27 P.(2d) 73, 74, the Supreme Court said: "The execution and filing of notice of appeal is done by a party or his attorney, and is not an act of the court. Where, through inadvertence or mistake of a party or his attorney, notice is not filed within the time limited by law, neither the trial court nor appellate court can afford relief thereafter by permitting filing of a tardy notice. What the trial court cannot do directly it cannot accomplish indirectly by authorizing amendment or alteration of a codefendant's timely notice of appeal by writing in the name of the defendant who failed to file notice in time." These observations apply with equal force to the limitations of time for initiating proceedings on motion for new trial, and to the limitations of time for giving notice of appeal.

The motion of respondents is granted, and the appeal from the judgment is dismissed.

We concur: HOUSER, J.; YORK, J.

On Petition for Rehearing.

PER CURIAM.

On petition of defendant Mercer Casualty Company for rehearing after order of dismissal of appeal from judgment.

In addition to petitioner's statement of reasons offered in support of petition, it is requested that the opinion of this court heretofore filed be amended to "set forth the fact that appellant's motion for a new trial in the court below was actually argued by counsel for appellant, opposed by counsel for respondent, taken and understood by the trial court as appellant's motion and not the motion of the General Cab Company, and as such heard and considered, after submission, as a motion for a new trial by appellant, and, finally, by the trial court denied, all without any objection whatever by respondent based on any insufficiency or defect in appellant's notice of intention to move for a new trial." It may be assumed that the foregoing quotation is justified by the record, except that in the absence of a notice of intention of defendant Mercer Casualty Company to move for a new trial there could be no such thing as "appellant's motion for a new trial." It is for this reason that we are of the opinion that in this case a motion of appellant for new trial was not pending at any time.

The petition for rehearing is denied.

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4 Cal.2d 108

HAAG v. HARRIS et al.

S. F. 15372.

Supreme Court of California.

July 26, 1935.

Rehearing Denied Aug. 22, 1935.

1. Landlord and tenant ☞ 169 (4)

Res ipsa loquitur doctrine held applicable to injury from fall in elevator shaft in apartment building after injured person had opened elevator door.

2. Landlord and tenant ☞ 169 (11)

In action against owners of apartment building by one falling into elevator shaft after opening elevator door, evidence that examinations of self-locking device on elevator two days prior to accident, and again after accident revealed that it was in good order, held for jury, since such evidence was not conclusive as to condition of door at time of accident.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Titus Haag against Max Harris and others. From a judgment for defendants, plaintiff appeals.

Reversed.

Prior opinion, 38 P.(2d) 851.

Meurice Swim and Ford & Johnson, all of San Francisco, for appellants.

Hadsell, Sweet & Ingalls and Hadsell, Sweet, Ingalls & Lamb, all of San Francisco, for respondents.

PER CURIAM.

This is an action for personal injuries, sustained by plaintiff as a result of a fall into the elevator shaft of defendants' apartment building. Plaintiff testified that he entered the building as a guest of one of the tenants, opened the elevator door, and fell into the shaft. The elevator was auto-

matic and self-operating, and the doors had locks which were intended to make it impossible both to move the elevator from any floor until the door was closed, and to open the door when the elevator was not at the floor. Various witnesses for defendant, including an inspector of the elevator company, and a safety engineer of the Industrial Accident Commission, testified that they inspected the locking device after the accident and found it in satisfactory condition. The inspector of the elevator company also testified that he had tested it two days before the accident, and found it in good order. Plaintiff submitted instructions embracing the doctrine of res ipsa loquitur. The lower court refused to give them, and instead instructed the jury that under the facts there was no presumption of negligence. The jury brought in a verdict for defendants, and the court gave judgment thereon. Plaintiff appealed.

[1] It is apparent that the record presents a proper case for the application of the doctrine of res ipsa loquitur. The elevator was under the control of the defendants; in the ordinary course of things the accident would not have happened if due care had been used by those in control of it; and plaintiff had no means of explaining how the elevator was not at the floor at which the door opened. There are several decisions holding the doctrine applicable to exactly this type of case, namely, injuries sustained through a fall into the shaft of an automatic self-operating elevator, in an apartment or hotel. *Class v. Young Women's Christian Ass'n*, 47 Ohio App. 128, 191 N. E. 102; *Moohr v. Victoria Inv. Co.*, 144 Wash. 387, 258 P. 43; *Id.*, 146 Wash. 251, 262 P. 643.

It is contended that our decision in *Barbieri v. Law*, 209 Cal. 429, 287 P. 464, is to the contrary. In that case, however, the instrumentality involved was a sidewalk freight elevator; and the injured person had stepped into it, apparently taken the starting lever in his hand, and thus was

actually operating the machine when he was injured by being crushed against the iron doors opening onto the sidewalk, which doors were not unlatched. This court observed that the *res ipsa loquitur* doctrine did not apply because the machine was not wholly within the control of the defendant. The distinction between that case and the instant case is obvious.

[2] The further contention is made by defendants that even if the doctrine applies, the inference of negligence arising therefrom was wholly rebutted by the evidence introduced by defendant to the effect that inspection failed to show any defect in the lock. At most this created a conflict, which should have gone to the jury under proper instructions. The testimony that at some time before and some time after the accident the lock appeared to be working properly, and that the machine was up to date and properly constructed and installed, is not conclusive as to its condition at the time of the accident. See *Jacobi v. Builders' Realty Co.*, 174 Cal. 708, 164 P. 394, L. R. A. 1917E, 696.

The judgment is reversed.



4 Cal.2d 154

GORE v. MARKET STREET RY. CO. et al.

S. F. 15367.

Supreme Court of California.

July 31, 1935.

Rehearing Denied Aug. 29, 1935.

1. Carriers ☞318(8)

Evidence that motorman did not see prospective passenger, who was compelled to cross both car tracks in front of his car to reach safety station where she could board car, until car was within 5 or 10 feet of her held not to show such negligence of motorman as to support verdict against street car company, since motorman was required to use only ordinary care, and if he had seen prospective passenger sooner he would have had right to assume that she would maintain her place of safety on other track.

2. Carriers ☞346(1/2)

Evidence that prospective passenger was watching approaching car at all times and that, although cars had frequently not stop-

ped for her upon signal, she proceeded across track in front of on-coming car, which did not slacken speed, in order that she might board it at safety station, held to show such contributory negligence as to bar recovery against street car company.

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Nella Gore against the Market Street Railway Company and another. From an order denying defendants' motion for judgment notwithstanding verdict for plaintiff, defendants appeal.

Reversed.

Prior opinions, 37 P.(2d) 1059; 38 P.(2d) 804.

William M. Abbott, Walter H. Linforth, and William M. Cannon, all of San Francisco, for appellants.

Ford & Johnson, Fletcher A. Cutler, and George K. Ford, all of San Francisco, and Francis N. Foley, of San Mateo, for respondent.

PRESTON, Justice.

Appeal by defendants from order denying their motion for judgment notwithstanding verdict for plaintiff. Plaintiff, struck by a street car operated by defendants, brought this action to recover damages for personal injuries so sustained, and had a \$7,500 jury verdict in her favor. The appeal presents the following questions: (1) Was the operator of the street car using ordinary care so that it might not injure other users of the highway? (2) Was the plaintiff guilty of contributory negligence as a matter of law? (3) If the answer be affirmative, may plaintiff then invoke the doctrine of last clear chance?

Upon review of the record, we find that appellants' contention that the evidence establishes that plaintiff's injuries were caused wholly by her contributory negligence must be sustained. The evidence, without substantial conflict, shows that the accident occurred about 8 p. m. on August 25, 1929, at the intersection of Fifteenth avenue and Fulton street, San Francisco, in somewhat the manner next described.

Defendant company owns and operates a double-track street railway along Fulton

street, an east-west boulevard, 55 feet wide from curb to curb. In the vicinity with which we are concerned said boulevard is bounded on the south by Golden Gate Park, without intersecting crossroads, and on the north by blocks 270 feet long with intersecting numbered avenues (Seventeenth, Sixteenth, Fifteenth, etc.), 40 feet wide from curb to curb. Approaching easterly, Fulton street is upgrade from Seventeenth avenue to Sixteenth, and 4 per cent. down grade from Sixteenth avenue to Fifteenth. At each intersection is an arterial sign requiring traffic on the avenues to stop before turning into the boulevard.

At the northwest corner of Fifteenth avenue and Fulton street there is a street light suspended from a trolley pole. About 10 feet west of the intersection, immediately south of the double tracks along Fulton street, is a safety station, approximately 55 feet in length, for use of persons intending to take eastbound or downtown going street cars. The street cars stop at this safety station upon signal of persons there waiting; if no passengers are waiting, the cars proceed without stopping; however, after reaching the crest of the grade at Sixteenth avenue, they customarily decrease speed on the down grade from Sixteenth avenue to Fifteenth.

Plaintiff, at the time of the accident, was 49 years of age, by occupation a practical nurse. For some seven years she had resided on Fifteenth avenue about a block from Fulton street and was accustomed to frequent use, often twice daily, of said street cars. On the evening of the accident, she left home and proceeded to the intersection, intending to board an eastbound or downtown street car. Because of said grade, she could only see the top of a car as it approached Sixteenth avenue from Seventeenth. But thus seeing that there was a car approaching about two blocks distant, she started at a fast walk from the north side of Fulton street, to reach the safety station on the south side, proceeding either, as she testified, from the northwest corner of Fifteenth avenue, or, as an eyewitness testified, diagonally from the northeast corner thereof. She had tan gloves on and stated that during her entire progress, up to the time she was hit, she kept her hand up as a signal to the motorman to stop. She failed to reach the safety zone. The street car struck her as she was crossing the south, or eastbound, tracks and her body

was thrown a little south of said tracks and east of the end of the safety zone. A man who was driving easterly on Fulton street behind the street car witnessed the path of plaintiff's body and was forced to turn his car sharply to the south to avoid running over her.

It is undisputed that there were no prospective passengers waiting on the safety zone. Neither is there any evidence that the street car was traveling at an excessive speed over this portion of its route. Thus, unless the motorman saw plaintiff, there was nothing to cause him to further decrease the speed of the car or to stop at the intersection. He testified that the speed of his street car at Sixteenth avenue was between 20 and 25 miles an hour, and that as he approached Fifteenth avenue, down grade, he reduced the speed, as was customary, to 12 to 15 miles an hour; that the first time he saw plaintiff was when he saw an object 5 or 10 feet in front of him, just coming to the north rail of the eastbound track; that he immediately used emergency measures to stop the car, but was unable to avoid hitting this object, which he later discovered was a woman, and that he brought the car to a stop within 25 or 30 feet, in about the middle of the intersection.

[1] We are unable to find any evidence whatsoever of negligence on the part of the motorman nor do we see any room for operation of the doctrine of last clear chance to uphold the verdict. Had the motorman seen plaintiff before she passed from the westbound to the eastbound tracks, and in time to stop the car, he still could not have foreseen that she would leave her place of safety on said westbound tracks. He had the right to assume that she would maintain her position there; her presence would have afforded no warning that she would proceed in the path of the car. The motorman was required to use only ordinary care and precaution in the management and operation of the street car to avoid inflicting injury upon persons using the street.

[2] It is apparent that plaintiff failed to exercise any care whatsoever for her own safety. Although as she claims, it may still have been light enough, at 8 o'clock of a late August evening, for the motorman to have seen her, it is undisputed that she was fully aware at all times of the on-coming car, its position and speed. She knew that cars frequent-

ly failed to stop at the intersection. She testified that she had boarded cars at that place frequently, "twice a day mostly." Asked whether the cars customarily stopped there for her upon signal, she replied: "No, they did not stop for me always. * * * The cars would pass by many times." She further stated that around that time, in the evenings sometimes, a couple of cars would pass, even though she signaled for them. Again, that when she was on the rails of the westbound car, when she had reached that point, she noticed the eastbound street car and it "looked to be about half a block away" from there; that she was then down to the second or last rail and the car was half a block away. She stated: "When I was on the second rail, yes, sir, the last rail there, I could see the car, because I was looking right at the car and I saw it about half a block away. I could see the lights of the car. * * *"

It will be noted that these were unusually short blocks, 270 feet long from curb to curb, or 240 feet from property line to property line. Thus a street car half a block away would have been approximately within 120 feet of plaintiff or only about 65 feet from the end of the safety zone.

It seems evident that the accident would not have occurred but for plaintiff's negligence in knowingly proceeding in the path of the on-coming car and in failing, up to practically the moment of impact, to avoid being hit, either by remaining on the westbound tracks, stepping back on them, or quickening her pace to get over the last south rail.

Respondent argues, to find support for the verdict, that the jury may have discredited the motorman's statement that he failed to see plaintiff sooner and that the jury was entitled to believe either that the motorman deliberately proceeded ahead without slackening speed or to believe that if he had been looking straight ahead, he could have and should have seen plaintiff; that, by not so looking and seeing, he was guilty of negligence which, notwithstanding contributory negligence of plaintiff, would entitle her to recover. We fail to see how such deliberate negligence on the part of the motorman could be inferred in view of the fact that had he seen plaintiff in time to stop, he would have noted her position of safety on the

westbound track and could not assume or foresee that she would negligently step into the path of the on-coming car, which she saw was not diminishing its speed.

A case similar to the instant case, in fact practically indistinguishable from it, save that plaintiff there admittedly "ran" in front of the car, whereas plaintiff here claims that she only "walked fast," is *Anderson v. Market Street Railway*, 116 Cal. App. 282, 285, 286, 2 P.(2d) 529, 530. In reversing a judgment for plaintiff, the court there said: "The issue of contributory negligence is ordinarily a question of fact for the jury, but there are cases in which it becomes a question of law under the undisputed facts. [Citing cases.] As was said in *Brown v. Pacific Elec. Ry. Co.*, supra, 167 Cal. 199, at page 205, 138 P. 1005, 1007: 'While it is true that ordinarily the question of contributory negligence must be left to the jury, we think that this is one of the cases where "the standard of conduct required of persons under given circumstances is so obvious as to be applicable to all persons under such circumstances." * * * If Mr. Brown had taken the commonest precautions, the accident would not have occurred. * * *' In the present case respondent's own testimony showed that she did not take any precautions or exercise any care whatsoever. She was at all times aware of the approach of the car, of its speed, and of its proximity. She knew that she was on the 'blind side' of the car where no passengers were admitted and knew that the car would stop only for persons waiting on the safety zone. She knew that there was nothing about the manner in which the car approached to indicate that it was stopping, and, to the contrary, testified that she knew that it 'came fast the whole time.' Having this knowledge she proceeded to run directly into its path, and the unfortunate accident is obviously accounted for by her great hurry to beat the on-coming car as she crossed the track. In our opinion the conclusion that her own negligence was a proximate cause, if not the sole proximate cause of her injuries, follows necessarily and irresistibly from the undisputed facts."

The order appealed from is reversed.

We concur: WASTE, C. J.; THOMPSON, J.; SHENK, J.; SEAWELL, J.

HAGUE v. CLEARY et al.
S. F. 14911.

Supreme Court of California.

July 31, 1935.

Rehearing Granted Aug. 29, 1935.

1. Master and servant ⇨69

Ordinance fixing definite scale of wages for work on public building *held* not inconsistent with charter provisions relating to same subject-matter because charter related to "every contract for any public work or improvement" and ordinance related to "every contract for any public work or improvement to be performed within the state of California."

2. Master and servant ⇨69

Ordinance providing that labor on public contracts shall be paid not less than highest general prevailing rate of wages in private employment for similar work "in City and County of San Francisco" *held* not conflicting with charter provisions requiring prevailing rate of wages in private employment for similar work where contract was to be performed in city and county of San Francisco.

3. Injunction ⇨123

In suit to restrain execution of contract for construction of public building, question whether ordinance requiring that labor under public contracts should be paid not less than highest general prevailing rate, which should be determined semiannually, was invalid because of changed economic conditions *held* not presented in absence of allegation that such conditions existed or were apt to exist in execution of contract involved.

4. Statutes ⇨206

Force must be given to every expression used in interpretation of statute.

5. Master and servant ⇨69

San Francisco charter providing that public contract shall require that labor thereunder be paid not less than highest general prevailing rate *held* to manifest intention to prohibit payment of wages on contract less than prevailing rate and no more.

6. Master and servant ⇨13(4), 69

Manufacture of goods or wares under contract for purchaser on his special order and not for general market is "contract for labor" as respects question whether such contract is controlled by city charter regulating working hours and rate of wages.

7. Master and servant ⇨13(4), 69

Manufacture of goods or wares under contract for purchaser where article is suitable for general trade or where one stipulates

for future sale of articles which he is habitually making is "contract of sale" as respects question whether such contract is controlled by city charter regulating working hours and rate of wages.

[Ed. Note—For other definitions of "Contract of Sale," see Words & Phrases.]

8. Master and servant ⇨69

Contract for construction of psychopathic building for city in accordance with detailed plans and specifications *held* "contract for labor" and not "contract of sale" requiring payment of not less than highest general prevailing rate of wages under provision of city charter including every contract for any public work or improvement.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by William E. Hague against Alfred J. Cleary, as chief administrative officer of the city and county of San Francisco, and another. From the portion of a judgment dismissing plaintiff's first and second causes of action plaintiff appeals.

Judgment affirmed.

Prior opinion, 39 P.(2d) 219.

Charles J. Wiseman, of San Francisco, for appellant.

George O. Bahrs, of San Francisco, amicus curiæ for California Metal Trades Ass'n.

DeLancey C. Smith and Murray Draper, both of San Francisco, amici curiæ for Pacific Mfg. Co.

Brobeck, Phleger & Harrison, of San Francisco, amici curiæ for Industrial Ass'n of San Francisco.

Allen G. Wright and Wright & Wright & Larson, all of San Francisco, amici curiæ for San Francisco Chamber of Commerce.

John J. O'Toole, City Atty., and Henry Heidelberg, Asst. City Atty., both of San Francisco (John J. Dailey, of San Francisco, of counsel), for respondents.

SEAWELL, Justice.

This appeal calls for the construction of a particular section of the charter of the city and county of San Francisco, and certain ordinances thereof with respect to the letting of bids for the construction

of a public building, as will fully appear in the development of the decision.

The petition for a hearing by this court was granted because we were unable to agree with the construction placed by the District Court of Appeal, First District, Division 2, Nourse, P. J., upon section 98, charter of the city and county of San Francisco, herein fully set forth, to the effect that "there is nothing in the charter section which would justify a distinction between the purchase of *standard* articles and materials *specially* manufactured," relying upon *Neal Publishing Co. v. Rolph*, 169 Cal. 190, 146 P. 659.

On all other questions presented for decision we are in accord with the decision of said District Court of Appeal and herewith adopt the same as the opinion and decision of this court. The particular question, as above noted, which impelled this court to grant a hearing, will be considered, together with such further added observations as may appear pertinent to the case generally, following the close of the opinion of said district court, which contains an accurate statement of the questions of fact and law involved in the controversy as follows:

The plaintiff sued to restrain the defendants from executing a contract for the construction of a public building in the city and county of San Francisco to be known as the Psychopathic building. Three causes of action were pleaded. The defendants' demurrers to the first and second causes were sustained without leave to amend and their demurrer to the third cause was overruled. They declined to answer to the third cause of action and judgment was thereupon entered dismissing the action as to the first and second causes and granting an injunction restraining the defendants from including in the contract the matters complained of in the third cause of action. The plaintiff has appealed from that portion of the judgment dismissing the first and second causes of action.

The controversy involves the construction of Ordinances No. 8995 and No. 9092 as applied to the provisions of section 98 of the municipal charter. This section is a portion of the new charter which became effective January 8, 1932. Ordinance 8995 was enacted May 22, 1931, after the charter was adopted and in contemplation of section 98. Ordinance 9092 was enacted after the effective date of the charter and became effective January 7, 1933.

The pertinent provisions of section 98 of the charter are: "Every contract for any public work or improvement, exclusive of purchases, to be performed at the expense of the city and county, * * * [To the foregoing we add the following from said charter: 'Whether such work is to be done directly under contract awarded, or indirectly by or under subcontract, subpartnership, day labor, * * * or any other arrangement whatsoever * * *'] must provide: * * * That any person performing labor thereunder shall be paid not less than the highest general prevailing rate of wages in private employment for similar work; * * *

"The board of supervisors shall have power and authority to make and enforce regulations in the premises not in conflict with the provisions hereof."

The pertinent provisions of ordinance 8995 are: "Every contract for any public work or improvement to be performed within the State of California at the expense of the City and County * * * must provide, * * * that any person performing labor in the State of California, in the execution of such contract, * * * shall be paid not less than the highest general prevailing rate of wages in private employment for similar work in the City and County of San Francisco." Provision is then made for the assembling of data by the civil service commission upon which the board of supervisors shall semi-annually fix and determine the highest prevailing rate of wages, which scale of wages shall be included in every public contract covered by the ordinance. Pursuant to this ordinance, resolutions were duly passed by the board of supervisors fixing the scale of wages for the purposes of the ordinance. Resolution No. 574 was passed January 5, 1933. Notice inviting sealed proposals for the contemplated building was first published January 12, 1933. An addenda to the invitation for proposals recited that the contract should include the stipulation that wages for labor performed thereunder should be in accord with the scale thus approved.

[1] The basis of the first cause of action is that the ordinance under which a definite scale of wages was fixed is in conflict with the terms of section 98 of the charter and that for this reason it was repealed by the provisions of section 2 of the charter which declared that all ordinances or resolutions "not inconsistent

therewith shall continue in force until amended or repealed." The point is not sound because the ordinance is not inconsistent with the provisions of the charter as will hereafter appear. The appellant professes to find an inconsistency in this: The charter provides, "Every contract for any public work or improvement, * * *" whereas the ordinance provides, "Every contract for any public work or improvement to be performed within the State of California. * * *" The board of supervisors is expressly authorized to make and enforce regulations to carry out the provisions of the section. There can be no objection to any one ordinance that it does not provide everything necessary to carry out every provision of the section of the charter. It was competent and consistent with the provisions of the charter for the board to provide by ordinance regulations covering city contracts to be performed within the state. As the contract which is subject of this litigation is one to be performed within the state and within the city and county, the appellant is not concerned with what might occur if some other contract to be performed outside the state should be contemplated.

[2] A similar attack is made upon the language of the ordinance declaring that labor under such contracts shall be paid not less than the highest prevailing rate of wages in private employment for similar work "in the City and County of San Francisco." It is argued that this is in conflict with the terms of the charter which require the prevailing rate of wages in private employment for similar work. Since the contract is to be performed in the city and county of San Francisco, the prevailing rate of wages in that locality would be the rate applicable under the charter and this would be true under the ordinance as well if the words "in the City and County of San Francisco" were omitted. Thus, what interpretation may be placed on these provisions of the ordinance, if a contract were to be performed by the city and county wholly outside its boundaries, is a question not before us in this litigation.

[3] A general attack is made upon the purposes of the ordinance which calls for semiannual fixing of the wage scale. It is said in argument that because of the changed conditions in the economic world, prevailing wages may change from the scale fixed by the board of supervisors so that

in some cases a contract executed in the terms of the ordinance might not reflect the prevailing wage at the time of its execution. Academically, the argument has merit, but the point does not arise here because the complaint does not allege that such conditions existed or were apt to exist in the execution of the contract in litigation.

[4,5] The brief of the industrial association of San Francisco and of the San Francisco chamber of commerce, appearing as amici curiæ in support of the appellant, is confined to the attack made in the first cause of action. The whole argument in this brief is based upon the untenable theory that because the charter provides that these public contracts shall require that labor thereunder shall be paid "not less than" the highest general prevailing rate, therefore any ordinance or any contract executed thereunder which provides for payment of labor more than the highest prevailing rate is in violation of the charter section. On this premise it is argued that the charter section was enacted for the benefit of the taxpayers and that they were thereby guaranteed that no such public contract would call for the payment of labor upon a scale higher than that prevailing in private employment. In the interpretation of a statute, we must give force to every expression used. If it had been the intention of the charter framers to prohibit the payment of wages on public work above the prevailing rate paid in private employment, they would have either used some expression to convey that intention or would have omitted the words "not less than." As the charter reads, these words clearly convey the intention to prohibit payment less than the prevailing rate and no more. To adopt the view of amici curiæ, we would have to disregard these words altogether.

We now come to a consideration of count 2, second amended complaint, which was dismissed after the entry of judgment in demurrer sustained thereto without leave to amend. The allegations of this count go to the substance of the proposition as to whether the contract for the construction of said public work, in view of the declared policy of the charter providing for the fixing of a minimum wage rate for all persons performing labor in the execution of said contract, and the further provision that "all laborers employed in the execution of any contract within the

limits of the city and county shall have been residents thereof for a period of one year immediately preceding the date of their engagements," etc., should be construed as a contract of labor or a contract of sale.

The defendants, acting in their official capacity, published a notice inviting sealed proposals for the construction of a public building to be erected on said city property. The construction of a building has a very definite meaning as used in ordinary building contracts, such as we have before us. The two outstanding items in the construction of buildings are *labor* and *materials*. The construction of a building is distinctly a task of labor. A building and the furnishings to be used for the detention of persons known as psychopaths must necessarily be specially constructed. The psychopathic building herein was to be constructed in accordance with detailed plans and specifications on file with the department of public works. Appellant by his complaint admits that many articles which are required in the construction of said public building must be "specially made, manufactured and fabricated." The contract to be let is for a completed building. The foundation, walls, roof, doors, windows, and every item of material which is to go into the building, whether for purposes of ornamentation or strength, as provided in the plans and specifications, are part and parcel of it. The building as a whole was to be constructed for the city. We think the distinction between this case and *Neal Publishing Co. v. Rolph*, 169 Cal. 190, 146 P. 659, 660, is made to appear by the illustrations of the learned author, the late Chief Justice Angellotti. There an appeal was taken from a judgment directing that a writ of mandate issue on the application of the petitioner, commanding the appellant, as mayor of the city and county of San Francisco, to sign and execute a certain contract with petitioner for the furnishing of certain *supplies* in the way of printed blanks and forms, for use in the several departments of the city government, which contract had been awarded to the petitioner as the successful bidder for such *supplies*. It is noteworthy that the blanks and forms are designated in the opinion as "supplies." The board of supervisors regularly advertised for the furnishing and delivery of a required quantity of specified printed forms and blanks for the use of the various offices and departments of the munici-

pality for the fiscal year 1913-14. Petitioner was awarded the contract. At the time he was awarded the contract he was conducting a union printing office and was entitled to use and affix to its work the label of the Allied Printing Trades Council of the city and county of San Francisco. On the day following the award, petitioner's right to the use of the label was taken away by the trades council and petitioner's establishment thereupon ceased to be a union office. Thereafter, the mayor, unaware that the petitioner's right to use the label had been revoked, approved the resolution awarding the contract to petitioner. A few days later a contract covering the items of petitioner's bid and award was presented to the mayor for his signature and he refused to sign and execute the same for two reasons: (1) That at the time of the presentation of the contract for his signature the petitioner was not entitled to the use of the label referred to, as was claimed to be required by a certain resolution of the board of supervisors; and (2) that the contract was not sufficient in form in that it did not contain the express provisions as to hours of labor and as to the minimum wages of labor required by the terms of article II, chapter III, section 1, of the charter. The application of petitioner for the issuance of a writ of mandate compelling the mayor to affix his signature to and to execute said contract was granted, consequently the appeal.

The charter of said city and county provided that every contract to be performed by the city and county must provide that in its performance eight hours shall be the maximum hours of labor on any calendar day, and that the minimum wages of laborers employed by the contractor in the execution of his contract shall be \$3 a day. Any contracts for work not complying with the provisions of said charter were declared to be null and void, etc.

The proposed contract did not contain the minimum wage nor the maximum hours of labor clause. These omissions were made the basis of the mayor's refusal to sign the contract. The decision holds that in the circumstances of that case the contract did not provide for "*the doing of work for the city and county, within the meaning*" of the charter provision, but simply for the furnishing of certain finished articles of merchandise "which the contractor may have printed *anywhere* that

he chooses." The charter under which Neal Publishing Co. v. Rolph was rendered read: "Every contract for work to be performed for the city and county must provide that in the performance of the contract, eight hours shall be the maximum," etc. The present charter, section 98, adopted since said decision, reads: "Every contract for any public work or improvement, exclusive of purchases, to be performed at the expense of the city and county or paid out of moneys deposited in the treasury, whether such work is to be done *directly* under contract awarded, or *indirectly* by or under *subcontract*, *subpartnership*, *day labor*, *station work*, *piece work* or *any other arrangement whatsoever, must provide*," etc. (Italics supplied.) The italicized words of the new charter are very inclusive and are very persuasive as to the breadth of the application which it was intended should be given to the charter to effect the manifest object with respect to laborers generally. The clause "exclusive of purchases" adds no strength whatever to appellant's contention. Doubtless said clause was added to the charter provision in order to remove any doubt that may be injected into the subject in conceivable cases of public improvement. Former Chief Justice Angellotti holds that the contract for furnishing the printing supplies was a contract to deliver completed chattels or merchandise. In such a case the contractor does not undertake to perform work for the city. A distinction is drawn in this respect between a contract or agreement for sale to a city and a contract for the doing of work therefor. It is pointed out in the one case, "if any work on his part is done in the way of manufacture or preparing the chattels or merchandise necessary to be *sold and delivered*, either personally or through employees, it is work done solely for himself, and in no proper sense for the city. His contract with the city is simply for the sale and delivery of the finished article, and until the delivery the city has no interest whatever in the property. In the other case he contracts to *furnish labor* or personal service *directly to the city*, as where he agrees to *construct a building for the city for a stipulated sum*, or where he agrees to grade or otherwise improve a street belonging to the city, or to perform any other work for the city."

The author was of the view that "no distinction material to the question under

consideration can be made between a contract or agreement for the sale of such articles as are already in existence, ready for delivery, and one for the sale of articles that must be manufactured or created to meet the demands of the contract. In neither case is there undertaken any 'work to be performed for the city and county.' The work done is not public work." Here the agreement is to "construct a *public building* for the city for a stipulated sum" at the expense of the city and county under plans and specifications calling for special designs of workmanship. The city charter as now framed provides that every contract for any public work or improvement, performed at the expense of the city and county, "whether such work is to be done *directly* under contract awarded or *indirectly* by or under subcontract * * * or any other arrangement whatsoever," must conform to the maximum hours of labor and the minimum rate of wages as therein prescribed. The bid being awarded to a general contractor, he may not by merely parceling the work out to various subcontractors who may employ workmen at a low wage and compel them to work long hours, thus defeat the evident policy of the law. The law, as it sometimes happens, may be subject to abuse by designing persons, but it is not the prerogative of courts to balance the good and the evil which may flow from legislation legally enacted and upon such a basis approve or condemn the policy of laws which bear upon the industrial life of a community.

[6-8] It is admitted by the pleadings that many and various kinds of articles which will be used in the construction of said psychopathic building will be specially made, manufactured, and fabricated for use by workmen. The rule is well settled by an early decision of this state (Flynn v. Dougherty, 91 Cal. 669, 27 P. 1080, 14 L. R. A. 230) and approved many times since, and at no time criticized, so far as we are advised, that goods or wares manufactured for the purchaser and upon his special order and not for the general market is a contract for labor, adopting the Massachusetts rule. The question in that case was whether the contract of the plaintiff "to cut, furnish, and deliver" to defendant the stonework of the asylum to be built at Agnew Station, according to the plans and specifications of the architects was within the statute of frauds. Civ. Code, §

1739. "If the stone had been cut according to his bid and the specifications, and had not been used in the construction of the asylum, it would not have been available for other purposes, or have been salable in the general market." So, in the instant case the stonework, metal, woodwork, grillwork, staircase materials, doors, windows, and other things forming a part of the building are to be cut, fabricated, and designed in accordance with plans and specifications. There is no question that in cases where the article is suitable for the general trade or where one stipulates for the future sale of articles which he is habitually making, it is a contract of sale. *Golden E. M. Co. v. Old Homestead Bakery*, 59 Cal. App. 541, 211 P. 56; *United Iron Works v. Standard Brass Casting Co.*, 69 Cal. App. 384, 231 P. 567, 569. Both of these cases, written many years after the *Neal Publishing Company Case*, expressly affirms the doctrine approved in *Flynn v. Dougherty* and are unquestionably authorities supporting the decision of the trial court in the instant case holding the proposed contract to be one for labor. What is said in those cases is not dicta, as that question was directly involved in the issues. It is said that the exception to the general rule exists in cases where "the contract calls for the manufacture of an article which is one that is manufactured and supplied to the trade generally." Concluding the subject, it is said: "The weight of authority is that a contract to manufacture a special article for a special purpose in accordance with plans furnished by the purchaser is a contract for work and labor, particularly if the article manufactured is not suitable for sale in the general market in the ordinary course of the manufacturer's business, and the purchaser furnishes the materials. See *Bancroft v. San Francisco Tool Co.*, 120 Cal. 228, 231, 52 P. 496; *Mannix v. Tryon*, 152 Cal. 31, 40, 91 P. 983; *Spencer v. Cone*, 42 Mass. (1 Metc.) 283." It is true that the city does not supply the materials, but that single fact does not change the rule.

It is to be observed that *Neal Publishing Co. v. Rolph*, supra, makes no mention of the *Flynn Case* or any other California case bearing upon the question immediately under consideration. Cases decided before and since the decision of the *Neal Publishing Company Case* sustain the *Flynn Case*. It may be that the

Flynn Case, falling within the class of contracts as does the instant case, to wit, *the construction of a public building for a stipulated sum*, and, as pointed out therein, such a contract being one of labor, it was not regarded as pertinent to the question there presented.

Counsel for appellant and amici curiæ devote much argument to incongruous situations which it is claimed exist to confuse if not make it impossible to follow the construction placed upon the charter and said ordinances by respondents. It is claimed that to attempt to do so would lead to insuperable absurdities and that it is impractical to require a manufacturer paying standard rates of wages in his business to pay a different rate of wages arbitrarily fixed by the board of supervisors in the manufacture of articles which are to be used in public work; that a division of labor is the practice with most all manufacturers and no single workman produces a finished product. Illustrations are carried to very remote distances to prove the harm that would befall business and industry from a regulatory standpoint, if the contentions of respondents should prevail. We are not disposed to enter into a discussion of the mechanics of the proposition and can only reply by stating that there does not appear to us to be good grounds for appellant's apprehensions. There may be, as there usually is in charter provisions and ordinances affecting the matter before us, rough edges and inconsistencies and irregularities which can be composed or ironed out by the exercise of co-operative efforts on the part of all persons upon whom the law may operate. In the instant case there should be no trouble on this score as both sides, the city and county attorney and his deputy on one side and a large number of amici curiæ on the other, though viewing the questions from opposite positions, are contending for the best welfare of the city and county of San Francisco and its citizens. The questions of law being settled, there should be no trouble in applying it in such manner as to accomplish the manifest purpose of the charter.

All other material questions have been sufficiently discussed by said district court of appeal as above set forth.

Judgment affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; SHENK, J.; PRESTON, J.; LANGDON, J.

4 Cal.2d 103

FARRIS v. PACIFIC STATES AUXILIARY CORPORATION et al.

S. F. 14992.

Supreme Court of California.

July 25, 1935.

1. Mortgages ⇨274

Plaintiff who acquired title while property was subject to lien of recorded trust deed, beneficiary of which, prior to transfer of title to plaintiff, had recorded its notice of breach and election to declare entire indebtedness due, and to cause sale of property under trust deed, and pursuant to trust deed property was sold by trustee before trial, *held* not entitled to judgment for possession of property.

2. Mortgages ⇨372(4)

Upon sale under trust deed, purchaser has immediate right to possession.

3. Sales ⇨475

Where plaintiff took assignment of interest of purchaser in apartment house furnishings while purchaser was in default on conditional sales contract, and during default on contract conditional seller transferred title to furnishings to defendant, plaintiff *held* not entitled to possession of furnishings, since rights of purchaser thereto had been forfeited for nonpayment.

4. Execution ⇨290

Plaintiff who had been assigned interest of buyer in specified dishes *held* not entitled to possession of dishes after they had been purchased by seller at execution sale upon judgment procured by it for purchase price and thereafter had been transferred by seller to defendant.

5. Mortgages ⇨274

Where plaintiff had acquired title to property which was subject to lien of recorded trust deed which provided that on default of indebtedness secured trustee should be entitled to possession and to rents and profits, and, after beneficiary had recorded notice of default and election to sell under trust deed, trustee had assumed possession before plaintiff acquired property with full knowledge of proceedings under trust deed, plaintiff could not recover damages for withholding of property from his possession by trustee.

6. Mortgages ⇨20

Trust deed may give trustee or beneficiary right to take possession and collect rents on default.

7. Mortgages ⇨274

Where plaintiff had purchased apartment subject to lien of recorded trust deed under

which trustee had taken lawful possession of property, plaintiff's physical occupancy of two apartments for month, receipt of \$223.50 rent money collected by manager of apartments, and attempted contract with manager of apartments to act for him which was later repudiated, *held* not to constitute interruption of possession of trustee, and plaintiff could not recover against trustee for rents collected and applied in accordance with trust agreement.

8. Trial ⇨139(1)

Where had jury returned a verdict for plaintiff trial court would have had duty to set it aside or reviewing court would have been required to reverse verdict as without support in evidence, trial court did not err in directing verdict.

In Bank.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Fred Farris against the Pacific States Auxiliary Corporation and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Leon French, of San Francisco, and Fred W. Lake, of Los Angeles, for appellant.

John L. Mace, of Los Angeles, for respondents.

SEAWELL, Justice.

Plaintiff appeals from a judgment for defendants entered upon a directed verdict. Defendants heretofore moved to dismiss the appeal or affirm judgment before filing of their respondents' brief. We denied the motion and granted said respondents time to file their brief. *Farris v. Pacific States Auxiliary Corporation*, 1 Cal. (2d) 289, 34 P.(2d) 489. Upon an examination of the briefs and transcript, we are convinced that the judgment must be affirmed.

Plaintiff alleged that on September 30, 1930, defendants wrongfully ousted him from possession of an apartment house of which he was the owner, entitled to possession, and in possession. He further alleged that the property withheld produced monthly rentals of \$1,800, wherefore he had been damaged in the sum of \$9,000 for the period of five months between the alleged ouster and the commencement of suit, and that he would continue to be damaged at the rate of \$1,800 a month until restored to possession. He prayed for possession of

the apartment house and its furnishings, and for damages as above set forth.

[1,2] Plaintiff learned of the apartment house property, situate in Alameda county and containing 39 furnished apartments, on August 27 or 28, 1930. On August 30 he agreed to exchange encumbered real property in Riverside county owned by him for said apartment house. On September 2, 1930, Harriet L. Collins, owner of the apartment house, and her husband delivered to plaintiff a deed to the apartment house and an assignment of "all right, title and interest, if any," in the furnishings and moneys due. The real property was subject to a recorded deed of trust lien executed by Mrs. Collins and her husband on February 2, 1929, to secure an indebtedness of \$69,600, wherein defendant Pacific States Savings & Loan Company was beneficiary and defendant Pacific States Auxiliary Corporation, trustee. On June 20, 1930, which was prior to the exchange agreement between plaintiff and Mrs. Collins, the Pacific States Savings & Loan Company recorded its notice of breach, and election to declare the entire indebtedness due and cause the property to be sold under the deed of trust. The property was duly sold on October 18, 1930, by the trustee and purchased by defendant loan company. The sale took place prior to trial of the action herein. Therefore, regardless of the question of defendants' right to possession prior to foreclosure, plaintiff was not entitled to a judgment for possession of the real property. Upon sale under a trust deed the purchaser has an immediate right to possession. *Central Savings Bank v. Lake*, 201 Cal. 438, 448, 257 P. 521; *Kelsey v. Richardson*, 101 Cal. App. 762, 768, 282 P. 515; 25 Cal. Jur. 101.

[3,4] Nor was plaintiff entitled to a judgment for possession of the furnishings, which, except for certain dishes, had all been purchased by Mrs. Collins on conditional sales contracts, upon which she was in default at the date of the exchange agreement. While said contracts remained in default, the conditional vendors upon payment by defendants of the balance due on the contracts, transferred title to the loan company or the auxiliary corporation. The rights of the purchaser under said contracts were forfeited for nonpayment. As to the dishes not bought on conditional sales contract, the seller had purchased them at execution sale upon a judgment procured by it for the purchase price, and

thereafter said seller transferred them to defendant Pacific States Auxiliary Corporation.

[5,6] Nor was plaintiff entitled to recover damages based on wrongful withholding of the apartment house from his possession. Upon the evidence it appears as a matter of law that at the date of the exchange agreement and subsequent thereto, defendant Pacific States Auxiliary Corporation, as trustee, was in possession of the apartment house in the lawful exercise of powers conferred on it by express provisions of the deed of trust, as well as subsequent consent given by Mrs. Collins while she remained the owner of the property. The deed of trust provided that in case of default in payment, the trustee should be entitled to take possession either personally or by its agents or attorneys, or by a receiver appointed by the court, and to collect and receive the rents, issues, and profits thereof.

On June 20, 1930, more than two months before plaintiff even learned of the property, the Pacific States Savings & Loan Company had recorded its notice of default and election to sell under the deed of trust. On July 19, 1930, more than a month before the exchange, Mrs. Collins and the Pacific States Auxiliary Corporation executed an instrument whereby Mrs. Collins delivered possession and the corporation, as trustee, assumed possession as of that date. With the execution of this agreement, the trustee assumed full management of the apartment house. Mrs. Barnes, who had acted as manager, was continued in that position under a written contract of employment with defendant trustee, dated July 21, 1930, and introduced in evidence herein. Rents collected by her were deposited in the bank in an account designated "Pacific States Auxiliary Corporation—Trustee Account."

This was the situation when plaintiff appeared at the apartment house on August 30, 1930, and demanded of Mrs. Barnes that he be let into possession and that all rents be turned over to him. The evidence as a matter of law will support no other conclusion but that the defendant trustee was then in lawful possession of the apartment house. A deed of trust may give the trustee or beneficiary the right to take possession and collect rents upon default. *Snyder v. Western Loan & Bldg. Co.*, 1 Cal. (2d) 697, 37 P.(2d) 86. Plaintiff testified that he himself searched the public

records and observed the deed of trust, and that he also observed the recorded notice of election to sell, which recited the trustor's default in payment of taxes and in payment of installments due on the indebtedness. At the trial his attorney offered evidence that there was exhibited to plaintiff a copy of the agreement of July 19, 1930, whereby Mrs. Collins surrendered, and the trustee accepted, possession as of that date, and said attorney read the agreement into evidence. There is no claim made that Mrs. Collins deceived plaintiff as to the true status of the property. Plaintiff admitted that he also saw copies of the bank deposit slips showing deposit of rents to the credit of Pacific States Auxiliary Corporation as trustee.

[7] When plaintiff appeared and demanded to be let into possession, Mrs. Barnes, the manager, after speaking on the telephone with Mrs. Collins, permitted him to enter and gave him the keys to two apartments, which he and his attorney occupied until about September 30, when plaintiff left for Los Angeles to attend to business there, leaving some clothes in the apartments. Upon his return on November 2 he testified that he found that his keys would not open the front door. He did not thereafter occupy either apartment. On or about September 2 he had induced Mrs. Barnes to turn over to him \$223.50 collected as rent. On September 1 he had offered Mrs. Barnes the position of apartment house manager for him, which she accepted in writing, but repudiated within a few days immediately upon discovery of the true facts.

In the circumstances shown, plaintiff's physical occupancy of two apartments for a month, his receipt of \$223.50 rent money, and his attempted employment of Mrs. Barnes as manager, did not constitute an interruption in the lawful possession of the trustee under the power conferred by the deed of trust. The acts of plaintiff, which he must have known by the exercise of ordinary intelligence constituted an infringement on the rights of the trustee, on no theory can give him the right to recover as damages, for wrongful withholding, any part of the rents collected by said trustee and applied in accordance with the trust agreement.

[8] Upon the whole evidence adduced, defendants were entitled to judgment as a matter of law. Had the jury returned a

verdict for plaintiff, it would have been the duty of the trial court to set it aside, or of this court to reverse it on appeal as without support in the evidence. It follows that the court below did not err in directing a verdict. *Umsted v. Scofield Engineering Const. Co.*, 203 Cal. 224, 263 P. 799; *Hunt v. United Bank & Trust Co.*, 210 Cal. 108, 291 P. 184; *Estate of Flood*, 217 Cal. 763, 768, 21 P.(2d) 579; 24 Cal. Jur. 912; 10 Cal. Jur. 1165. The judgment having been entered on a directed verdict, findings of fact were not required to be filed.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; PRESTON, J.; THOMPSON, J.



4 Cal.2d 128

BRANT v. CALIFORNIA DAIRIES, Inc.,

et al.

L. A. 13972.

Supreme Court of California.

July 30, 1935.

Rehearing Denied Aug. 29, 1935.

1. Contracts ☞14

In determining whether contract has been made undisclosed intention of parties to the contract is immaterial in absence of mistake, fraud, and the like, and the outward manifestation of assent is controlling.

2. Appeal and error ☞842(1)

In construing contract question whether uncertainty or ambiguity exists is one of law and lower court's finding on such issue is not binding on appeal.

3. Evidence ☞461(1)

Testimony by party to contract as to his intention and interpretation of clauses in letters forming the contract to prove there was no meeting of the minds and thus no contract held inadmissible under parol evidence rule where testimony was in direct conflict with plain meaning of the writing constituting the contract.

4. Contracts ☞147(2)

Where terms of agreement are set forth in writing and words are not ambiguous, the writing constitutes the contract of the parties

and a party may not escape its obligations by showing he did not intend to do what his words bound him to do.

5. Corporations 3399(7)

Vice president and sales manager of dairy corporation who had for years contracted with dairyman on behalf of the corporation and had made all negotiations and contracts for handling of dairyman's milk held to have ostensible authority to contract for the milk on behalf of the corporation, so as to impose liability on corporation for its breach of a contract made by vice president with dairyman under which corporation had received the benefits for considerable period.

In Bank.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by D. O. Brant against the California Dairies, Inc., and another. From a judgment for defendants, plaintiff appeals.

Reversed.

Prior opinion, 38 P.(2d) 846.

Chapman & Chapman and Ward Chapman, all of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for respondents.

LANGDON, Justice.

This is an action for breach of contract to distribute milk.

Plaintiff is the owner of a dairy ranch in Los Angeles county, where he produces a high grade of milk from purebred Guernsey cows. In 1925, Crescent Creamery Company, defendant's predecessor, took over the marketing and distributing of plaintiff's milk, under an agreed schedule of prices, subject to modification by mutual agreement, and without any fixed duration for the contract.

Some time prior to 1929 defendant California Dairies, Inc., succeeded to the business of Crescent Creamery Company, and proceeded with the distribution of plaintiff's milk on the same basis. In January of that year plaintiff informed K. L. Carver, vice president in charge of sales of defendant company, that he was dissatisfied with their marketing agreement, which did not handle his entire output, and that he proposed to reduce his herd unless an arrangement to take the surplus could be made. A number of letters were written by plaintiff and Carver. It is plaintiff's contention that

these letters resulted in a contract whereby defendant agreed to market a certain quantity of milk, 950 quarts per day, increasing this amount each month by 50 quarts, until a maximum of 1,500 quarts was reached; and that the contract was not terminable except upon one year's notice. It is defendant's contention, first, that Carver had no authority to bind defendant to any contract involving purchase of a definite quantity of milk, for a definite period, and at a fixed price; and, second, that if he had such authority, the contract actually entered into was a trial arrangement which could be terminated by defendant if the obligation became burdensome.

After some performance, defendant, on or about March 27, 1930, notified plaintiff that it would refuse to distribute his milk after April 10, 1930. Thereafter defendant refused plaintiff's tender of milk, and plaintiff disposed of his product elsewhere. The present action for damages followed. The complaint seeks damages for shortages prior to the time of notice of discontinuance, as well as for breach of the executory obligations.

The trial court found, in brief, that Carver in good faith believed that the agreement was simply one to attempt increased distribution, and that if this proved unsuccessful, the parties were to negotiate for a price reduction or other modification of terms, and that if this could not be agreed upon, then they were to be mutually released. Accordingly, the court concluded that the minds of the parties had never met, and that defendant committed no breach when it failed to distribute the above-mentioned quantities of milk, and failed to give one year's notice of termination of the agreement.

Judgment was given for defendant, and plaintiff appealed.

The negotiations of the parties were by correspondence, and the agreement is to be found in the letters interchanged by them. It is necessary, therefore, to set forth this correspondence in some detail.

On January 19, 1929, plaintiff wrote Carver that unless defendant was willing to take substantially his entire output at a fixed price, he was going to sell part of his herd and terminate the agency.

Carver did not at once reply, but on February 7, he wrote plaintiff as follows:

"If we can keep our present pace of increasing Brant sales, we should be able to

add at least an average of fifty quarts per day per month for a few months. My thought is that instead of accepting the proposition you offer, we should continue on the old basis, but with a commitment on our part to sell and pay for at our present price, until your present surplus production is absorbed, at least fifty quarts per day on the average more than we have sold during each preceding month.

"If, with this commitment hanging over our heads, it still becomes absolutely impossible for us to increase our sales this rapidly and the burden of paying the penalty that might result from our not being able to increase sales as outlined above, should become unbearable, then we will have to put our feet under the same table and talk it over—either admit that we have fallen down and release you to make some other connection, or work out whatever seems best at the time.

"Frankly, I hesitate to make the above commitment; nevertheless, I realize your position and I want to do everything reasonable to improve the situation so that you will be satisfied. I always have been enthusiastic about the marketing of your milk and I feel that it would be a very severe blow if we ever had to give it up."

On February 11, 1929, plaintiff replied to Carver's letter, as follows:

"* * * In foregoing this chance of making a sale of a good part or all of our cows, I think it only right that you agree to give us as much notice if you discontinue your agreement as you ask for building up our trade to the 1500 quart limit, so that we will have ample time to make other arrangements for the successful sale of our milk which will have fallen away under your management if you find it necessary to discontinue. This time period, as it works out under our plan, is one year.

"I will understand in accepting your commitment that you agree to the points above made, which are briefly 950 quarts as the starting point for January, 1000 daily for Feb. and so on; one year's notice of discontinuance and approval in advance for our half of the advertising expenses which will be necessary to sell the milk.

"Unless I hear from you to the contrary, I will understand that the above is also your understanding. * * *

Carver made no reply to this letter, and plaintiff wrote him again on March 4, 1929, requesting a reply to the letter of February 11, 1929.

On March 7, 1929, Carver made this reply:

"From the last paragraph of your recent letter, I assumed that it would not be necessary for me to answer your letter confirming the arrangement, unless I disagreed on some of the points. I believe our letters pretty well set forth what our understanding is, when coupled with our previous arrangements.

"When I get to it, I believe I should recap our various arrangements and letters into one condensed document, which would be concise and to the point.

"In the meantime, we will continue to operate as per our recent correspondence."

In reliance upon this understanding, plaintiff gave up the opportunity to sell any part of his herd, and installed additional equipment.

In a letter dated June 8, 1929, Carver referred to bills for shortages during the months of April and May, stating: "These figures are perhaps correct and are in accordance with our agreement made about the first of the year; however, we certainly should have the number of quarts of milk represented by these shortages to us as a credit against these charges."

There can be no doubt that the above correspondence resulted in a contract by the terms of which Carver undertook to bind defendant to market increasing quantities of plaintiff's milk each month; and that the agreement was made not subject to termination except upon one year's notice. Carver's indefinite counterproposals were definitely rejected by plaintiff; the terms of plaintiff's proposal were stated clearly and explicitly, and Carver's letter of March 7, 1929, was undoubtedly an acceptance thereof.

The trial court, as stated above, found that the minds of the parties never met. This finding is based upon certain testimony of Carver, admitted over plaintiff's objection. Counsel for defendant read that portion of plaintiff's letter which specified one year's notice of discontinuance, and then asked Carver:

"Q. What interpretation did you put on the clause asking for a year's time? A. I don't know that I paid any particular attention to that at the time. I considered the letter as a whole. Other than that if our prices be readjusted so it was possible for us to sell the milk, I was perfectly willing to allow a year's notice, because at the time I had no intention of discontinuing the sale

of the milk if we could make a price that would make it possible for us to sell it.

"Q. Did you interpret that request for a year's notice as an agreement that if you could not sell it at the then price, and could not make an adjustment, that you would have to continue for a year? A. No, absolutely not. * * *

[1-3] Other statements of similar character were admitted. Together they amount to nothing more than a statement of what Carver personally believed the agreement of the parties to be. But it is now a settled principle of the law of contract that the undisclosed intentions of the parties are, in the absence of mistake, fraud, etc., immaterial; and that the outward manifestation or expression of assent is controlling. This is the "objective" standard, established by the modern decisions and approved by authoritative writers. See *Zurich Gen. Acc., Etc., Co. v. Ind. Acc. Com.*, 132 Cal. App. 101, 22 P.(2d) 572; *McConnell v. Lamontagne*, 82 N. H. 423, 134 A. 718; 1 *Williston, Contracts*, § 21, p. 21; 4 *Wigmore, Evidence* (2d Ed.) p. 191; *Restatement, Contracts*, § 71. In construing a contract, the question whether an uncertainty or ambiguity exists is one of law, and the lower court's finding on this issue is not binding on appeal. *O'Connor v. West Sacramento Co.*, 189 Cal. 7, 207 P. 527. No showing of mistake is made here; and a fair reading of the correspondence discloses the terms of the agreement without uncertainty. The testimony of Carver as to his intention is in direct conflict with the plain meaning of the writings constituting the contract, and was therefore incompetent and inadmissible under the parol evidence rule. As the court said in *Payne v. Commercial National Bank*, 177 Cal. 68, 72, 169 P. 1007, 1008, L. R. A. 1918C, 328: "No authority sustains the proposition that under the guise of construction or explanation a meaning can be given to the instrument which is not to be found in the instrument itself, but is based entirely upon direct evidence of intention independent of the instrument." See, also, to the same effect, *Barnhart Aircraft, Inc., v. Preston*, 212 Cal. 19, 297 P. 20; *Fraters G. & P. Co. v. Southwestern Construction Co.*, 200 Cal. 688, 254 P. 1097.

[4] Defendant seeks to justify the admission of the evidence by citing cases concerned with equivocal acts, such as handing over a deed to a grantee, which cases hold that the grantor may testify as to his intent not to make a legal delivery. See, for example,

Howell v. Mays, 107 Cal. App. 751, 290 P. 898. The distinction, however, is fundamental. Because the act is equivocal, evidence of the intent of the party is competent and relevant to establish its legal effect. But where the terms of an agreement are set forth in writing, and the words are not equivocal or ambiguous, the writing or writings will constitute the contract of the parties, and one party is not permitted to escape from its obligations by showing that he did not intend to do what his words bound him to do.

[5] Some question is raised as to the authority of Carver to bind defendant by such an agreement. Carver was vice president, member of the board of directors, member of the executive committee, the manager of sales of defendant corporation. The lower court found, however, that though Carver had authority to contract to handle the milk on an agency basis, he had no authority, actual or ostensible, to contract for its purchase, and that plaintiff failed to exercise due care in ascertaining the extent of Carver's authority. We may assume that Carver had no actual authority to make the contract. But the record shows that for years he alone dealt with plaintiff, on behalf of defendant company, as well as its predecessor; that he handled all of the negotiations and made all of the contracts with plaintiff for the handling of his milk; that all modifications and changes in price were made by conference with him; that this particular contract resulted from protracted correspondence; and that defendant company received the benefits of plaintiff's performance for a considerable period, without ever giving any notice of limitations on Carver's authority. It further appears that after defendant company had succeeded to the business of Crescent Creamery, plaintiff, on January 9, 1928, wrote to "Mr. K. L. Carver, California Dairies, Inc.," and inquired what, if any, change in their arrangements would take place by reason of the coming in of this new corporation, and specifically asked, "Who are we now doing business with?" No written answer was made to the letter, but plaintiff testified that Carver stated orally that there would be no change, and this statement is not disputed by Carver. There are, therefore, all of the necessary elements of ostensible authority, despite any secret limitations or defective authorization. See *Leavens v. Pinkham & McKevitt*, 164 Cal. 242, 128 P. 399; *Robinson v. American Fish & Oyster Co.*, 17 Cal. App. 212, 119 P. 388; *Newton v. Johns-*

ton Organ, Etc., Co., 180 Cal. 185, 180 P. 7; Stevens v. Selma Fruit Co., 18 Cal. App. 242, 123 P. 212; Fairbanks v. Crump Irr. etc., Co., 108 Cal. App. 197, 291 P. 629, 292 P. 529; Restatement, Agency, § 43.

It is finally contended that even though plaintiff's interpretation, that is, of a binding contract terminable only by one year's notice, be accepted, still plaintiff was guilty of a material breach of condition in failing to make the necessary price adjustments upon which Carver understood defendant's obligation rested. The answer to this is simply that the correspondence contains no such condition, except by inference in Carver's counterproposal which was rejected by plaintiff. It may be observed, however, that the record contains a good deal of correspondence in which plaintiff displayed a thoroughly co-operative spirit in this connection, and no justification appears for the conclusion that he arbitrarily refused to agree to price reductions.

The judgment is reversed.

We concur: WASTE, C. J.; PRESTON, J.; THOMPSON, J.; SEAWELL, J.; SHENK, J.



4 Cal.2d 188

PEOPLE v. HENDERSON.
Cr. 3853.

Supreme Court of California.
Aug. 1, 1935.

Rehearing Denied Aug. 29, 1935.

1. Criminal law ⇨723(1)

In prosecution for contributing to delinquency of minor by giving her intoxicating liquor, statements of prosecuting attorney in argument which emphasized question of motive of defendant in giving liquor to minor by comment upon irrelevancy of such motive held prejudicial error, where evidence concerning nature of beverage given minor and whereabouts of minor from time of her departure from defendants' store until her return to her home was uncertain, and sister of minor had accused defendant of intention to rape minor by first causing her to become intoxicated.

2. Criminal law ⇨859

Where evidence of guilt of defendant of contributing to delinquency of minor was uncertain, failure to include testimony of defendant and that of another witness which fixed time at which minor left defendant's store on day in question with testimony of minor and part of testimony of defendant relating to time spent by minor in defendant's store which were read to jury after it had received case in response to its request to have read evidence relative to element of time, held prejudicial error.

In Bank.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

George Henderson was convicted of contributing to the delinquency of a minor, and he appeals from a judgment of conviction, from an order denying motion for a new trial, and an order denying motion to dismiss.

Reversed.

Prior opinion, 37 P.(2d) 1056.

Willis O. Tyler and Sylvester Isonberg, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

PRESTON, Justice.

Appeal from judgment entered upon jury verdict convicting defendant of the crime of contributing to the delinquency of a minor by giving her intoxicating liquor. Appellant urges insufficiency of the evidence to support the verdict and prejudicial error and misconduct alleged to have occurred during trial of the cause and in connection with charging the jury. It is unnecessary to pass definitely upon the first contention as said error, which under other circumstances might be nonprejudicial, may well have swayed the conclusions of this jury in view of the conflicting evidence and its doubtful sufficiency to warrant a conviction. The following is a résumé of some 200 pages of testimony taken on the trial.

The complaining witness was a Mexican high school girl, approaching 16 years of age, who resided at 1459 East Eighteenth street, Los Angeles, some five blocks from the general dry goods store and post office operated by defendant, a middle-aged

negro. Her story is that she had known the store, and defendant in connection therewith, for some two years; that on the afternoon of December 24, 1933, she left home with a man in a Ford car, a friend of her mother, who dropped her off at the home of a girl friend a few blocks away; that at the latter place nobody was home, so she left and walked to defendant's store, arriving shortly after 3 o'clock; that he was alone, as he had been on previous occasions when she patronized the store; that she asked to look at dresses; that while she was looking a man customer came in, was waited on, and left; that defendant offered her a dress cheap; that he then gave her a quarter and asked her to buy him a bottle of gingerale; that she went across the street and made the purchase; that when she told who it was for, the lady did not require her to pay a deposit on the bottle; that she returned and gave defendant the change and the gingerale; that she then resumed discussion of the purchase of a dress; that he insisted and practically forced her to drink a mixture of the gingerale and some other liquid; that altogether she had three glasses; that during this period, the above-mentioned man customer again came in the store and talked for some minutes with defendant; that she finally completed her purchase but became dizzy and fell on her knees, whereupon defendant hit her and in a daze she ran from the store and walked along the street, remembering no more until after she was taken from her home some hours later to police headquarters and a doctor.

The above-mentioned man customer was a police officer in plain clothes. He testified that he saw complainant on both visits to the store; that the first time she was looking at a dress; that he stayed four or five minutes; that some three or four minutes later, a little after 4 o'clock, he returned and as he entered the door he noticed the girl going up to her mouth with her left hand, having some kind of liquid in a glass or bottle; that he left very soon; that on both occasions defendant was leaning back near the cash register, well away from the girl; that on the second visit the dress was on the counter with wrapping paper and cord; that there were also on the counter a number of bottles of hair oils, toilet waters, cosmetics, lotions, etc., and the girl was standing near

the portion of the counter where the bottles were.

The owner of the store across the street from defendant's place testified to purchase of a bottle of gingerale by complainant between 2 and 3 o'clock and stated that later she went after the bottle, having taken no deposit on it; that as she was about to enter defendant's store some one stopped her on the street and while she was talking, she felt the empty bottle put in her hand by another person, by whom she did not notice.

Complainant's sister testified that complainant returned home about 6 p. m. To various persons she said that she heard an automobile draw up, and then complainant came in but she later testified that complainant was walking. At any rate, she said that complainant was not herself, was wobbling, and she did not know whether or not she was drunk; that complainant was carrying the package containing the dress and said she had been "with the big shot"; that she knew complainant had made the purchase at defendant's store; that she put complainant to bed and then went to defendant's store, where there was quite a scene. She made accusations against him, returned the dress, and received back the purchase price, \$2.95. She also called the police and complainant was taken to the police station and was also subjected to medical examination, which revealed bruises on her front left side, arm, knee, and lips.

A witness, John Turner, stated that he had been standing in front of the store by a mail box over the entire period of time covered by complainant's visit to the store. He testified that he saw her arrive there about 3:30 or 20 minutes to 4, driving up from the east in a Ford car with two young men; that he particularly noticed her, among the holiday crowd, because she almost got run over by another automobile in crossing the street; that she went directly to a little cigar stand on the corner, bought some kind of a bottle, which she gave to the boys in the automobile, whereupon they drove off northerly; that she then recrossed to defendant's store, entered inside; that about half an hour later the automobile came back, drove around the corner, stopped and waited 10 or 15 minutes; that complainant then came out of defendant's store, got in the automobile and they all drove away; that she came

from the store about 4:15 carrying a package wrapped in Christmas paper and that there was nothing wrong or unusual about her demeanor.

In the evening after the sister's report to the police, two officers called on defendant and looked over his store. Over objection they testified that they found a bottle with "dregs of whiskey" in it, a gingerale bottle and some Coca-Cola bottles.

Defendant throughout flatly denied having given intoxicating liquor, or any other kind of liquor to the complainant. He testified that he had been engaged in business in the same block for 14 years, at the location here mentioned for 12 years; that so far as he recollected he had never before seen complainant; that when complainant's sister called upon him to return the dress, she made accusations against him and threatened him with criminal prosecution if he refused to pay for medical treatment of complainant's injuries. This last statement was corroborated by another witness, who was in the store at the time.

It will be noted that if the defendant did in fact give complainant a drink of some kind, there was an utter failure to prove that the liquid, whether or not it was a mixture of gingerale and some other substance, was an intoxicating beverage. Defendant urges that on this point alone the case for the prosecution must fall. He further urges that it was clearly erroneous for the court to permit the police officials to testify that they found in his store a bottle containing "dregs of whiskey," as there was no identification of the bottle nor was it connected up or related in any way to complainant's visit to the store. The police officer stated that defendant told him that a man had brought the whisky bottle and some gingerale there the day before and consumed it in celebrating the holiday season.

It will also be noted that no account was given of complainant's whereabouts from the time she left defendant's store, about 4:15, until her return home about 6 o'clock. According to the witness Turner she drove away with the young men. Her own story is that she does not remember what she did, but presumes she just wandered dizzily along the street.

[1] In view of this uncertain state of the record we cannot but believe that defendant may have been injured in his substan-

tial rights by reason of the following remarks made to the jury in the argument of the prosecution and by reason of the further occurrence which will be hereinafter set forth:

Among other things, the prosecuting attorney in her argument stated: " * * * You are dealing here with a little Mexican girl, with a very Mexican type of femininity that those of you who know the Mexican people recognize perfectly. * * * Ladies and gentlemen of the jury, if I have my own opinion as to what motive he had they wouldn't let me give it to you, and I haven't any right to give it to you even if he asked me. And what that motive was, whether it was Christmas spirit or whether it was a motive to see just how much this girl might be worth some place else and how much liquor she could hold, ladies and gentlemen, is not a problem here. What his motive was in giving her the liquor is neither here nor there. * * * " In connection with these remarks should be considered the sister's accusation that it was defendant's intention to rape the complainant by first causing her to become intoxicated.

[2] But even more injurious to defendant than the above, was the following occurrence: The case went to the jury at 3:30 p. m. At 4:57 they came back into court to have certain testimony read. The court asked what their desire was, whereupon the following conversation was had:

"A juror: Your Honor, the gentleman wasn't quite sure about the time. * * *

"The Court: Don't say whether he was quite sure. If you want to ask for some testimony to be read, ask for it, but don't say anybody was not quite sure about anything. That would be misconduct.

"The Juror: Well, he wanted to know the time the girl left the store and the time she got home.

"The Court: Are you asking to have the testimony of the girl read?

"The Juror: Yes, Your Honor. The Court: That is, the complaining witness or her sister. * * *

"The Juror: Better have the sister's, I guess.

"The Court: All right. * * * "

"The reporter then read some three pages of the sister's testimony, to the effect that complainant returned about 6 o'clock.

"The Court: Do you want anything further read?

"The Juror: Your Honor, is it a proper question to ask if there is anything in the testimony that would indicate what time the girl left the store? That is the question that seems to be in doubt.

"The Court: Do you wish to have a portion of Officer Echols' testimony read?

"Miss Woodhead (representing the State): If Your Honor please, may I suggest that the only statement as to the time the girl left would be the girl's statement, which was a statement to the effect—well, I won't say what it was.

"The Court: Is it satisfactory to read Celia Ponce's (complainant's) testimony in regard to that?

"The Juror: Yes, Your Honor.
* * *

The reporter then read some sixteen lines from complainant's testimony to the effect that she went to the store about 3 o'clock and did not know how long she stayed. Also, on further request of a juror, two lines from defendant's testimony were read to the effect that complainant was in his store about 25 minutes. The reporter then said: "I find nothing else in his testimony regarding the time." The court asked the jury if it wanted anything else read; there was no response, and the jury retired to again deliberate on a verdict. Over five hours later, to wit, at 10:32 p. m., they returned into court to announce their verdict of conviction.

It will be noted that the prosecuting attorney's remark, that the testimony of complainant would be the only other statement on the element of time with respect to which the jury was in doubt, was erroneous. Furthermore, the reporter's statement that he found nothing else in defendant's testimony regarding the time was also erroneous. Defendant testified: "I figure that Miss Ponce had left about 4:15, something like that, so it must have been about two hours or more before Mrs. Moore came in * * * about 6:30. * * *" Still further, the court failed to call to the attention the definite testimony of the witness Turner on the element of time. He testified: "She came out, got in the car and they went west on 12th Street and that is the last I saw of it * * * when she came out she had a package wrapped in Christmas paper.

"Q. You are now referring to the time she came out of Henderson's store? A. Yes.

"Q. What time was it? * * * A. It was about 4:15."

Who can say that the jury, in their 5-hour deliberation, might not have reached an opposite conclusion had they had the benefit of having reread to them that which they requested, to wit, all of the testimony touching the element of time, particularly the time that complainant left defendant's store. As above stated, complainant's whereabouts from 4:15 to 6 o'clock are not satisfactorily accounted for.

As the errors above noted require a reversal of the judgment, it is unnecessary to discuss the further contentions of appellant.

The judgment is reversed.

We concur: WASTE, C. J.; LANGDON, J.; THOMPSON, J.



4 Cal.2d 31

ATWOOD et al. v. HAMMOND et al.

L. A. 14751.

Supreme Court of California.

July 1, 1935.

Rehearing Denied July 30, 1935.

1. Navigable waters ☞37(8)

1911 act held to convey tidelands to city of San Diego as sole owner, as against contention that act only granted city right to make improvements in harbor, lease wharves, piers, and other harbor facilities, and collect rents therefor (St. 1911, p. 1357).

2. Navigable waters ☞37(8)

Constitutional provision withholding tidelands fronting on navigable waters and within two miles of incorporated city or town from grant or sale to private persons does not prohibit grant of tidelands to municipal corporations (Const. art. 15, § 3).

3. Navigable waters ☞37(2)

Attempted grant in violation of constitutional provision withholding tidelands fronting on navigable waters and within two miles of incorporated city or town from grant or

sale to private persons is void (Const. art. 15, § 3).

4. Navigable waters ⇨37(8)

Municipality granted tidelands by state holds tidelands subject to constitutional provision withholding certain tidelands from grant or sale to private persons (Const. art. 15, § 3).

5. Navigable waters ⇨37(8)

Grant of title to tidelands to city of San Diego by 1911 act *held* not negated by amendments to 1911 act changing terms upon which city was permitted to lease tidelands and harbor facilities and permitting city to grant franchises as well as leases (St. 1911, p. 1357; St. 1913, p. 77; St. 1915, p. 1323; St. 1917, p. 916).

6. Navigable waters ⇨37(8)

Grant of tidelands to municipality, subject to public trust and accompanied by delegation of right to improve harbor and exercise control of harbor facilities, does not place tidelands entirely beyond supervision of state, but state may continue to protect public interests (St. 1911, p. 1357).

7. Navigable waters ⇨37(8)

Conveyance of tidelands to city of San Diego as sole owner in 1911 precluded state from thereafter granting such tidelands to city and county as joint owners (St. 1911, p. 1357; St. 1929, p. 1550).

8. Navigable waters ⇨38

Reclamation of tidelands conveyed to city of San Diego by state by deposit of material removed in dredging and deepening harbor *held* proper exercise of authority to make harbor improvements conferred on city by state in act conveying tidelands (St. 1911, p. 1357).

9. Navigable waters ⇨38

By establishing bulkhead or pierhead line in harbor, federal government consented to reclamation of land shoreward of such line, but, without reclamation and further action by state, trust for navigation and commerce, subject to which state or municipality holds title to tidelands, was not abrogated.

10. Navigable waters ⇨38

Reclaimed tidelands, although no longer, because of changed nature thereof, subject to public easement for fishing and navigation, may remain dedicated to public uses connected with and which tend to promote commerce, navigation, and fishing (Const. art. 15, § 2).

11. Navigable waters ⇨38

Reclamation of tidelands granted to city of San Diego in interests of commerce, navigation, and fishing did not ipso facto terminate public trust for navigation and com-

merce, although uses changed from those which attached while land was covered and uncovered by tides, but state could by legislative action terminate public trust as to reclaimed tidelands (St. 1911, p. 1357; St. 1917, p. 1943; St. 1929, pp. 1058, 1550).

12. Navigable waters ⇨38

Constitutional provision, although making all grants of tidelands subject to public easement, does not forbid reclamation of tidelands filled in as result of beneficial program of harbor development (Const. art. 15, § 2).

13. Navigable waters ⇨38

Legislature could free lands, originally granted to city of San Diego as tidelands and reclaimed during harbor development, from public easement and authorize use of lands as site for city and county buildings, on finding that land was no longer required for navigation, commerce, or fisheries (St. 1911, p. 1357; St. 1917, p. 1943; St. 1929, pp. 1058, 1550; Const. art. 15, §§ 2, 3).

14. Navigable waters ⇨38

Freeing of tidelands reclaimed by city of San Diego from public easement for navigation and commerce *held* not to infringe any right of federal government (St. 1911, p. 1357; St. 1929, pp. 1058, 1550).

15. Commerce ⇨10, 18

Congress has power to regulate waters as incident of power to regulate interstate commerce, but, in absence of exercise of such authority, states have full power over waters and tidelands within their jurisdiction.

16. Navigable waters ⇨38

Statute freeing reclaimed tidelands previously conveyed to city of San Diego from public easement and purporting to grant reclaimed tidelands to city and county jointly as site for city and county buildings, although ineffective as grant because of previous conveyance to city, constituted proposal by state to free land from trust for navigation and commerce on condition that city and county take steps to cause title to be vested in them jointly and dedicate land to county and municipal purposes, which proposal could be put in effect by joint agreement of state, city, and county (St. 1911, p. 1357; St. 1917, p. 1943; St. 1929, pp. 1058, 1550).

17. Navigable waters ⇨38

Provision of charter of city of San Diego for creation of harbor fund for furtherance of navigation and commerce from revenues derived from tideland leases and franchises *held* not to limit power of city and state to free from trust for uses connected with navigation and commerce reclaimed tidelands which state found were no longer required for commerce, navigation, and fishing (St.

1919, p. 1533, c. 8, § 2; St. 1929, pp. 1533, 1570).

18. Appeal and error ⚡762

Statement in respondents' brief that certain sum had been paid, where undenied in appellants' reply brief, established payment.

19. Appeal and error ⚡460(2)

Appeal from judgment dissolving temporary order restraining payment to state did not stay dissolution of temporary restraining order.

20. Appeal and error ⚡162(1)

Question of plaintiffs' right to enjoin payment to state *held* moot, on appeal from judgment dissolving temporary order restraining payment, where payment to state had been made.

In Bank.

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by Frank E. Atwood and others against Chauncey R. Hammond, as County Auditor, and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

H. C. Gardiner, of San Diego, for appellants.

Alfred Haines, Sanders & Jacques, all of San Diego, amici curiæ.

C. L. Byers, City Atty., H. B. Daniel, Deputy City Atty., Thomas Whelan, Dist. Atty., and J. B. Abbey, Deputy Dist. Atty., all of San Diego, for respondents.

SEAWELL, Justice.

Plaintiffs appeal from a judgment for defendants entered after defendants' demurrer to the amended complaint had been sustained without leave to amend. Plaintiffs are residents and taxpayers of the county of San Diego, and taxpayers of the city of San Diego. They name as defendants the city of San Diego, the county of San Diego, the auditor of the city of San Diego, and the auditor of the county of San Diego.

The action involves a tract of reclaimed land, described in the complaint as containing 18 acres, which formerly was covered and uncovered by the flow and ebb of the tides in the bay of San Diego. The city and county of San Diego propose to establish a civic center upon said property. Plaintiffs contend that an act of the Legislature of 1929 (Stats. 1929, p. 1550) purporting to grant said 18-acre parcel to the city and

county as joint owners is invalid for the reason that it is part of a larger area previously conveyed by the state to the city as sole owner, and that said tract remains subject to the public trust or easement for commerce, navigation, and fishing, and cannot be diverted to uses not connected therewith, such as a civic center.

We are of the view that upon the allegations of the complaint it appears that title to said land was vested in the city as sole owner at the commencement of the action. But it does not follow therefrom that plaintiffs were entitled to a decree that it remained subject perpetually to the public trust for commerce, navigation, and fishing. They were not entitled to such a decree, nor to enjoin the city and county from taking steps to cause title thereafter to be vested in them jointly. Their prayer that the auditor of the city and the auditor of the county be restrained from each paying \$500 to the state to comply with the act purporting to grant the 18-acre parcel to the city and county as joint owners will be considered hereinafter.

In 1911, the state granted to the city of San Diego tidelands of the bay of San Diego lying bayward of said city. Stats. 1911, p. 1357. The grant was made upon the express condition that the city expend \$1,000,000 in harbor improvements within three years, which time was later extended. In connection with the work of harbor improvement, a section of the harbor was dredged and by deposit of the dredged material on the tidelands a portion of the tract granted was reclaimed. The 18-acre tract which is the subject of this action is included in the area thus reclaimed. It is alleged in the complaint that a bulkhead line was established by the United States government in 1912 200 feet in front of or bayward from the lands which are the subject of this action. A seawall was erected in front of the 18-acre tract along the bulkhead line as thus fixed. The strip of land 200 feet wide which separates the land which is the subject of this action from the seawall has, in compliance with the grant, been set aside by the city for a municipal belt line railroad, to be operated in conjunction with the system of docks in the harbor.

In 1917 the Legislature found that the city had fully and carefully performed each and all of the terms and conditions of the grant of 1911, and that title to the lands therein

described was vested in the city subject only to the public trust for navigation, commerce, and fishing. Stats. 1917, p. 1943, Senate Concurrent Resolution No. 25. In 1929 the Legislature passed two acts applying to lands granted by the Act of 1911. By the first enactment in 1929 (Stats. 1929, c. 642, p. 1058) it declared that all lands included in the original grant which lay shoreward from the bulkhead line as established by the United States government had ceased to be tidelands, and were free from all trusts and restrictions imposed by the Act of 1911, as amended, except the restriction against alienation. This act provided that it should not limit, supersede, or affect any law to be passed at the same session granting any portion of the lands described to the city and county jointly for county and municipal purposes. By a subsequent act of the same session (Stats. 1929, c. 778, p. 1550), the Legislature purported to grant the 18-acre tract which is the subject of this action, and which was part of the larger area previously granted by the state to the city as sole owner, to the city and county as joint owners, "to be used only for county and municipal purposes, including the erection and maintenance thereon of county and municipal buildings."

[1] Defendants city and county of San Diego contend that the Act of 1911 was not a conveyance of land to the city as sole owner, but only a grant to it of a right to make improvements in the harbor, with the right to lease wharves, piers, and other harbor facilities, and to collect rents therefor. The language of the act refutes this contention. The title of the act describes it as "An act conveying certain *tide lands* and lands lying under inland navigable waters situate in the Bay of San Diego. * * *" (Italics supplied throughout.) The preamble of the act refers to the power of the state to "convey to municipalities limited and defined areas of such *lands*" in the interests of commerce, navigation, and fishing. By its terms the act *grants* and *conveys lands* lying between the line of mean high tide and the pierhead line in the bay. Provisions prohibiting alienation of the *lands* described, and providing for reversion to the state of "the *lands* by this act conveyed," upon a violation of any of the provisions of the act, are inconsistent with defendants' position that no lands were granted to the city. Likewise inconsistent, is the legislative resolution of 1917, which contains this provision: "Title to the tide lands therein described [in Act of 1911] is vested in the city

of San Diego, subject only to the public trusts therein enumerated." The Act of 1917 authorized the city to convey 500 acres to the United States government free of the public trust. Even the Act of 1929 purporting to convey the 18-acre tract to the city and county as joint owners described it as "a portion of the *land heretofore granted* to the city of San Diego."

Grants of waterfront lands similar in form and expression to the Act of 1911 have been interpreted repeatedly as conveyances to municipalities of tidelands subject to the public trust for navigation and commerce. Stats. 1911, p. 1254, City of Oakland v. Larue Wharf, etc., Co., 179 Cal. 207, 176 P. 361; City of Oakland v. E. K. Wood Lbr. Co., 211 Cal. 16, 292 P. 1076; Stats. 1909, p. 665, Cimpher v. City of Oakland, 162 Cal. 87, 121 P. 374; Stats. 1911, p. 1304, City of Long Beach v. Lisenby, 175 Cal. 575, 166 P. 333; Strand Improvement Co. v. Long Beach, 173 Cal. 765, 770, 161 P. 975; Stats. 1911, p. 1256, City of Los Angeles v. Anderson, 206 Cal. 662, 275 P. 789; City of Los Angeles v. Pacific Coast Steamship Co., 45 Cal. App. 15, 187 P. 739; see index to Deering's General Laws 1931, title "Waterfront," where statutes affecting particular towns are listed; 18 Cal. Jur. 1030; 26 Cal. Jur. 334. That there may be a delegation of the right to make harbor improvements, without a conveyance of the legal title in the land is recognized in People v. Banning Co., 166 Cal. 630, 138 P. 100. But the grant made to the city of San Diego by the Act of 1911 is not of such nature.

[2-4] Section 3, article 15, Constitution, does not prohibit grants of tidelands to municipal corporations. City of Oakland v. E. K. Wood Lbr. Co., 211 Cal. 16, 23, 292 P. 1076; Cimpher v. Oakland, 162 Cal. 87, 121 P. 374. Said section withholds tidelands within two miles of any incorporated city or town, and fronting on navigable waters from grant or sale to *private* persons, partnerships or corporations, and an attempted grant in violation of said provision is void. People v. California Fish Co., 166 Cal. 576, 138 P. 79. Upon a grant by the state to a municipality it will hold the land subject to the restrictive provisions of section 3, article 15. Cimpher v. Oakland, supra; 26 Cal. Jur. 335; 18 Cal. Jur. 1035.

[5, 6] We do not regard the fact that the Legislature by amendments to the Act of 1911, in 1913, 1915, and 1917 (Stats. 1913, p. 77, Stats. 1915, p. 1323, Stats. 1917, p. 916) changed and added to the terms and condi-

tions upon which the city was permitted to lease tidelands and harbor facilities, and enlarged the rights of the city by permitting it to grant franchises as well as leases, as negating a grant of title to the city by the Act of 1911. Upon a grant to a municipality, subject to the public trust, and accompanied by a delegation of the right to improve the harbor and exercise control of harbor facilities, as in the case herein, the lands are not placed entirely beyond the supervision of the state, but it may continue to protect the public interests. See *Illinois Central R. v. Illinois*, 146 U. S. 387, 13 S. Ct. 110, 36 L. Ed. 1018. The question as to how far the state may go in changing regulatory provisions contained in an original granting act is not involved in this case. Neither party objects to the amendments made in 1913, 1915, and 1917.

Defendants cite *Dean v. City of San Diego* (D. C.) 275 F. 228; *Id.* (C. C. A.) 284 F. 970, in support of their contention. The plaintiff *Dean*, a resident of Louisiana, brought suit in California, claiming title to certain lands below the line of ordinary high tide through a conveyance by the city of San Diego in 1871, at which date the city had no title to the land in question. He claimed that title acquired by the city under the Act of 1911 inured to his benefit. Both the district court and the circuit court pointed out the express restriction against alienation in the grant of 1911. We think the decisions of both courts, properly construed, go no further than to hold that the city did not acquire a title in 1911 which would inure to the benefit of the plaintiff. The tidelands were granted to the city subject to the public trust for navigation and commerce, and while they remained subject to said trust, by virtue of the provisions of section 3, article 15, Constitution, as well as the express restrictions against alienation in the grant, the title acquired by the city could not feed the title of plaintiff on the theory of estoppel by deed.

[7] In the light of our conclusion that the state, having conveyed the tideland area to the city as sole owner in 1911, could not thereafter, in 1929, grant said land to the city and county as joint owners, we now pass to consider the validity of other provisions in the legislation of 1929 which freed the 18-acre tract from the public trust for navigation, commerce, and fishing, and declared that it be used only for county and municipal purposes, including the erection of county and municipal buildings. Plaintiffs contend that all lands granted by the

Act of 1911 must remain subject perpetually to the public trust for navigation and commerce.

[8,9] In the above discussion we have considered the validity of grants of tidelands by the state to municipalities subject to the public trust for navigation and commerce. We have now to consider the authority of the state to terminate said trust as to an area of reclaimed land. The reclamation of this area was a proper exercise of the authority to make harbor improvements conferred by the state on the city in the Act of 1911. The lands were reclaimed by the deposit of material removed in dredging and deepening the harbor. The Act of 1911 required that the city maintain accommodations for ocean-going vessels of the largest class, with a depth of water at piers of not less than 35 feet. The Act of 1917 expressly found that the city had performed all conditions of the grant of 1911, and confirmed title in the city. By establishing the bulkhead or pierhead line in the harbor in 1912, the federal government consented to reclamation of land shoreward of such line. *People v. California Fish Co.*, 166 Cal. 576, 599, 600, 138 P. 79. But the establishing of a harbor line does not of itself prior to reclamation and further action by the state abrogate the trust for navigation and commerce subject to which the state, or municipality, holds title to tidelands. *People v. Kerber*, 152 Cal. 731, 736, 93 P. 878, 125 Am. St. Rep. 93; *People v. California Fish Co.*, 166 Cal. 576, 599, 138 P. 79; 26 Cal. Jur. 309.

[10] In the case herein, the 18-acre tract which is the subject of this action has been reclaimed. By virtue of the fact that it is no longer tideland, covered and uncovered by the tides, the public easement which pertains to tidelands, a right to fish in and navigate in the waters above the land, can, in the nature of things, no longer persist. But, nevertheless, reclaimed lands may remain dedicated to public uses connected with and which tend to promote commerce, navigation, and fishing. *People v. California Fish Co.*, 166 Cal. 576, 600, 138 P. 79. The reclamation of tidelands aids commerce and navigation by providing space for piers, docks, wharves, and warehouses. In *City of Oakland v. Williams*, 206 Cal. 315, 274 P. 328, we held that the leasing of a municipally-built warehouse on filled land to a private corporation engaged in packing, processing, and shipping products was a public use in furtherance of the trust for naviga-

tion and commerce, subject to which the city held title to the lands. The building and leasing of the warehouse was part of a comprehensive plan adopted with the purpose of improving and developing a harbor, and providing facilities to common carriers by water, who are themselves engaged in fulfilling their obligation to the public.

[11] The grant to the city of San Diego in the instant case was expressly made in the interests of commerce, navigation, and fishing, and the Senate Resolution of 1917, enacted after the city had completed its \$1,000,000 program of harbor development, expressly found that the title of the city was subject to the trust for those purposes. In this situation we conclude that the reclamation of these tidelands in the bay of San Diego did not ipso facto terminate the public trust for navigation and commerce, which remained, although with uses changed from those which attached while the land was covered and uncovered by the tides. But we are further of the view that it was competent for the state by legislative action to terminate this public trust as to the 18-acre parcel, which constitutes but a small part of the area granted to the city.

The rule is broadly stated in a number of decisions, following the language of the Supreme Court of the United States in *Illinois Central Railroad Co. v. Illinois*, 146 U. S. 387, 452, 453, 13 S. Ct. 110, 118, 36 L. Ed. 1018, that "grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining" are sustained as irrevocable conveyances free of the public trust. *City of Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 183, 50 P. 277; *People v. California Fish Co.*, 166 Cal. 576, 585, 138 P. 79; *Messenger v. Kingsbury*, 158 Cal. 611, 613, 112 P. 65; *Forester v. Johnson*, 164 Cal. 24, 30, 127 P. 156; *Boone v. Kingsbury*, 206 Cal. 148, 183, 186, 188, 273 P. 797; 26 Cal. Jur. 328. One of the most notable examples of a series of grants free of the public easement is provided by the transfer of lands formerly covered by the waters of San Francisco bay, which today constitute one of the principal business districts of the city of San Francisco. The legislative acts authorized the sale and transfer of lands then submerged, but lying shoreward of a waterfront or harbor line established in said bay. *Stats. 1853*, p. 219, *Stats. 1855*, p. 226, *Stats 1867-68*, p. 716. These acts have

been interpreted as authorizing sales and transfers into private ownership free of any easement in the public for uses connected with navigation and commerce. *City of Oakland v. Oakland Water Front Co.*, supra; *Eldridge v. Cowell*, 4 Cal. 80; *Knudson v. Kearney*, 171 Cal. 250, 152 P. 541; *Shirley v. Benicia*, 118 Cal. 344, 50 P. 404; *Bolsa Land Co. v. Burdick*, 151 Cal. 254, 261, 90 P. 532, 12 L. R. A. (N. S.) 275; 26 Cal. Jur. 336.

[12, 13] The grants of lands in the bay of San Francisco antedated the enactment of sections 2 and 3, article 15, Constitution, and the statutory provisions of similar effect which preceded the constitutional sections. Section 3, as noted above, withholds all tidelands within two miles of any incorporated city and fronting on navigable waters from grant or sale to private persons, partnerships, or corporations. The effect of section 2 is to make all grants of tidelands subject to the public easement. *People v. Southern Pacific R. Co.*, 166 Cal. 614, 138 P. 94. In the case herein there has been no attempt to alienate the 18-acre parcel which is the subject of this action from public ownership, but, rather, an effort to require that it be used only for purposes not connected directly with navigation or commerce, that is, for county and municipal buildings. However, in view of the manifest purpose of sections 2 and 3, article 15, the prohibition against alienation necessarily implies a prohibition against freeing such tidelands from the trust for navigation and dedicating them to other uses while they remain tidelands. But said section cannot be interpreted to forbid the reclamation of lands which may be filled in as the result of a highly beneficial program of harbor development. It applies to tidelands, that is, to lands covered and uncovered by the flow and ebb of the tides, and, it has been held, to lands which are continuously submerged. It does not in terms apply to lands which, through reclamation, are no longer covered and uncovered by the tides, and have ceased to be tidelands. We are of the view that it was competent for the Legislature upon finding that the 18-acre tract was "not longer required for navigation, commerce or fisheries," to free it from the public easement for those purposes.

It has been said that the provisions of section 2, article 15, do not deprive the Legislature of the power to free a parcel of land which has been reclaimed from the public trust. *People v. California Fish Co.*, 166 Cal. 576, 598, 138 P. 79. A similar interpre-

tation of section 3, article 15, is supported by the court's discussion in *People v. Kerber*, 152 Cal. 731, 93 P. 878, 125 Am. St. Rep. 93.

While it may be that the inherent nature of the state's title in tidelands and its duty to protect the public interest is such that it could not free from the public trust all reclaimed lands lying shoreward from a bulkhead line, as provided in the earlier 1929 enactment herein, without reserving any land for warehouses or other facilities, this question need not be decided in the case herein. It does not appear whether all lands lying shoreward of the bulkhead line have been reclaimed, nor that the seawall extends the entire length of the grant to the city. The second enactment of 1929, which relates only to the 18-acre parcel which is the subject of this action, frees it from the public trust for navigation and commerce. Plaintiff does not allege what proportion of the total area lying shoreward of the bulkhead line or seawall this 18-acre parcel constitutes. But the inference is that it is only a very small part of the total acreage. That the total extent of the grant to the city was large, is indicated by the fact that in 1917 the state authorized the city to convey 500 acres to the federal government. We cannot interfere with the Legislature's decision that the public easement may be abrogated as to this relatively small parcel.

[14, 15] The freeing of this parcel from the public easement did not infringe on any right of the federal government. Although Congress has power to regulate waters as an incident of the expressly granted power to regulate interstate commerce, in the absence of the exercise of this authority, the states have full power over waters and tidelands within their jurisdiction. *People v. California Fish Co.*, 166 Cal. 576, 599, 600, 138 P. 79; *Forestier v. Johnson*, 164 Cal. 24, 39, 127 P. 156; *Henry Dalton & Sons Co. v. Oakland*, 168 Cal. 463, 143 P. 721; 27 R. C. L. 1324, 1333. By establishing a harbor line in the bay, as noted above, the federal government consented to reclamation of lands shoreward of said line. *People v. California Fish Co.*, *supra*.

Chapter 778, Statutes of 1929 (page 1550), which relates particularly to the parcel which is the subject of this action, not only declares it free from the public trust for navigation and commerce, but purports to grant it to the city and county jointly, declares that it shall be used only for county and municipal purposes, including the erec-

tion and maintenance of county buildings, and requires that \$1,000 be paid to the state in consideration of the conveyance. Thus, the legislative declaration freeing this parcel from the public trust is not a severable provision, but part of a scheme whereby said parcel was to be freed from the public trust for navigation and commerce that it might be dedicated to county and municipal purposes.

[16] We have heretofore held that the grant to the city and county as joint owners was ineffective, as the state had already conveyed title to the city, subject only to the public trust for navigation, commerce, and fishing. Hence the state by unilateral action could not divest the city of its title, nor annex a different use to this 18-acre parcel. But the state, the city, and the county jointly may agree that if the state frees the parcel from the easement for commerce and navigation, the city shall take steps to cause title to be vested in the city and county jointly, and said city and county will thereafter hold the land dedicated to county and municipal purposes. By reason of the fact that title was vested in the city, chapter 778 is in effect an offer by the state to free the parcel from the trust for navigation and commerce on condition that the city and county take steps to cause title to be vested in them jointly and dedicate the land to county and municipal purposes. It was competent for the state, as a condition to its consent to free the parcel from the trust for navigation, to require that it be dedicated to county and municipal purposes. The land had been granted by the state to the city subject to the public trust for navigation, and no compulsion rested upon the state to free this particular parcel from said trust, which remained even though the land was reclaimed.

Aside from the allegations of the complaint that the city and county co-operated to procure the enactment of chapters 642 and 778, Statutes of 1929 (pages 1058, 1550), the allegations of the complaint are to the effect that the city and county by ordinance have evinced a desire to accept this offer and to effect a transfer to the city and county jointly by any means by which it may be accomplished. Plaintiffs pray that said city and county be perpetually enjoined from effecting such a transfer on the theory that the tract must remain subject forever to the trust for navigation and commerce. Upon the complaint they were not entitled to such a decree.

[17] Plaintiffs refer to the provisions of section 2, chapter 8 of the charter of the city of San Diego (Stats. 1919, p. 1533), which provides for the creation of a harbor fund, to constitute a trust fund for the furtherance of navigation and commerce, in which were to be placed all revenues derived from tideland leases and franchises and other income from harbor improvements, to be devoted to the purposes of the trust. If the 18-acre tract which is the subject of this action is used for county and municipal buildings no revenues will be derived therefrom which will be paid into the harbor fund, plaintiffs contend. The charter provision requires that such revenue as may be derived from tideland leases and harbor improvements shall be placed in the harbor fund. It does not operate as a limitation on the power of the state and city to free from the trust for uses connected with navigation and commerce this 18-acre parcel, which the state found was not longer required for commerce, navigation and fishing.

We conclude that one of the purposes of the law in authorizing the conveyance by the state of its tidelands to municipalities is to promote the general welfare of said municipalities and of the grantor itself. We are unable to see that any detriment will come to the state, the federal government, or the people by the dedication of the parcel of land described herein to the proposed uses.

[18-20] The appellants also sought to enjoin the city and county from each paying \$500 to the state to comply with the provisions of chapter 778, Statutes of 1929 (page 1550), which required that \$1,000 be paid to the state as a consideration for the conveyance to the city and county as joint owners. Since the \$1,000 payment was expressly required to be made as a consideration for the conveyance to city and county jointly, rather than as a payment for the state's consent to free the parcel from the trust for navigation, and since the act could not operate as such a conveyance for the reason that the state had previously conveyed to the city as sole owner, we are inclined to the view that the sum of \$1,000 was not due to the state. However, the question whether the city and county should be enjoined from paying this sum has become moot. Respondent city of San Diego and city auditor of San Diego state in their brief that in fact the sum already has been paid. Re-

spondents county of San Diego and county auditor adopt all allegations of the city's brief as their own. Appellants fail to deny the fact of payment in their reply brief. In this situation respondents' unchallenged statement may be accepted to establish payment. The judgment for defendants dissolved the temporary restraining order against payment to the state, and the appeal from the judgment did not stay a self-executing provision, such as that dissolving the temporary restraining order. 2 Cal. Jur. 438-440, and cases there cited. Appellants cannot enjoin the payment to the state of a sum already paid.

We have hitherto held that the plaintiffs upon the allegations of their complaint were not entitled to the other injunctive relief which they sought. That is, they were not entitled to restrain the city and county from causing title thereafter to be vested in them jointly. Nor were they entitled to a decree that the land must remain subject to the trust for navigation and commerce. It follows that the judgment for defendants must be, and it hereby is, affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.



4 Cal.2d 152

CITY OF LOS ANGELES v. FORRESTER
et al.

L. A. 14920.

Supreme Court of California.

July 31, 1935.

1. Appeal and error ☞544(1)

If matters other than such as appear on face of judgment roll are sought to be reviewed, record thereof can be presented either by bill of exceptions or by reporter's transcript prepared under provisions of Code of Civil Procedure (Supreme Court Rules, rule 29; Code Civ. Proc. § 953a).

2. Appeal and error ☞597(1)

No record other than judgment roll is required on appeal from judgment roll alone.

3. Appeal and error ☞657(1)

Clerk's transcript which bore proper certificate of county clerk and certificate of tri-

al judge that transcript was true and correct and constituted entire record of proceedings, and which contained matter which had been certified only by trial judge, would not be returned to trial court with directions to segregate matters required to be certified only by judge from those included in clerk's transcript, where record was such that such action was unnecessary.

In Bank.

Action to quiet title by the City of Los Angeles, a municipal corporation, against Marie Forrester and others. From an order denying plaintiff's motion for writ of possession after judgment for the plaintiff, plaintiff appealed, and the defendant moved to dismiss the appeal.

Motion to dismiss appeal denied.

Ray L. Chesebro, City Atty., F. Von Schrader, Asst. City Atty., and Randolph Karr, Deputy City Atty., all of Los Angeles, for appellant.

Randall & Bartlett, Kenneth W. Kearney, and Duggan & Wisdom, all of Los Angeles, for respondents.

WASTE, Chief Justice.

Judgment for the city of Los Angeles was entered in an action to quiet title to property claimed for park purposes. Subsequently, the city filed notice of motion for a writ of possession. Issuance of the writ was denied. Plaintiff thereupon appealed from the order denying the motion. A typewritten "Clerk's Transcript" was duly filed. Respondents moved to dismiss the appeal upon the ground that there is no proper record on appeal before the court, in that there is no bill of exceptions on file as required by rule 29 of this court.

[1, 2] The motion must be denied. If any matters other than such as appear on the face of a judgment roll are sought to be reviewed on appeal, the record thereof may be presented either by a bill of exceptions or by a reporter's transcript prepared under the provisions of section 953a of the Code of Civil Procedure. Rule 29 of this court, providing for the authentication of papers on appeal, distinctly so provides. *Sutcliffe v. Sutcliffe*, 220 Cal. 398, 401, 31 P.(2d) 195. Other than the judgment roll, no further record is required for appeals on the judgment roll alone.

[3] The clerk's transcript before us not only bears the proper certificate of the county clerk, but also contains a certificate of the

trial judge that the transcript is "true and correct, and constitutes the entire record used in the proceedings." An examination of the transcript discloses that pages 40 to 70, inclusive, should have been omitted therefrom and certified only by the trial judge as the record of the proceedings on motion for issuance of the writ of possession. The transcript contains a proper judgment roll and a record of the proceedings on motion for the issuance of the writ of possession, the latter not properly certified. It does not appear that any oral testimony was taken.

The court has, in some instances in similar cases, returned the transcript to the trial court with directions to segregate the matters required to be certified only by the judge from those included in the clerk's transcript. In the present instance, however, the record is so simple and so easily unscrambled that we deem such action unnecessary. This should not be taken as indicating in any way that the court countenances such poor preparation of records on appeal.

The motion to dismiss the appeal is denied.

We concur: SHENK, J.; THOMPSON, J.; PRESTON, J.; LANGDON, J.



7 Cal.App.2d 722

In the Matter of the ESTATE of Edgar MOORE, also Known as Edgar A. Moore, Deceased.

Willie Moore McDUGGLE, Appellant, v. Mary Agalice Moore ALLNETT, Respondent.
Civ. 5395 (3).

Supreme Court of California.
Aug. 19, 1935.

In Bank.

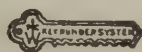
Appeal by a legatee from an order of the Superior Court of Madera County, Stanley Murray, Judge, of distribution of an estate in a proceeding to determine conflicting interests of two claimants thereto.

George Mordecai, of Madera, for appellant.

Mason A. Bailey, of Madera, for respondent.

PER CURIAM.

The petition for hearing in the Supreme Court after decision by the District Court of Appeal, Third Appellate District, 47 P. (2d) 533, is denied. Because of the amendment of section 1875, subdivision 3, of the Code of Civil Procedure (St. 1927, p. 110), relating to judicial notice, we withhold approval of that portion of the opinion of the District Court of Appeal relating to "the absence of any pleading or proof as to what the law of Texas may be in regard to the subject of adoption."



4 Cal.2d 242

MARCH v. PANTALEO et al.

Sac. 4926.

Supreme Court of California.

Aug. 26, 1935.

Rehearing Denied Sept. 23, 1935.

1. Vendor and purchaser ⇨229(2)

Attorney who, prior to rendering services to property owner under agreement that owner would transfer his ranch for attorney's fee, had inquired of owner as to existence of any liens against property and had been informed of existence of one creditor and one mortgage only, which records showed had been satisfied, held not required to have made further inquiry and hence was bona fide purchaser, notwithstanding existence of a second mortgage, unrecorded, to mentioned creditor.

2. Vendor and purchaser ⇨238

Transferee of bona fide purchaser of property without notice of prior unrecorded mortgage held to have obtained title superior to that of holder of unrecorded mortgage, regardless of whether transferee had notice.

In Bank.

Appeal from Superior Court, Stanislaus County; J. J. Trabucco, Judge.

Action by Harry A. March against Joseph Pantaleo and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Bush & Cleary, of Modesto, for appellant.

Griffin & Boone and Edward T. Taylor, all of Modesto, for respondents.

LANGDON, Justice.

This is an action to quiet title to a ranch near Riverbank, Cal. Vito Clarizio was the owner of the property prior to the transactions which led to the present controversy. He had previously, in 1925, borrowed money from plaintiff March, and given a deed of trust to secure the loan. A reconveyance of the property was made, and on December 14, 1930, Clarizio executed a new deed of trust to plaintiff, to secure a loan of \$650. The first of these deeds of trust was recorded, and the satisfaction and reconveyance thereof also appeared of record. The subsequent instrument was not recorded until much later.

In August, 1931, Clarizio retained defendant Edward T. Taylor of the law firm of Griffin & Boone to defend him on a criminal charge and agreed to the transfer of his ranch for the attorney's fee. Accordingly, on August 21, 1931, Clarizio executed a deed to defendant Griffin. The defendant Pantaleo purchased the property from Griffin, giving a deed of trust for the \$800 balance and receiving a quitclaim deed from Griffin dated September 1, 1931. Clarizio gave Pantaleo a grant deed dated the same day.

On September 12, 1931, at 9 a. m., the deeds from Griffin to Pantaleo and from Clarizio to Pantaleo were placed on record. At 9:58 a. m. of the same day the prior deed of trust from Clarizio to plaintiff March was recorded.

Thereafter plaintiff March proceeded to sell the property under his deed of trust, and purchased at the trustee's sale. The present action followed, and the trial court gave judgment for the defendants, holding that defendant Griffin had purchased the property from Clarizio on August 21, 1931, for valuable consideration, without knowledge of any prior rights therein. Plaintiff brings this appeal. It is stipulated that the sale under the deed of trust was regular, and that defendants Taylor, Griffin, and Boone were associated in the transaction and are bound by any notice or knowledge acquired by defendant Taylor.

[1,2] The deed of trust to plaintiff March was prior in time, and would be prior in right save for the failure to record it. It is conceded that the deed to Griffin was first recorded, and that at the time of said re-

cordation, no prior conveyance or encumbrance appeared of record. But Griffin's right is superior to plaintiff's only if Griffin is a bona fide purchaser, for the recording acts protect the subsequent purchaser who gives value before he has any notice, actual or constructive, of prior equities. *Bell v. Pleasant*, 145 Cal. 410, 78 P. 957, 104 Am. St. Rep. 61; *Chapman v. Ostergard*, 73 Cal. App. 539, 238 P. 1081; *Whitney v. Sherman*, 178 Cal. 435, 173 P. 931; *Olson v. Cornwell*, 134 Cal. App. 419, 25 P.(2d) 879; *Ocean Shore R. R. Co. v. Spring Valley Water Co.*, 218 Cal. 86, 21 P.(2d) 588. The question is, therefore, whether Griffin had either actual notice of plaintiff's prior claim, or constructive notice thereof by reason of facts sufficient to put him on inquiry, before he gave value, that is, before his law firm undertook the obligation to defend Clarizio. If he did not, then his title is good as against plaintiff, and defendant Pantaleo, his transferee, will likewise take a title superior to that of plaintiff, under the rule that a bona fide purchaser may clothe his transferee with a good title, regardless of whether the transferee had notice. See *Los Angeles Inv. Co. v. Torchia*, 106 Cal. App. 21, 288 P. 810.

The record shows that Taylor had several conversations with Clarizio during the month of August, 1931, with respect to putting up the ranch as a fee. As to one of these conversations, which took place on or about August 19, Taylor testified: "I asked him if he had ever borrowed any money on it, if he owed any money on it. * * * He said he had borrowed money from Mr. March, the barber. I asked him when, and he says he didn't know exactly. I said: 'Well, never mind that,' I would look it up in the records." Taylor also testified that he had asked Clarizio if he had ever borrowed any money from anybody except March, and Clarizio said that he hadn't. Thereupon Taylor searched the records, found the March deed of trust of 1925, then the satisfaction thereof and the reconveyance. There being no further record of encumbrances on the property, Taylor concluded that was clear.

In view of the finding of the trial court that Griffin was a bona fide purchaser without notice, we cannot say that Taylor's action was, as a matter of law, unreasonable. Clarizio mentioned but one mortgage and one creditor. The records showed that this

obligation had been satisfied and discharged. Further inquiries by Taylor were not, under these circumstances, necessary.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SHENK, J.



4 Cal.2d 229

MEYER v. KIRKWOOD et al.

CASE v. SAME.

L. A. 14499.

Supreme Court of California.

Aug. 22, 1935.

Rehearing Denied Sept. 20, 1935.

Work and labor ⇨ 28(1)

In action for labor performed and material furnished at defendants' request for irrigation and crop improvements to ranch which defendants had contracted to purchase, evidence held sufficient to sustain judgment for plaintiffs.

In Bank.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Separate actions tried together and consolidated for purpose of appeal, by Robert V. Meyer and by George S. Case against M. M. Kirkwood and others. From a judgment for plaintiffs, defendants appeal.

Judgment of superior court affirmed.

For prior opinion, see 38 P.(2d) 866.

Leonard J. Meyberg, of Los Angeles, P. N. McCloskey, of San Bernardino, and Paul M. Joseph, of Los Angeles, for appellants.

Walter C. Davison, of Riverside, for respondents.

PRESTON, Justice.

These causes, to foreclose liens for labor and material and for personal judgment against appellants, were tried together and consolidated for purposes of appeal. They grew out of the same transaction. The claims of lien were abandoned, but plaintiffs had personal judgment against defendants Kirkwood and White, who both appealed.

The liability of appellant White appears clearly from uncontradicted evidence. The liability of appellant Mrs. Kirkwood rests upon the inference that she acted partly upon her own initiative but mainly through the agency of her coappellant White, who is her son-in-law. The sole issue is the sufficiency of the evidence to warrant the findings and judgment entered against her.

Not only are we satisfied that the evidence supports the findings and judgment as to Mrs. Kirkwood, but in our view any other conclusion would result in a palpable miscarriage of justice. Enough of the facts will be recited to show the truth of this assertion.

Plaintiff and respondent Meyer, at the request of appellant White, who claimed to be acting in his own right as well as for appellant Kirkwood, his mother-in-law, laid on certain ranch property 1625 feet of 14-inch concrete pipe and 1275 feet of 12-inch concrete pipe, not less than 34 inches under the surface of the ground, and in connection therewith furnished 23 14-inch alfalfa valves, 3 24-inch control stands and 2 14-inch portable hydrants, the whole forming a complete irrigation system upon said property which is located in Riverside county and known in the record as the Wineville land, for the purchase of which property appellant Kirkwood had bound herself in writing by an instrument dated February 14, 1930. The above work was done between March 12 and April 1, 1930, the labor and material furnished being of the admitted reasonable value of \$1,563.10.

Plaintiff and respondent Case, acting upon the same request, made at the same time, between March 4, 1930, and April 19, 1930, improved 75 acres of the above-mentioned land by plowing, leveling, ridging, seeding, and extra disking, all of which work was done for the purpose of permanently improving it for the growing of alfalfa by means of irrigation; the admitted reasonable value of this work being \$1,455.

The alfalfa seed was furnished by some one and freight therein prepaid. The bill was for \$418.50, paid April 1, 1930, and the invoice was made out by the seller to "Mr. M. M. Kirkwood." There was no Mr. Kirkwood and the inference is too clear for controversy that appellant Kirkwood is the party to whom the seed was

billed and by whom the charge therefor was paid, either personally or through someone purporting to act for her. Her deposition was taken but she was not asked by her counsel whether she directly or indirectly paid this item. It was the clear duty of appellants to show who ordered and who paid for this seed if they expected to escape liability for the work and labor performed on said property. In view of the fact that work and labor of said character was in progress during said period of time and involved such open and extensive improvements upon said land, appellant Kirkwood cannot for a moment be absolved of liability on the pretext that she did not know the work was in progress. It is equally incredible that she did not know that her said son-in-law White had sworn to a criminal complaint charging the theft of certain personal property from the place, alleging her to be the owner thereof. White himself admitted that he told his mother-in-law about the trips he was making to the ranch. What could she have thought he was doing on the property, if not acting for its care and improvement?

As above stated, she had agreed to exchange certain property for this Wineville land, by a writing executed February 14, 1930. She intrusted the delivery of this document to her agent, White. Later he signed in her name the escrow instructions necessary to complete the transfer. She thereafter specifically referred to said escrow instructions as subsisting documents by a notice of rescission on the exchange agreement, signed by her and dated May 14, 1930.

In short, plaintiffs performed said labor and furnished said materials at the request of White, and appellant Kirkwood could not have been ignorant of the fact that he was acting in her name. When the bills came in she began to rue her bargain for exchange of properties and then decided also to repudiate these claims for labor and material. The court below was clearly justified in holding her liable. It is unnecessary to detail further facts.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.

4 Cal.2d 245

ST. JOHN v. ST. JOHN.

Sac. 4921.

Supreme Court of California.

Aug. 26, 1935.

Husband and wife ☞264

Evidence held insufficient to show that property in possession of husband at his death was separate property, with income and transmutations thereof, of his first wife, so as to entitle property to be adjudged part of and impressed with trust for benefit of first wife's heirs.

In Bank.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Action by Harry L. St. John, administrator of the estate of Frances A. St. John, deceased, against Ada A. St. John, administratrix of the estate of John L. St. John, also known as J. L. St. John, deceased, and Ada A. St. John, individually. From a judgment for the defendant, plaintiff appeals.

Affirmed.

Jesse W. Carter, of Redding (Dallas L. Barrett, of Redding, of counsel), for appellant.

Chenoweth & Leininger, of Redding, for respondent.

PRESTON, Justice.

John L. St. John and his first wife, Frances, were married for some twenty years, from 1880 until her death in 1900. The second marriage of John L. St. John, to defendant Ada A. St. John, lasted for some twenty-five years, to wit, from 1906 until his death on May 17, 1932. Three sons are surviving issue of the first marriage. There was no issue of the second marriage. On June 3, 1932, proceedings were instituted for the probate of the estate of John L. St. John and also for the probate of the estate of his said first wife. This action, commenced February 1, 1933, represents an effort by Harry L. St. John, a son by said first marriage, to secure for himself and his two brothers, through the estate of their mother, certain property in defendant's possession. Plaintiff, as administrator of the mother's estate sues the second wife, as administratrix of the father's estate and individually, asserting that all property in possession of the father

at the time of his death was the separate property, with increase and transmutations thereof, of said first wife.

The complaint states two causes of action, first, to have all said property adjudged a part of and impressed with a trust for the benefit of the estate of Frances A. St. John and her heirs; and, second, for possession thereof. The allegations of trust are predicated upon the theory that one who assumes possession of and deals with property of a deceased, without administration of her estate, holds such property in trust for the estate and those therein interested and, further, that John L. St. John expressly agreed to hold said property in trust.

The cause went to trial before the court without a jury, and thereafter findings and judgment were entered for defendant, from which plaintiff has prosecuted this appeal. The sole question is that of sufficiency of the evidence to support the findings and judgment. A review of the entire record leaves us without the slightest doubt as to the correctness of the conclusions of the court below.

Briefly, it appears that from 1880 to 1898 Frances and John St. John and their children resided in Chico, Cal., where John followed his trade as carpenter and ranch laborer. During this period Frances became the separate owner, through deed of gift from her mother, of three lots in Chico, two of which she deeded to her husband shortly before her death. The third lot she sold in 1896 for \$650. The record does not reveal the disposition made of this sum. Other property accumulated by the family during said period, including real estate and \$1,250 insurance collected in 1897 when the family residence burned, was, upon conflicting evidence, found by the court to be community property and not the separate property of the wife.

In the fall of 1898 the family moved to Shasta county, where Frances used gold coins out of a box in her possession to purchase cattle and equipment and make a \$500 down payment on a 520-acre ranch, known as Bald Mountain ranch, which she and John L. St. John contracted to buy for \$3,000 (\$500 down and \$2,500 within three years). There is nothing to identify the gold coins as part of the wife's said \$650, as part of the \$1,250 insurance money, or as part of other alleged separate or community assets. No further payments

were made upon the ranch until May, 1903, almost three years after the death of Frances.

Following the death of his first wife, John L. St. John increased his holdings. In 1902 he acquired the Montgomery place; in 1906, the Walker property. He and defendant second wife resided on the Bald Mountain ranch until 1910, when it was leased to plaintiff and they purchased the so-called Horr ranch and made it their home. In 1912 they purchased additional real property. Finally, in 1929, John L. St. John contracted to sell the Bald Mountain ranch for \$14,000; \$11,000 of the purchase price being secured by trust deed. This encumbrance was not paid off, and after the death of John L. St. John in 1932, the ranch was sold thereunder to defendant administratrix and thus passed into her possession.

It will be noted that the case, at least in so far as it concerns the Bald Mountain ranch, turns upon the evidence touching the character of the property possessed by Frances and John L. St. John at the time they moved from Chico to Shasta county. It is unnecessary to detail this evidence, which consists largely of testimony of the son Carl St. John and of plaintiff. They claim that their father, because of continuous poor health and physical weakness, was unable to progress in his trade and never earned more than enough to cover the bare living expenses and immediate needs of his family; indeed, that in 1887 he was adjudged insolvent and that when he left Chico in 1898 he possessed no separate money or property and that the community assets, in so far as cash was concerned, were nil. They claim that the original Shasta county purchases were made by the mother solely with the proceeds of her separate estate and that all properties subsequently acquired by the father were the fruits of this original investment by reason of his inability to contribute labor or earnings thereto. They claim that the father declared to them on numerous occasions that he would carry out his promise to their mother and her wish that the boys get all of her property, but for which promise she would have left a will bequeathing it to them.

Other witnesses, however, offered substantial testimony as to the business ability of John L. St. John, abundantly sufficient

to support the findings to the effect that he managed and farmed said properties and devoted to his own use the profits realized therefrom and the sale of the increase of the live stock and that during portions of the time he worked at his trade as a carpenter. Both sons, Carl and Harry, were over 50 years of age at the time this cause came to trial. They testified to transactions which occurred during their childhood, thirty or forty years before. The trial court was warranted in weighing this evidence, to discard that which he could not credit. Indeed, giving all plaintiff's evidence full value, it seems too indefinite to support his claims. Moreover, it conflicts in material particulars with the documentary evidence and the testimony of defendant's witnesses. There is ample proof of the father's ability and business capacity. There is nothing whatsoever to show that the accumulations following the original Shasta county investment were other than the fruitage of his skill, management, and labor performed under his direction. In short, there is ample evidence to support all of the findings of the court below. Indeed, the following statement, made by that court at the close of the trial, seems to properly sum up the situation: "Taking into consideration all the evidence and giving to each part the weight I think it should have considering the time element (of over forty years in some instances) and the conduct of the various parties all these years, including the admissions of the father, which might be considered as against interest and were therefore admitted, I cannot say that I can say with conviction that the Bald Mountain property or the cattle and other property originally purchased by the St. John parents were other than community property of both father and mother. The Horr property is community property of the second Mrs. St. John and the deceased. If any trust had existed all these years something should have been done to make it certain and capable of proof. This is absent. I therefore direct findings and conclusions to be prepared to support judgment for the defendant."

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.; SHENK, J.

4 Cal.2d 220

SOUTHERN CALIFORNIA ROADS CO. v.**SAN LUIS OBISPO COUNTY et al.****L. A. 15142.****Supreme Court of California.****Aug. 16, 1935.****Rehearing Denied Sept. 12, 1935.****Counties 192**

Mandatory and continuing duty existed to levy tax, not exceeding 10 cents on each \$100 of assessed valuation, to pay overdue principal and interest on bonds issued under County Improvement Act of 1921 and Improvement Bond Act of 1915 for improvement of streets which were dedicated to county as public highways, notwithstanding that improvements were of primary benefit only to property owners of particular residential district (St. 1915, p. 1441, as amended; St. 1921, p. 1658, as amended).

In Bank.

Petition for writ of mandate by the Southern California Roads Company against the County of San Luis Obispo, a public corporation, and others.

Writ issued.

Robert H. Dunlap and George R. Larwill, both of Los Angeles, for petitioner.

M. R. Van Wormer, of San Luis Obispo, and Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, for respondents.

LANGDON, Justice.

This is a petition for a writ of mandate to compel respondents to levy a tax to pay principal and interest on bonds of an improvement district.

In 1930, by resolution of the board of supervisors of respondent county, bonds were authorized under the County Improvement Act of 1921 (St. 1921, p. 1658, as amended) and the Improvement Bond Act of 1915 (St. 1915, p. 1441, as amended), to pay for improvement of streets in said county, all of which were dedicated to the county as public highways. Petitioner acquired a number of these bonds, and to-day holds coupons representing unpaid installments of principal and interest. Demand has been made for pay-

ment, and respondents have refused to transfer money into the bond redemption fund, and have also refused to levy a tax to meet the obligation. It is stipulated that a tax of 6 cents on each \$100 of assessed valuation of said county will produce the amount necessary to pay the delinquent installments.

This case comes squarely within the holding of the following recent decisions of this court: *American Co. v. City of Lakeport*, 220 Cal. 548, 32 P.(2d) 622; *American Securities Co. v. Forward*, 220 Cal. 566, 32 P.(2d) 343, 96 A. L. R. 1268; *Union Safe Deposit Bank v. City of Menlo Park* (Cal. Sup.) 43 P.(2d) 811, 45 P.(2d) 347. Under these decisions, a mandatory and continuing duty exists to levy a tax, not exceeding 10 cents on each \$100 of assessed valuation, to pay overdue principal and interest on the bonds.

Respondents have advanced the contention that the improvement herein involved was of primary benefit only to the property owners of a particular residential district, and that to make the owners of property in the entire county pay for it by means of a tax is to take their property without due process of law. The fact that the streets are part of the public highway is a complete answer to this objection. *American Co. v. City of Lakeport*, supra. Respondents also suggest that the statutory procedure by which the properties of persons delinquent in their assessments are sold to the state for the benefit of the county is confused, and does not protect the rights of the county. Specifically it is contended that since the statutes provide different periods of redemption from sales of property for delinquent assessments and delinquent general taxes, a separate sale must take place for each type of delinquency, and no such separate sales were had in this case. We express no opinion on respondents' interpretation of that part of the statute. A discussion of that procedure is wholly irrelevant in the present proceeding, which seeks to enforce a clear mandatory duty imposed by the statute.

Let a writ of mandate issue as prayed.

We concur: WASTE, C. J.; SEAWELL, J.; PRESTON, J.; SHENK, J.

4 Cal.2d 776

**D. F. SAWYER, Petitioner, v. COUNTY OF
SAN LUIS OBISPO (a Public Corpora-
tion) et al., Respondents.**
L. A. 15178.

Supreme Court of California.
Aug. 16, 1935.

In Bank.

Robert H. Dunlap and George R. Larwill,
both of Los Angeles, for petitioner.

M. R. Van Wormer, Dist. Atty., of San
Luis Obispo, for respondents.

LANGDON, Justice.

This petition for a writ of mandate pre-
sents a situation practically identical with
that involved in the case of Southern Cal-
ifornia Roads Co. v. County of San Luis
Obispo (Cal. Sup.) 48 P.(2d) 34, this
day decided.

For the reasons therein stated, it is or-
dered that a writ of mandate issue as pray-
ed.

We concur: WASTE, C. J.; SEA-
WELL, J.; PRESTON, J.; SHENK, J.



4 Cal.2d 222

GRIFFITH CO. v. LOS ANGELES COUNTY
et al.
S. F. 15423.

Supreme Court of California.
Aug. 16, 1935.

Rehearing Denied Sept. 12, 1935.

1. Mandamus 110

Where county board levied special tax to
meet unpaid installments of principal and in-
terest on improvement bonds and subsequent-
ly canceled appropriation, writ of mandamus
would issue to compel county board, treas-
urer and tax collector, and county auditor to
transfer money from county treasury to bond
redemption fund to make such payments.

2. Counties 192

Mandatory duty to levy special tax to
meet unpaid installments of principal and in-
terest on county improvement bonds is not
affected by procedure followed in sales for
delinquencies.

In Bank.

Petition for writ of mandate by the Grif-
fith Company against the County of Los
Angeles and others.

Writ issued.

Gibson, Dunn & Crutcher and Wood-
ward M. Taylor, all of Los Angeles, for
petitioner.

Everett W. Mattoon, Co. Counsel, and
J. H. O'Connor, Asst. Co. Counsel, both
of Los Angeles, for respondents.

LANGDON, Justice.

[1,2] This is a petition for a writ of
mandate to compel respondents to transfer
money from the county treasury to the
bond redemption fund to meet unpaid in-
stallments of principal and interest on im-
provement bonds. The facts and issues in
this proceeding are substantially similar to
those presented in Southern California
Roads Co. v. County of San Luis Obispo
(Cal. Sup.) 48 P.(2d) 34, and Sawyer
v. County of San Luis Obispo (Cal.
Sup.) 48 P.(2d) 35, this day decid-
ed. The only difference is that in the in-
stant case a special tax was actually levied
to meet the delinquency, but subsequently
the board of supervisors canceled the ap-
propriation. The respondent county herein
argues that unless there are separate sales
for delinquencies in assessments and gen-
eral taxes, its liability does not exist. As
we pointed out in Southern California
Roads Co. v. County of San Luis Obispo,
supra, the mandatory duty to levy the spe-
cial tax is not affected by the procedure
followed in sales for delinquencies, and it
is accordingly improper in this proceeding
to attempt to set forth the construction of
the statutory provisions governing such
sales.

Let a writ of mandate issue as prayed.

We concur: WASTE, C. J.; SEA-
WELL, J.; PRESTON, J.; SHENK, J.

4 Cal.2d 232

BENNETT v. UKIAH FAIR ASS'N et al.**UKIAH FAIR ASS'N v. THURSTON et al.**

Sac. 4940.

Supreme Court of California.

Aug. 23, 1935.

1. Appeal and error ⇨632

Second mortgagor suing to require trustees who were proceeding to sell under prior trust deed to hold for mortgagor's benefit any funds in excess of amount required to discharge trust deed held "adverse party," as regards right to be served with transcript, to appeal from judgment on owner's cross-complaint against trustees to restrain sale, since mortgagor had direct and immediate interest in subject-matter of appeal that would be affected by reversal of judgment.

[Ed. Note.—For other definitions of "Adverse Party," see Words & Phrases.]

2. Appeal and error ⇨632

Appeal from judgment on cross-complaint would not be dismissed on ground that adverse party was not first served with transcript, where transcript was timely filed.

3. Appeal and error ⇨635(1)

Appeal from judgment on cross-complaint would not be dismissed on ground that transcript was incomplete because of its failure to include original pleadings in cause as distinguished from pleadings in cross-action, since such matter could easily be adjusted by proceedings on suggestion of diminution of record.

—◆—
In Bank.

Appeal from Superior Court Mendocino County; Benjamin C. Jones, Judge.

Action by E. C. Bennett against the Ukiah Fair Association, E. P. Thurston, Lucile La Bastie and others, in which the Ukiah Fair Association filed a cross-complaint against E. P. Thurston and Lucile La Bastie. From the judgment on the cross-complaint, the cross-complainant appeals. On motions to dismiss the appeal.

Motions denied.

Keith C. Eversole, of Ukiah (W. H. Brunner and J. E. Pemberton, both of Ukiah, of counsel), for appellants.

H. L. Preston and Taft & Spurr, all of Ukiah, for respondent.

WASTE, Chief Justice.

Motions to dismiss.

Plaintiff, the holder of a mortgage on certain real property owned by the Ukiah

Fair Association, appellant here, which property was also subject to a prior deed of trust, commenced this action to require the trustees, who were then proceeding to sell under the deed of trust, to impound and hold for his benefit any and all funds received in excess of the amount required to discharge the prior trust deed indebtedness. The association, as owner of the property, filed a cross-complaint, naming as cross-defendants the trustees, respondents here, wherein it requested a declaration of rights under the deed of trust and a decree restraining any sale of the property by such trustees upon the grounds they had not been properly substituted as trustees, and that they had improperly instituted proceedings to sell within ninety days after the publication of the notice of default and election to sell and that any sale by such trustees would therefore be invalid and place a cloud upon its title. The trustees interposed a general demurrer to the cross-complaint, which was sustained. Upon refusal of the cross-complainant to amend, judgment of default was entered against it on the cross-complaint. Thereafter the trustees proceeded with the sale under the trust deed, and plaintiff, as holder of the subsequent mortgage, bought in the property.

The trustees, as respondents, move to dismiss the cross-complainant's appeal from the judgment on the cross-complaint upon several grounds, some of which, in effect, overlap. Simplified, it is requested that the appeal be dismissed because an asserted adverse party (the plaintiff mortgagor) was not named or served as a respondent, that the transcript is incomplete, and that, by reason of the sale by the trustees, the issues have become moot. The plaintiff and omitted "adverse" party has also filed a motion to dismiss, urging the same grounds.

[1,2] We are satisfied that the plaintiff is an "adverse party" within the meaning of our decisions. In *Johnson v. Phenix Ins. Co.*, 146 Cal. 571, 575, 80 P. 719, 721, an "adverse party" is defined as "one 'whose rights may be affected by a reversal of the judgment.' * * * 'Every party whose interest in the subject-matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken is, we think, an "adverse party," * * * irrespective of the ques-

tion whether he appears upon the face of the record in the attitude of plaintiff or defendant or intervener.' * * * The question is whether the judgment gives * * * something which will be taken away by a reversal." MacDonald v. Superior Court, 101 Cal. App. 423, 425, 281 P. 672, is to the same effect.

In our opinion, the rights of the plaintiff in this cause will be "affected by a reversal of the judgment" whether he be regarded merely as a subsequent encumbrancer seeking a share of the proceeds of the sale under the prior trust deed or as the purchaser at the trustees' sale. In either capacity, his rights are dependent upon such trustees' sale, and any attempt by way of cross-complaint or otherwise to preclude such sale or to have it declared invalid would have a material bearing upon such rights. In other words, he has a direct and immediate interest in the subject-matter of the appeal that would be affected by a reversal of the judgment. He is therefore an "adverse party" upon this appeal. However, the transcript having been filed within time, it is not fatal to the appeal that plaintiff was not first served therewith. Particularly is this true when it is considered that no longer is it essential to serve the respondent with the notice of appeal. Moreover, appellant apparently intends to confine the issues upon the appeal to those presented by the cross-action.

[3] If, as the movants contend, it should subsequently appear that the transcript in its present form is incomplete because of its failure to include the original pleadings in the cause, as distinguished from the pleadings in the cross-action, the matter may readily be adjusted by proceedings on suggestion of diminution of the record. The clerk of the lower court has certified that the papers included in the transcript constitute the judgment roll in the cross-action.

We are not prepared to now declare that the consummation of the sale by the trustees has foreclosed and rendered moot all of the issues presented by the cross-action or the appeal from the judgment therein entered.

A further ground, common to both motions, to the effect that the appeal lacks merit, may more properly be presented up-

on motion to affirm, if deemed advisable, following the filing of the appellant's opening brief.

The motions are and each is hereby denied.

We concur: LANGDON, J.; SEAWELL, J.; CURTIS, J.; SHENK, J.



4 Cal.2d 185

WESTERN UNION TELEGRAPH CO. v.
FIBUSH et al.
S. F. 15364.

Supreme Court of California.
Aug. 1, 1935.

Master and servant ☞393½

Physician's lien claim, for treating workmen's compensation claimant, filed before employer's final settlement with claimant, held improperly allowed against employer as "living expense," where physician's claim was for treatment which had nothing to do with and was not affected by the industrial injury, since statute specifically limited lien for medical services to cases where treatment was for industrial injury (St. 1929, pp. 323, 420, §§ 9(a), 24(a), b).

In Bank.

Certiorari to Industrial Accident Commission.

Proceeding under Workmen's Compensation Act by Margaret Kassebaum, employee, opposed by Western Union Telegraph Company, employer, wherein Arthur Fibush filed notice of lien. To review an award of the Industrial Accident Commission, allowing as a lien claim of Arthur Fibush, M. D., for medical treatment, employer brings certiorari.

Order annulled.

For former opinion, see Western Union Telegraph Co. v. Industrial Accident Commission, 38 P.(2d) 428.

Pillsbury, Madison & Sutro, of San Francisco (Francis Gill, of San Francisco, of counsel), for appellant.

Everett A. Corten and J. Francis Shirley,
both of San Francisco, for respondents.

PER CURIAM.

The petitioner seeks by this proceeding in review to annul an order of the respondent Industrial Accident Commission which directs the petitioner to pay the sum of \$178.50 to the respondent Arthur Fibush, M. D.

In August, 1929, Margaret Kassebaum was injured in the course of her employment with the petitioner by a counter door dropping on her neck. The petitioner, self-insured, provided medical treatment and paid to Mrs. Kassebaum the sum of \$1,632.94 in sickness and accident benefits. This sum, it is stated, equaled the highest rating to which she would have been entitled if all issues had been decided in her favor in a proceeding before the commission. She was treated for the injury by a member of the petitioner's medical staff until December, 1930, at which time she was discharged as cured. She later engaged Dr. Bill as her physician. He treated her until November 14, 1932, when she employed the respondent Fibush, who thereafter administered treatments.

On November 25, 1932, Mrs. Kassebaum applied to the commission for additional compensation and medical treatment. The application was resisted by the petitioner on the ground that it had paid to her the full amount to which she was entitled, and that her subsequent treatment by Dr. Fibush was not by its authorization nor for an ailment resulting from the industrial injury. At the suggestion of the referee of the commission the matter was brought to a compromise by which the petitioner agreed to pay \$800 to Mrs. Kassebaum. The compromise agreement was filed with the commission on October 4, 1933. Three days later Dr. Fibush filed with the commission a notice of lien for \$261.10 "for medical treatment furnished to the employee subsequent to her injury of August, 1929," and against any compensation payable to Mrs. Kassebaum. A copy of the notice of lien was received by the petitioner on October 9th, on which day the commission filed its order approving the compromise agreement. Notwithstanding its receipt of notice of the filing of the lien the petitioner paid the stipulated sum of \$800, with certain deductions not here involved, directly to Mrs. Kassebaum as provided in the

compromise agreement. This payment was so made by the petitioner on the advice of its counsel, who concluded that the finding and order of the commission precluded payment otherwise than in accordance with the order. The finding of the commission was that the medical attention furnished by Dr. Fibush to Mrs. Kassebaum was procured by her at her own expense and request and that the petitioner herein was not liable to her for the same. The commission further found that the medical services furnished by Dr. Fibush were not to cure or relieve an industrial injury, and that such services "were not needed or required to cure or relieve from an industrial injury." It appeared in evidence that the disability from which Mrs. Kassebaum was suffering and for which she was treated by Dr. Fibush was a spinal abnormality having nothing to do with and not affected by the industrial injury.

After the payment of the \$800 to its employee by the petitioner the commission held further hearings as to the claim of lien pressed by Dr. Fibush and decided that it could not allow the lien as and for medical services rendered to the employee, but that it would allow a lien as and for living expenses. The commission accordingly ordered the petitioner to pay directly to Dr. Fibush the amount claimed in his notice of lien. It is this order which is sought to be annulled.

The correctness of the conclusion of the commission depends upon the proper construction of the pertinent provisions of the Workmen's Compensation Act. Section 24 (a), St. 1917, p. 851, as amended by St. 1929, p. 323, provides that compensation awarded an applicant shall be paid directly to him and none other, unless otherwise ordered by the commission, and that such compensation shall not be subject to be taken for the debts of the party entitled to the compensation except as in the section provided. Subdivision (b) of section 24 provides that the commission "may fix and determine and allow as a lien against any amount to be paid as compensation," certain enumerated items, the second of which is "the reasonable expense incurred by or on behalf of the injured employee, as defined in subsection (a) of section nine hereof." Section 9 (a), St. 1917, p. 836, as amended by St. 1929, p. 420, provides that liability for compensation shall include such medical treatment "as may reasonably be required

**CAMERER v. CALIFORNIA SAVINGS &
COMMERCIAL BANK OF SAN
DIEGO et al.
L. A. 13905.**

Supreme Court of California.
July 31, 1935.

to cure and relieve from the effects of the injury." The third subdivision of section 24 (b) authorizes a lien on the compensation awarded for "the reasonable value of the living expenses of an injured employee * * * subsequent to the injury."

It appears beyond question that Dr. Fishbush was not entitled to a lien on the compensation awarded as and for medical services pursuant to subdivision 2 of section 24 (b), for the reason that such services were rendered by him for a nonindustrial disability, and the statute authorizes a lien for medical attention only "to cure and relieve from the effects of the injury." The question is whether the cost of medical aid may be treated as "living expenses" within the meaning of the act, and a lien therefor be allowed.

It is insisted by the respondent that the term "living expenses" includes payment for medical treatment. Although no authority or precedent on the subject is presented by counsel or discovered, it is assumed, at least, that under some circumstances and as a general proposition living expenses might include payment for medical treatment. It must, however, be concluded that under our statute medical aid was not so included. The two subjects are specifically and separately treated. The act allows a lien for the reasonable value of medical services rendered, but not without restriction. The limitation is, as stated, that such medical treatment must tend to cure and relieve from the industrial injury, which is not the case here, and the commission so found. It would be improper to hold that the cost of certain medical treatment, specifically found by the commission to be excluded as such from the pertinent lien provisions of the statute, could nevertheless be the subject of a lien under the general term "living expenses." Obviously it was never so intended by the legislature and the language of the statute excludes such a construction. When the commission assumed to accord vitality to the asserted lien it was acting in excess of its jurisdiction and its order attempting to do so must be annulled.

The authorities cited by the petitioner are not helpful. None involves the factual situation here presented. The result rests upon a construction of the statute with no persuasive argument in favor of an opposite conclusion.

The order is annulled.

1. Evidence ⇨5(2)

Supreme Court may take judicial notice that in fall of 1929 a phenomenal crash occurred in stock market, which marked onset of long period of economic depression and steadily declining property values.

2. Banks and banking ⇨76

In owner's action to recover bearer bonds intrusted to president of insolvent bank who used bonds to deceive bank examiners by fraudulent showing of assets, evidence held insufficient to charge owner with constructive notice of president's fraudulent scheme and owner was not estopped to reclaim bonds, notwithstanding bank's depositors and creditors would thereby suffer loss.

3. Banks and banking ⇨76

Insolvent bank purchasing bearer bonds with knowledge that owner had merely intrusted bonds to its president who used proceeds to effect a fraudulent showing of assets was not a purchaser in good faith of such bonds so as to preclude owner from recovering bonds or value thereof from receiver in charge of liquidation of bank.

4. Banks and banking ⇨77(3)

Liquidating receiver represents interests of depositors and creditors.

5. Receivers ⇨69

Receiver takes insolvent's property subject to all liens, defenses, and equities to which it is subject in insolvent's hands, and receiver administers on behalf of creditors no greater title or estate than debtor possessed.

6. Receivers ⇨167

Although insolvent debtor cannot set aside transfer in fraud of his creditors, as he is in pari delicto, receiver acting for creditors may attack such transfer.

7. Receivers ⇨67

Although unrecorded conveyance or mortgage is valid as against grantor or mortgagor, his receiver prevails over holder under unrecorded instrument under statutes providing that unrecorded transfers are void as to creditors.

8. Receivers ⇨69

Although receiver, in exceptional circumstances, is accorded rights denied to insol-

vent, receiver does not have status of bona fide purchaser for value.

9. Banks and banking ⇨76

Owner of bearer bonds permitting bank president to have access to deposit box solely to clip coupons of such bonds held not estopped to reclaim bonds fraudulently sold by president to insolvent bank, since access alone will not give rise to an estoppel.

10. Estoppel ⇨99

Estoppel based on intrustment, but without fraudulent connivance, should not be enforced beyond extent necessary to make good loss suffered through acts which form basis of estoppel.

11. Banks and banking ⇨77(4)

Even if owner of bonds wrongfully sold to insolvent bank was estopped to reclaim bonds, receiver of bank would not be entitled to retain possession thereof in absence of showing of amount of damages bank's depositors and creditors would suffer should owner prevail.

In Bank.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Clyde B. Camerer against the California Savings & Commercial Bank of San Diego and Edward Rainey, as Superintendent of Banks and trustee in charge of the liquidation of the California Savings & Commercial Bank. From the judgment, the defendants appeal.

Affirmed.

Prior opinion, 38 P.(2d) 837.

Elbert W. Davis and J. H. Hoffman, both of San Francisco, Gray, Cary, Ames & Driscoll, of San Diego, and Sullivan, Roche, Johnson & Barry, of San Francisco, for appellants.

Whelan & Whelan and Stearns, Luce & Forward, all of San Diego, for respondent.

PER CURIAM.

This case was transferred to this court upon plaintiff's petition for hearing after decision by the District Court of Appeal, Fourth District, reversing a judgment for plaintiff. Although we are of the view that the judgment for plaintiff must be affirmed, we hereby adopt as part of our opinion the statement of facts and certain conclusions based thereon, as they appear in the decision of the appellate court.

Respondent instituted this action against appellants, and others, to recover possession of \$45,500 par value of bonds and

other securities, or their value, if possession could not be had. Other relief was sought which it is not necessary that we consider here. Judgment was rendered against Edward Rainey, as superintendent of banks, for the recovery of the securities in his possession of the par value of \$44,500, or their market value in the sum of \$39,385, in case redelivery could not be made. The case against the California Savings & Commercial Bank of San Diego was ordered dismissed. We will hereafter refer to the California Savings & Commercial Bank of San Diego as the bank.

I. I. Irwin was a banker with an experience of more than eighteen years in the city of San Diego. Respondent was a medical officer in the United States Navy, a friend and acquaintance of Irwin, and a depositor in the financial institutions with which he was connected.

Irwin organized the California Savings & Commercial Bank of San Diego and became its president. He owned 4,112 out of a total issue of 5,000 shares of its capital stock. He dictated the policies of the bank except during the last few months of its existence as a going concern. About the time of its organization he persuaded respondent to transfer his account to the bank and to purchase 50 shares of its capital stock.

The California Safe Deposit Company of San Diego conducted a safe deposit business in the basement beneath the bank. While it had a separate corporate entity, it was a subsidiary of the bank and was controlled by it. On November 5, 1927, respondent rented a safe deposit box in which he kept his valuable papers. According to the signature card and rental agreement, C. B. Camerer, Mrs. C. B. Camerer, his wife, and I. I. Irwin were authorized to open the box. Respondent was frequently away from San Diego for considerable periods of time on duty with ships, at sea, or at hospitals in other localities. During such times Irwin, with the knowledge and consent of respondent, opened the safe deposit box, clipped and collected the coupons, and performed other services for him.

The bank continuously lost money from the time it opened until it was closed. Either quarterly, or semiannually, Irwin placed in the profit and loss account of the bank sufficient money to cover the loss of the period succeeding his prior payment so that no loss would appear on the books.

Irwin began using respondent's bonds in the fall of 1927, and continued using them in 1928 and 1929 whenever the bank needed money to make up its deficit. In all but one of these transactions he described his actions as follows:

"A. Well, as far as my memory serves me, at each quarter the bank needed money to pay the deficit, and when that occurred I took these bonds and sold them to the bank and deposited this money to my account and gave the bank a check to pay on the profit-and-loss account. Later on, when I had money in my account, I took the bonds back, and later on I put them back again. That is my recollection of it.

"Q. Did some of the other officers of the bank know the nature of these transactions? A. I suppose so. * * *

"A. Those bonds were turned over to the official who had charge of the bonds, and he made out the statement and credited the amount to my account and charged the bonds to the bank's bond account. That's my recollection.

"Q. During this period that you were speaking of, the bank was not making any profits, but, on the contrary, was losing money? A. Yes.

"Q. And needed the money at the end of each quarter to pay its running expenses? A. Yes.

"Q. And these bonds were simply manipulated in that way so that the bank would have money? A. Yes. * * *

"Q. Into which of the bank's accounts was that put? A. It was charged to my account and credited, as far as I know, to the profit-and-loss account of the bank.

"Q. Was the same thing done in regard to money ostensibly raised by the other negotiations with these bonds that you say were similarly sold to the bank? A. As far as I remember.

"Q. All went into the profit-and-loss account of the bank and it was needed for the running expense of the bank? A. Yes, sir."

Respondent at no time prior to the closing of the bank in July, 1930, had any knowledge that Irwin had sold any of his bonds or securities or used them as a pledge to secure payment of a promissory note to the bank, and prior to November 21, 1929, did not know that Irwin had removed any of the securities from the safe deposit box.

The "sales" of respondent's securities to the bank were made by Irwin upon his ex-

press understanding with the other bank officials that they were to be kept separate from other securities owned by the bank; that the bank would not sell them; that Irwin would repurchase them when he could; that the coupons would be clipped and delivered to Mr. Irwin. Irwin repurchased all of the securities "sold" to the bank prior to September, 1929, and returned them to the Camerer safe deposit box.

In the latter part of September, 1929, Irwin needed over \$20,000 to make good the losses of the bank. He removed securities of the par value of \$22,500 from the safe deposit box of respondent and "sold" them to the bank, at their market value, with the instructions we have outlined. These were never repurchased by Irwin, but, with the exception of one one thousand dollar bond which matured and was delivered to Irwin, remained in the possession of the bank and were taken over by the superintendent of banks when he closed it.

In the latter part of November, 1929, respondent made an unexpected and hurried return to San Diego. Irwin contacted him and explained that he wanted to rent the use of some of the securities. He explained to Camerer that the bank had ways of making profits from the securities in addition to their regular interest. Camerer consented and gave Irwin the securities he desired which were the same ones which Irwin had "sold" to the bank in September, 1929. They were all in Camerer's safe deposit box, though how, when, or by whom they were taken from the bank safe and returned to the Camerer safe deposit box is not explained. Irwin gave Camerer the following receipt and agreement:

California Savings & Commercial Bank
of San Diego
San Diego, Cal., Nov. 21, 1929
Bonds borrowed
from C. B. Camerer
by I. I. Irwin

As follows:

\$9,500—Bryant Building Inc.	6½%
\$3,000—Midland Counties Land Co.	7%
\$3,000—Otis Steel Co.	6%
\$5,000—Pickwick Corporation	7%
\$2,000—Utilities L & P Corp.	5½%

\$22,500—par value (Twenty Two Thousand Five Hundred Dollars)—

As security for the return of said Bonds I hereby deposit with C. B. Camerer

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Certificate No. ~~200~~ for two hundred (200) shares of the capital stock of the California Savings & Commercial Bank of San Diego to be redelivered to me upon the return by me to C. B. Camerer of the above Bonds.

$\frac{1}{4}\%$ (one quarter of one per cent.) Premium as hire to be paid by I. I. Irwin to C. B. Camerer of \$56/25 (Fifty six 25/100 Dollars) for each three months or less

November 21, 1929

I. I. Irwin.

On December 31, 1929, the bank again needed funds to make up its deficit. Irwin had one of his employees execute a promissory note to the bank in the sum of \$23,000, and pledged \$23,000 par value of respondent's securities for the payment of this note. The money was deposited to the credit of the employee, transferred to Irwin's account, then transferred to the profit and loss account of the bank. These securities are now in the possession of the superintendent of banks.

On January 8, 1930, Irwin telephoned the residence of respondent. Respondent was not at home and Irwin explained to Mrs. Camerer that he could use more securities under the same arrangement as before. She communicated with her husband who consented to the transaction. She went to the bank, opened the safe deposit box, where the exact securities which Irwin desired to use were reposing, delivered them to Irwin, and took a receipt in substantially the same form as the one dated November 21, 1929. The securities were the identical ones pledged to the bank to secure the note of December 31, 1929. How they were returned to the safe deposit box does not appear unless an explanation is offered in the testimony of Irwin that they might have been delivered to the bank after the date of the note.

The trial court found that the bank was insolvent on July 23, 1930; that it had been taken over by the superintendent of banks on that day, together with the Camerer securities of the par value of \$44,500; that these securities have remained in the possession of the superintendent of banks; that Irwin, in September and December, 1929, had neither right nor authority to sell, transfer, pledge, or convey any interest in the securities to the bank and that

the purported sale and pledge were made without the knowledge or consent of Camerer; that the money derived from the "sale" and pledge of the securities went into the funds and assets of the bank; that the receipt given by Irwin to Camerer on November 21, 1929, was given after the purported "sale" to the bank of the same securities described in the receipt; that the same was true of the receipt dated January 8, 1930, for the securities pledged to the bank on December 31, 1929; that Camerer had no notice or knowledge of the sale or pledge of his securities until after the bank was closed on July 23, 1930; that all, or most of the securities so sold or pledged to the bank, were purchased by Camerer through the bank and this fact was known to the assistant cashier of the bank at the time of the purported "sale" and pledge; that the two receipts for the securities dated November 21, 1929, and January 8, 1930, and signed by Irwin individually were executed by him for and on behalf of and for the benefit of the bank; that all the interest coupons were detached from the securities while in the possession of the bank, delivered to Irwin or the agent of Camerer, and deposited in Camerer's personal account in the bank; that all of the "sales" of the Camerer securities to the bank, and their pledge, between the fall of the year 1927 and January 9, 1930, were made by Irwin wrongfully, without any authority, and for the purpose of showing fictitious assets of the bank in order to deceive the superintendent of banks; that the bank had notice and knowledge through its officers that Irwin did not have title to the securities at the time of their "sales" and pledge; that the bank received the benefit of the unlawful sale and pledge of the securities to it.

All of the foregoing findings are supported by ample evidence or by reasonable inferences to be drawn from it.

The trial court made the following finding: "That in the transactions above referred to the said plaintiff acted in all respects as an ordinary, prudent person would act, having full confidence at all times in the integrity and honesty of the said defendant Irwin as president of the said California Savings & Commercial Bank of San Diego, * * * plaintiff was not negligent in accepting the receipts above referred to or in permitting the said California Savings & Commercial Bank of San Diego to borrow the said bonds and securities as represented by said receipts

above referred to, and the said plaintiff was not negligent in any of the acts done or taken by him, and was not negligent in the omission of any acts whatsoever." This finding is seriously assailed by appellants.

It will shorten this opinion to state frankly that if the bank were not an insolvent institution with its assets in the possession of the superintendent of banks, but were a going concern, we would unhesitatingly affirm a judgment which would require the return to Camerer of the securities which had been taken from him by the dishonest acts of the president of the bank. We are unimpressed with the argument that the receipts signed by Irwin on November 21, 1929, and January 8, 1930, gave Irwin authority to sell or pledge the securities. The "sale" occurred in September, 1929, two months before the first receipt was executed, and the pledge on December 31, 1929, a number of days before the second receipt was signed and delivered to Camerer. He had no knowledge of a prior conversion of his securities. That a person cannot ratify the unauthorized act of another of which he had no knowledge is too elemental to need support of authority. We are equally unimpressed with the argument that the bank and its officers, other than Irwin, neither had, nor should have had, notice of the fraudulent character of the several transactions in which Irwin purported to "sell" and pledge the securities. A large part, if not all of the securities, had been purchased for Camerer by the bank. The bank was not to dispose of any of them, but was to hold them for repurchase by Irwin. They were not to be placed among the securities owned by the bank, but were kept separate until a bank examiner ordered the practice discontinued a short time before the bank was closed. The coupons were clipped and delivered to Irwin, he giving his check to the bank for their face value. The coupons, or most of them, were deposited to Camerer's personal account. The "sales" were known to be "wash sales." The signor of the note was known to be a "dummy" and at least two officers of the bank objected to making the loan. All the transactions with the securities were made for the purpose of concealing the losses of the bank and deceiving the superintendent of banks as to its actual condition. Surely these and other facts which must have been known to the responsible officers of the bank

should have caused them to inquire into the good faith of the transactions.

The District Court of Appeal, after announcing the above conclusions, with which we are in accord, proceeded to hold that the facts presented called for the application of the principle that where one of two innocent persons must suffer, he who by his conduct has made possible the perpetration of the wrong should bear the loss. In the theory of the appellate court, Camerer, by intrusting possession of the bonds, which were payable to bearer, to Irwin or to the bank, under the hiring receipts described above, enabled Irwin to deceive the bank examiners by a fraudulent showing of assets, which was reflected in the statements of the bank's condition published periodically in the press, as required by law. As a result thereof, the bank was held out to the public and to its depositors and creditors as a sound institution and kept open beyond the date when it otherwise would have been ordered closed. If the bank had been closed at an earlier date, new deposits would not have been made, and existing depositors and creditors would have received a larger liquidating dividend than they will now receive. The District Court of Appeal expressly recognized in the portion of the opinion above quoted that the bank did not occupy the status of a holder in good faith of the bonds. But the appellate court was of the view that the defendant superintendent of banks, representing the creditors and depositors, could assert rights and defenses not available to the bank, and that in his capacity of receiver he was entitled to retain the bonds as assets for distribution to depositors and creditors. It was to examine this conclusion that we granted plaintiff Camerer's petition for transfer to this court.

[1] Plaintiff Camerer contends that there is no evidence that the bank examiner, and, through him, the depositors and creditors were deceived by the manipulation of Camerer's securities, and no evidence that the bank would have been closed at an earlier date had the said securities not appeared as assets of the bank, nor evidence that if the bank had been closed at an earlier date, the depositors and creditors would have received a large dividend. The substance of these contentions is that it is not shown that the depositors and creditors have in any way been prejudiced

by the acts of Irwin in relation to the Camerer bonds, wherefore Camerer should not be estopped to require their return to him. Without discussing this matter in detail, it must be said that the whole evidence will support no reasonable inference, but that the state banking authorities were in fact deceived by the fraudulent showing of assets, and by reason thereof the bank was permitted to continue doing business, receive new deposits, and incur new obligations. As to existing creditors and depositors, the conclusion is inevitable that they will receive a smaller dividend than they would have received had the bank closed earlier. The officers of the bank testified that it never earned expenses since its establishment in 1927. We may take judicial notice that in the fall of 1929 there occurred the phenomenal crash in the stock market, which marked the onset of a long period of economic depression and steadily declining property values. In a bank which at the time of the crash was not earning expenses, and which never afterwards earned expenses, the value of assets for distribution to depositors and creditors decreased as the bank remained open. Although it appears that the depositors and creditors have been prejudiced through the bank remaining open, it is true that the record is devoid of proof to establish the extent to which they have been damaged. This question as to proof of damage will be discussed hereinafter.

[2] Notwithstanding the depositors and creditors of the bank will suffer a loss, we are of the view that Camerer is not estopped to reclaim his bonds. No claim is made that Camerer colluded and connived with Irwin to deceive the bank examiner, or that he had guilty knowledge that Irwin desired to make a fraudulent showing of assets. The findings also negative defendant's contention that the circumstances connected with the "hiring" of Camerer's bonds were so unusual that he should have distrusted Irwin. The finding of the trial court, quoted above, was to the effect that plaintiff acted in all respects as an ordinarily prudent person would act, having full confidence at all times in the integrity and honesty of Irwin, and that plaintiff was not negligent in the acts done by him or in the omission of any acts. It cannot be said as a matter of law that the evidence compels the conclusion that plaintiff was chargeable with constructive notice of Irwin's fraudulent scheme. In this situation the finding of the trial court must stand.

[3] The bank was not a purchaser in good faith of the Camerer bonds. Although the transaction was manipulated in such a manner as to make it appear that the bank had given value for the bonds, in truth, there was nothing more than a series of bookkeeping entries designed to simulate an honest transaction. In September, 1929, a credit to represent the purchase price paid by the bank for bonds owned by Camerer of the par value of \$22,500 was credited Irwin, and he immediately caused his account to be debited in favor of the bank, with the result that the assets of the bank appeared to be increased by the value of the bonds without a corresponding increase in its liabilities. In the transaction involving the Snyder note, a credit to represent the proceeds of the note, secured by pledge of Camerer's bonds, was given Snyder, who transferred it to Irwin, and he immediately caused his account to be debited and a credit to be entered in the bank's profit and loss account, thereby increasing the assets without increasing the liabilities.

[4-7] There is testimony of doubtful import as to the bank paying \$54,000 to Irwin after January 8, 1930, to recompense him for securities transferred by him to the bank. But the evidence as to this payment and as to its being intended as a payment for the Camerer securities is doubtful and uncertain, and at any rate it would not place the bank in the position of a holder in due course, for the officers of the bank had actual knowledge of facts from which they must have inferred that Irwin was engaged in an unlawful and fraudulent scheme at the time of the transfer of the bonds to the bank. It would seem that Irwin later paid \$70,000 to the bank to make restitution to persons whom he had defrauded, but no part of this sum was paid to Camerer, it being applied to obligations which the officers of the bank regarded as more pressing. It is fundamental that a liquidating receiver represents the interests of depositors and creditors. It is equally fundamental that as a general rule, the receiver takes the insolvent's property subject to all liens, defenses, and equities to which it is subject in the hands of the insolvent, and that he administers on behalf of creditors no greater title or estate than the debtor had. 22 Cal. Jur. pp. 437, 488, 492, 518, 521, citing cases; 53 C. J. pp. 99, 324, 344, citing cases; 23 R. C. L. pp. 117, 121, citing cases. Without denying the validity of this gen-

eral rule, there are certain situations where the receiver is permitted to assert rights and defenses not available to the insolvent. Thus, it is held that although the insolvent debtor cannot set aside a transfer in fraud of his creditors, as he is in *pari delicto*, the receiver acting for the creditors may attack it. See 23 R. C. L. p. 116, citing cases. It is also held that although an unrecorded conveyance or mortgage is valid as against the grantor or mortgagor, his receiver prevails over the holder under the unrecorded instrument under statutes which provide that unrecorded transfers are void as to creditors. *Shooters Island Shipyard Co. v. Standard Shipbuilding Corp.* (C. C. A.) 293 F. 706, 716; *In re K-T Sandwich Shoppe* (D. C.) 34 F.(2d) 962. The justice and equity of such exceptions to the general rule that the receiver has only the rights of the insolvent debtor are apparent.

There is a further exception within which defendant receiver contends the instant case lies. There are a considerable number of cases arising in the various jurisdictions in this country where a receiver has brought suit upon a promissory note executed by the maker without consideration on the express understanding that it was to be used to make a fictitious showing of assets to the bank examiner, and thereafter to be returned to the maker, who was in no event to be held liable thereon. The bank, which is in *pari delicto* with the maker, cannot recover on a note given for such a purpose, but if it passes into the control of a receiver as an insolvent institution, recovery by the receiver is permitted. *German-American Finance Corp. v. Merchants & Manufacturers State Bank*, 177 Minn. 529, 225 N. W. 891, 64 A. L. R. 582; *First Nat. Bank v. Boxley*, 129 Okl. 159, 264 P. 184, 64 A. L. R. 588; annotation, 64 A. L. R. 595, collecting cases; *Brannan's Negotiable Instrument Law* (5th Ed.) p. 410; 28 *Yale Law Jour.* 823; 38 *Harvard Law Rev.* 239.

In this state, acceptance of the above rule was indicated in *Bank of Orland v. Harlan*, 188 Cal. 413, 206 P. 75, and *First National Bank of Reedley v. Reed*, 198 Cal. 252, 244 P. 368. Both of these cases involved suits brought by the bank, which was denied recovery on the ground that it would be indefensible to permit it to profit by its own wrong, but this court expressed its opinion that had the bank become insolvent and suit been brought by a receiver

recovery would be allowed. In the more recent case of *Wood v. Kennedy*, 117 Cal. App. 53, 3 P.(2d) 366, the superintendent of banks as receiver was plaintiff, and the court sustained his right to recover on a note used to make a fictitious showing of assets. In both *Bank of Orland v. Harlan* and *First National Bank of Reedley v. Reed*, the maker of the note knew that it was to be used to perpetrate a fraud under the banking laws. In *Wood v. Kennedy*, the appellate court said that while upon the record it did not care definitely to hold that the maker of the note gave it to the bank to be used to fraudulently increase its assets, such a conclusion was logical. Had Camerer delivered or permitted his bonds to be delivered to the bank to be used to deceive the bank examiner, upon the authority of the above cases, defendant as receiver would be entitled to retain them. But the trial court's findings exonerate Camerer from connivance and collusion in the fraud and from negligence. In cases involving negotiable promissory notes it has been held that the receiver of a bank cannot recover on the note where the maker was not a party to the deceit practiced on the bank examiner and was not aware that the note was to be used for an unlawful purpose. *Shaw v. Korth* (Tex. Civ. App.) 71 S.W.(2d) 332; *Browning v. Fuller*, 153 Va. 36, 149 S. E. 462; *Baird v. Miller*, 56 N. D. 142, 216 N. W. 340; *Hudson State Bank v. Richardson*, 128 Kan. 238, 276 P. 815; *Grant County State Bank v. Schultz*, 178 Minn. 556, 228 N. W. 150; *Crum v. Emmett*, 197 Iowa, 1160, 196 N. W. 982; 2 *Moss, Banks and Banking*, p. 1597.

Defendant receiver contends that although Camerer may not have been negligent in the sense that he should have mistrusted Irwin and anticipated an improper use of his bonds, nevertheless he had intrusted Irwin or the bank with possession and by the hiring receipts with authority to deal with the bonds, and this is sufficient to estop him from reclaiming the bonds. We are mindful of cases where an estoppel has been raised against the owner of indorsed certificates of stock or bearer bonds based on an intrustment of possession coupled with authority to deal in some manner with the securities, although the owner cannot be said to have been negligent in the sense that as a man of reasonable prudence he had cause to doubt the integrity of his agent. *Powers v.*

Pacific Diesel Engine Co., 206 Cal. 334, 274 P. 512, 73 A. L. R. 1398; *Lynch v. International Banking Corporation*, 68 Cal. App. 432, 229 P. 968; *Grange v. Judah Boas Co.*, 60 Cal. App. 484, 213 P. 712; 13 Cal. Law Rev. 251; 17 Cal. Law Rev. 403. In such cases the owner is the victim of misplaced confidence, and can be said to be negligent only in the restricted sense that he has placed it within the power of his agent to accomplish a fraud. This doctrine is applied to protect bona fide purchasers and pledgees, and may also be invoked in other situations where equity and good conscience dictate. But we do not find that its application is indicated in the situation herein.

[8] We have hitherto pointed out that it has been held in the promissory note cases that the receiver cannot recover where the maker was not a party to the fraud. It follows from our previous discussion that although the receiver is in exceptional circumstances accorded rights denied to the insolvent, the receiver does not have the status of a bona fide purchaser for value. 53 C. J. p. 100; 23 R. C. L. p. 56, citing cases. Banks commonly have in their lawful possession and under their control large quantities of securities, including indorsed stock certificates, bearer bonds, and negotiable promissory notes, which they hold upon express trusts with broad powers to dispose of such securities and otherwise deal with them in administration of the trust. Should such securities be misappropriated to deceive the bank examiner by fraudulently showing them to be assets of the bank, it could not be successfully contended that because the bank had been intrusted with possession, together with power to deal with the securities, the receiver for the bank, as against the beneficiaries of the trust, could retain them as an asset for distribution to depositors and other creditors. It seems readily apparent that the rights of the beneficiaries of express trusts would be in equity and good conscience superior to the claims of the depositors and creditors, represented by the receiver.

As in the hypothetical case outlined above, so in the instant case, the property consists of bearer bonds. In said hypothetical case we have assumed broad powers in the bank as trustee to sell and exchange the securities in administration of the trust, but their use to make a fraudulent showing of bank assets is incon-

sistent with the powers granted or implied. Likewise in the instant case, whatever may have been the rights of Irwin or the bank under the so-called hiring agreements, the use of Camerer's bonds to deceive the banking authorities was not authorized. There is a question presented in the case herein as to whether the intrustment under the hiring agreements was to Irwin as an individual or to the bank. The testimony of Camerer indicates that he believed he was dealing with the bank. On the other hand, the written receipts by which the agreement was reduced to written form tend to indicate that the intrustment was to Irwin, rather than to the bank. If the intrustment was to Irwin, the bank by reason of the guilty knowledge of its other officers became an involuntary trustee of the bonds for Camerer. And if the intrustment was directly to the bank, it, and after it the receiver, continued to hold the bonds for Camerer's benefit despite their fraudulent showing as assets of the bank, to which scheme Camerer was not a party. As in the hypothetical case of an express trust which we have assumed, so upon the facts of the instant case in equity and good conscience Camerer's claim to the bonds is superior to that of the bank's depositors and other creditors.

[9] Although the above analysis impels an affirmance of the judgment for the plaintiff, there is a further reason why the judgment should not be reversed if it be conceded, for purposes of argument, that an estoppel arose in favor of the receiver on the facts shown. The facts upon which an estoppel could be predicated did not arise as to the bonds of the par value of \$22,500, the subject of fictitious sale to the bank on September, 1929, until November 21, 1929, when Camerer signed the hiring agreement relating to said bonds, nor as to the balance of the bonds until January 8, 1930. On that date they were in Camerer's safe deposit box, although they then appeared in the bank's records as assets of the bank. Prior to the date when the hiring agreement was signed, and the bonds handed to Irwin in pursuance of said agreement, neither Irwin nor the bank had been intrusted with possession of Camerer's bonds nor with any power to deal with them. Irwin merely had been given access to Camerer's box to clip coupons during Camerer's absence and to place in the box new bonds bought by Camerer. The distinction between mere access and a real intrustment coupled with authority to deal

in some manner with the property is well settled. It is held that mere access alone will not give rise to an estoppel. *Crocker Nat. Bank v. Byrne & McDonnell*, 178 Cal. 329, 173 P. 752; *The Yamato v. Bank of Southern California*, 170 Cal. 351, 149 P. 826; *Kohn v. Sacramento Electric, Gas & R. Co.*, 168 Cal. 1, 141 P. 626.

[10, 11] On the date of the hiring agreement the bank was already in an unsound condition. Indeed it was in such a condition in 1927 and 1928, when Irwin first commenced to manipulate Camerer's securities. If the bank had been ordered closed upon the rendering of the bank's report soon after the execution of the hiring agreement of November, 1929, as it would have been but for the deception practiced on the bank examiner, it is highly probable that the depositors and creditors would not have received payment of their claims in full. An estoppel based on intrustment, but without fraudulent connivance, should not be enforced beyond the extent necessary to make good the loss suffered through the acts which form the basis of the estoppel. See note, 38 *Harvard Law Review*, 239. To assess damages in the case herein, it would first be necessary to compute the dividend which the depositors would have received had the bank been closed on an earlier date and to then estimate the dividend they will receive as a result of the closing of the bank on July 23, 1930, when it in fact closed. The difference will then represent the loss to existing depositors resulting from the deception practiced on the bank examiner. If the securities of other owners besides Camerer were similarly manipulated, they, pro rata with Camerer, would bear this loss, and to the extent not required to make good the loss, such securities should be returned to their owners. Conceding for purposes of argument only, that Camerer should be estopped on the facts shown, the evidence would not support a judgment for defendant receiver for the reason that he has failed to make a showing of the amount of damage.

Both respondent and appellant herein rely on our recent decision in *Verder v. American Loan Society*, 1 Cal. (2d) 17, 32 P.(2d) 1081, in support of the respective contentions. In that case plaintiff, upon request of the American Mortgage Company that a note for \$10,000 owned by her and secured by deed of trust be brought in for payment, deposited said instruments

with the mortgage company, which gave her a receipt that the note and deed of trust had been taken for collection. One Kundert, acting as a dummy for the mortgage company, executed a note and deed of trust, also for \$10,000, in favor of the American Loan Society, which was recorded. After the deed of trust to the loan society had been recorded, the mortgage company presented plaintiff's note and deed of trust to the trustees named therein and procured from said trustee a reconveyance, which was also recorded, with the result that the Kundert deed of trust executed in favor of the loan society became a first lien, and plaintiff's prior lien became discharged of record. The mortgage company never paid plaintiff the amount due on her note, but from time to time put her off on the ground that it had not yet been collected. Both the loan society and the mortgage company passed into receivership. The loan society's deed of trust was foreclosed and it acquired title in fee.

Plaintiff brought action to set aside the reconveyance of her deed of trust, and establish its status as a first lien. The mortgage company and loan society had interlocking officers and directors. The court held that the knowledge of the agents and officers of the mortgage company, who were also officers and agents of the loan society, made both corporations guilty participants in a conspiracy to defraud plaintiff, and decreed her deed of trust a first lien on the property described therein.

There, as here, it was urged that plaintiff was estopped to assert her claim against the receiver of the loan society, representing its depositors and creditors. The court held that the receiver could not prevail, first, because it could not be said that plaintiff in anywise was at fault or negligent in leaving her note and deed of trust with the mortgage company for collection. Secondly, the loss to creditors of the loan society by decreeing plaintiff's lien to be prior would not be direct, but consequential. The court further pointed out that it was not shown that the creditors and investors in the loan society became creditors after recordation of the fraudulent reconveyance of plaintiff's deed of trust, with the result that it did not appear that any one had parted with value relying on the new deed of trust as a first lien.

In the instant case we think it must be presumed that in the period of seven

months between the first hiring agreement and the closing of the bank deposits were made in a bank in a city the size of San Diego, and, further, we have pointed out that existing depositors and creditors suffered through the bank being kept open, although defendants failed to prove the extent of their loss. But the other grounds of the court's decision support plaintiff Camerer herein.

In the *Verder Case* it is stated that the rule permitting a liquidating receiver to claim certain rights and defenses not available to the insolvent corporation is applied to cases where the dealings of the insolvent are in fraud of the creditors' rights, or where the dealings are had directly between the third party claimant and the insolvent corporation. But such generalizations mean little except as applied to particular facts. In certain proper cases where the receiver has been permitted to assert defenses not available to the insolvent, it will be found that dealings were directly with the insolvent, or in fraud of the creditors' rights, but it does not follow that in all cases where either of these circumstances is present the receiver may assert rights not available to the insolvent in disregard of rules of law and equitable principles.

The judgment is affirmed.



8 Cal.App.2d 687

LORRAINE v. LORRAINE et al.
Civ. 5354.

District Court of Appeal, Third District,
California.
Aug. 7, 1935.

Rehearing Denied Sept. 6, 1935.
Hearing Denied by Supreme Court
Oct. 4, 1935.

1. Divorce ⇨203

Where complaint in action for divorce set forth detailed account of fraudulent inducements in execution of property settlement, no objection being raised at trial as to sufficiency of pleadings, answer denying allegations put in issue validity of property settlement and gave court jurisdiction to set aside property settlement although divorce was denied.

2. Judgment ⇨252(5)

Plaintiff is entitled to such relief in court of equity as complaint may show her to be entitled to even in absence of prayer for general relief (Code Civ. Proc. § 580).

3. Husband and wife ⇨272(1)

Where plaintiff alleges that there is no community property and defendant defaults, judgment rendered on such complaint is final in respect to everything properly embraced within allegations of complaint and prayer for relief, operating as adjudication that there was no community property.

4. Husband and wife ⇨272(1)

Decree of court in foreign jurisdiction granting husband's petition for divorce, but making no reference to community property, held not to vest title thereto in husband nor to preclude wife from securing partition of such property, of which they became owners in common after divorce, where wife's claim was based on fraud.

5. Equity ⇨39(2)

Court of equity will grant such relief whether legal or equitable as parties are entitled to.

6. Husband and wife ⇨272(1)

Where husband and wife became tenants in common of community property after husband was granted divorce, husband's possession of such property without objection by wife held not to preclude wife from recovering her share of profits from property during period of husband's possession where husband had obtained possession by fraud.

7. Husband and wife ⇨262(2)

In action by wife for partition of community property, patents issued on gas trap to husband during marriage, for manufacture of which wife advanced husband money with understanding that she would share in profits, were presumed to be community property, placing burden on husband to overcome presumption by clear evidence.

8. Husband and wife ⇨262(1)

Separate and community property commingled in such manner that it is impossible to trace funds will be treated as community property.

9. Husband and wife ⇨264

Evidence held to sustain finding that patents on gas trap, for manufacture of which wife advanced husband money, which was commingled with husband's funds, with understanding that she should share in profits, were community property, and that property settlement was obtained by fraud, entitling wife to equal division of property belonging to community.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Suit by Rose Lorraine against David G. Lorraine and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Lawrence Cobb, of Los Angeles, for appellants.

Henry G. Bodkin, Bingham Gray, and G. Stuart Silliman, all of Los Angeles (V. P. Lucas, of Los Angeles, of counsel), for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment awarding to plaintiff one-half of certain property which had once been the community property of plaintiff herein and defendant David G. Lorraine. Rose Lorraine and David G. Lorraine intermarried in California on January 23, 1920, and continued to live together as husband and wife until about January 29, 1926, at which time they separated, David G. Lorraine going to Texas, and there on August 8, 1927, he obtained a divorce. Service in this action was obtained by publication of summons, based upon an affidavit by Lorraine that the whereabouts of his wife were to him unknown, although the record discloses that at that time he was having his wife shadowed and was receiving frequent reports as to her activities and he knew where she was at all times. No attempt was made to notify Rose Lorraine of the fact of a divorce or of the findings of the court, and it was not until late in 1929 that she learned of the divorce. The decree made no reference to any of the property of the parties, but merely dissolved the bonds of matrimony existing. Thereafter and on November 25, 1927, Lorraine and Sarah R. Irwin were married and are now husband and wife.

Prior to the separation of Lorraine and Rose L. Lorraine, a property settlement had been entered into by which Rose Lorraine received \$10,000 in full settlement of their property rights.

In 1930 Rose Lorraine brought the present action, wherein she sought first a divorce, secondly, that the property settlement be set aside upon the ground of fraud, and, lastly, that she be given an equitable share of what had been community property and which had been transferred to others by Lorraine.

In paragraph XIV of her complaint it is alleged in substance that on or about the 27th day of August, 1925, through the fraud, misrepresentation, and undue influence of David G. Lorraine, she was compelled to and did sign a property settlement and agreement, and at that time, and as part of the representations calculated to induce and which did induce plaintiff to sign the settlement, he represented that he had no real property or any interest therein that she could obtain; that he was "broke" and deeply in debt and that the Lorraine Corporation was insolvent; that Lorraine at that time sent his secretary and bookkeeper to plaintiff, who told her that Lorraine was insolvent and that the Lorraine Corporation also was insolvent. Lorraine also at that time sent his then business associate, who represented to her that Lorraine and the Lorraine Corporation were insolvent, and also sent other persons and employees to plaintiff, both prior to and at the time of the execution of the property agreement, who represented to her that Lorraine had no money and was heavily in debt and that the Lorraine Corporation was not doing any business and was in fact insolvent, and that he was on the verge of going through bankruptcy. It was also alleged Lorraine instructed his secretary and bookkeeper to give to plaintiff no information whatsoever respecting his financial standing or financial status of the Lorraine Corporation, and that on occasions when plaintiff accompanied her husband to the plant of the Lorraine Corporation he would not permit her to enter the offices, but would leave plaintiff outside and he would enter the office and lock the door after him preventing plaintiff's entrance.

It was further alleged that plaintiff did not discover the fraud which had been perpetrated against her by the defendant David G. Lorraine until about February, 1930, when she discovered the true state of affairs and the fraud and misrepresentations which had been practiced upon her; that the said property agreement referred to was unjust, unfair, and inequitable; and that said representations were false and were then known by said defendant Lorraine to be false and were made with intent to deceive and defraud plaintiff and did in fact deceive and defraud plaintiff, and plaintiff believed and relied upon such representations and was thereby induced to sign the property agreement. It is also there alleged that said defendant Lor-

rairie was at that time worth in excess of a million dollars.

The prayer of the complaint is for a divorce dissolving the bonds of matrimony, asking that a receiver be appointed to hold the community property, and for an accounting of all of the property of David G. Lorraine, and that such portion of the community property be granted and set apart to plaintiff as shall be equitable and just and for such other and further relief as to the court may seem just and meet.

No demurrer was interposed to the complaint by defendants, but an answer thereto was filed upon behalf of David G. Lorraine, Sarah R. Lorraine, and the Lorraine Corporation, denying the various material allegations and particularly the allegations of paragraph XIV of the complaint, thereby putting in issue the question of fraud and undue influence and alleging that the property settlement therein referred to was just, fair, and equitable to plaintiff. After a trial before the court upon the issues framed, findings were made that plaintiff Rose Lorraine and David G. Lorraine were not husband and wife, the marriage having been dissolved by decree of the Ninety-fifth judicial court of Dallas, Tex., on August 8, 1927, which judgment had not been vacated, set aside, reversed, or appealed from and had become final and was in full force and effect.

The court also found, and we may add that all the findings are fully supported by the evidence, that at the time of the marriage of plaintiff and defendant David G. Lorraine, said defendant was practically destitute and plaintiff herein advanced to defendant large sums of money upon the understanding that the said amount would be invested in the Lorraine gas trap and that she would share equally with defendant David G. Lorraine in the proceeds arising from the manufacture and sale of said trap. The court then found that the various parcels of real and personal property were the community property of plaintiff and defendant David G. Lorraine, and were acquired during their marriage or were an increase of said community property and had been transferred to the Lorraine Corporation.

Among the assets of the Lorraine Corporation were various patents apparently of great value, the first patent thereon being issued to Lorraine on April 5, 1921, known as oil, gas, and sand separator. Following that original patent, some

twelve or fifteen other patents were issued to Lorraine having to do apparently with the separation of gas and oil, the patents therefor being issued at various dates subsequent to April 5, 1921, over a period of four or five years, and while the Lorraines were living together as husband and wife.

Various acts of cruelty and abuse inflicted by defendant Lorraine upon plaintiff during their married life were also found to be true and set forth in the findings.

Dealing particularly with the allegations of paragraph XIV hereinbefore summarized, the court found that it was true that defendants David G. Lorraine and Sarah R. Lorraine and the Lorraine Corporation had fraudulently conspired and combined together to deceive and defraud plaintiff to prevent her from recovering of and from defendant David G. Lorraine her just proportion of the community property. It was also found to be true that on the 27th day of August, 1925, through fraud, misrepresentation, and undue influence of defendant David G. Lorraine, plaintiff was compelled to and did sign a property settlement and agreement. The court then found to be true substantially all of the allegations of paragraph XIV of the complaint, hereinbefore summarized.

The court found that plaintiff believed such representations which induced her to sign said property agreement and that plaintiff in executing said agreement relied upon her husband, David G. Lorraine, and his agents, employees, and representatives because of the faith and confidence she had in her husband, David G. Lorraine.

The court also found it to be a fact that defendant David G. Lorraine prevented plaintiff from obtaining information from his employees or from entering the place of business of the Lorraine Corporation, and also found that plaintiff was at that time without business experience and that David G. Lorraine took an unfair and unconscionable advantage over plaintiff in that at the time and place and prior to the signing of the agreement, plaintiff did not know the facts therein set forth, nor did she discover the fraud which had been perpetrated against her until on or about February 15, 1930.

The court also found that said agreement was unfair and inequitable to plaintiff and that in fact and in truth the said defendant David G. Lorraine at the time of the execution of said property settlement had in his possession community

property worth approximately \$750,000, and that it is not true that plaintiff, at the time of the execution of the property settlement, had full or any knowledge of the financial condition and the property of David G. Lorraine or of the Lorraine Corporation, or that she was thoroughly, or at all, familiar with or knew of her own knowledge, the amount, character, or value of all or any community property belonging to herself and defendant David G. Lorraine, or that she had independent advice of counsel concerning the matter. In this regard the court found that prior to the time of the execution of said property settlement David G. Lorraine sent plaintiff to see a certain attorney stating that said attorney would represent her in the proposed agreement. This attorney stated to plaintiff that he could not represent her in said controversy, but that it would be necessary for plaintiff to have counsel in the matter, and that said attorney thereupon stated he would take her to a good attorney who would properly protect her interests. Plaintiff thereupon was sent to the office of an attorney, who was in fact the brother-in-law of the attorney with whom she first consulted, but of the relationship she did not know until long after the execution of said property settlement. The court further found the attorney with whom she consulted made no investigation, however, to ascertain the true financial condition of David G. Lorraine or the Lorraine Corporation and allowed plaintiff to make a settlement without fully advising her as to her rights or being in a position to advise her as to the making of said agreement. The finding then proceeded to set forth the property holdings of the defendant David G. Lorraine and his earning power, and the fact that plaintiff herself was in ill health, without earning capacity, and has separate property of the value not to exceed \$10,000.

Upon these findings the court entered judgment denying plaintiff a divorce upon the ground that the decree granted by the Texas court was a valid and a subsisting judgment terminating the marriage between plaintiff and David G. Lorraine. Furthermore, upon the ground that defendant had defrauded plaintiff of her interest in the community property the court set aside the property settlement theretofore entered into between Rose Lorraine and David G. Lorraine and awarded to plaintiff one-half of the property found by the court to have been community proper-

ty at the date of the divorce decree and the earnings therefrom and the increase thereof.

From this judgment, defendants appeal, claiming the court, having denied the divorce, was without jurisdiction either to set aside the property settlement, or to determine the character of the property to be community property or to divide the same.

[1] As to the contention that the court was without power to set aside the property settlement, it will be remembered that paragraph XIV of the complaint set forth a detailed account of the execution of the property settlement and of the false and fraudulent inducements made by defendant Lorraine. All of the essentials of a cause of action for fraud were alleged. The fraudulent representations were shown, together with allegations that they were actually false and known to defendant to be false; that they were made with intent to deceive plaintiff for the purpose of inducing her to enter into the transaction; that plaintiff relied upon the representations, believing them to be true; and that she was deceived thereby. 12 Cal. Jur. p. 806. No demurrer was interposed to the complaint, nor any objection raised at the trial as to the sufficiency of the pleadings or as to the question of fraud or misrepresentation so pleaded. By the answer defendants denied the allegations and directly met the issue in the trial court, where, after full and complete hearing, the trial court found against defendants and in favor of plaintiff upon the issues there presented. Neither was a motion for new trial presented to nor requested of the trial court.

An examination of the pleadings, the evidence, and the findings shows that the contract was set aside because of the fraud practiced in its procurement. In the case of Locke Paddon v. Locke Paddon, 194 Cal. 73, 227 P. 715, the wife brought an action for divorce and alleged she had been induced to sign a property settlement by fraudulent representations made to her by her husband to the effect that he had no separate or community property and was bankrupt. It was there held that in every divorce action the court had jurisdiction to examine the property settlement between the parties and to either affirm or disregard it. In *Mason v. Mason*, 219 Cal. 111, 25 P.(2d) 461, 462, upon this subject, the court said:

"It is next urged that the court below, having denied a divorce to either party, was without jurisdiction to vacate the homestead and award an undivided one-half interest in the property to each spouse. The failure to decree a divorce did not oust the court of jurisdiction to adjudicate the title to the property, where such title was put in issue by the pleadings. Furthermore, although judgment of divorce is denied, the court may, in an action for divorce, provide for the maintenance of the wife by the husband (Civil Code, § 136), and in doing so may make the same disposition of the community property and of the homestead as would have been made if the marriage had been dissolved (Civil Code, § 137)."

In the instant case defendant by his answer submitted to a court of competent jurisdiction not only the question of the property in general, but also the question of his good faith in the execution of the property settlement, and upon those issues the court found contrary to defendant.

Appellants also contend the relief is not warranted by the prayer of the complaint, but section 580 of the Code of Civil Procedure provides:

"The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."

[2] The following cases construing this section hold the plaintiff is entitled to such relief as the complaint may show her to be entitled to even in the absence of a prayer for general relief: *Nathan v. Dierssen*, 164 Cal. 607, 130 P. 12; *Goldsmith v. Board of Education*, 63 Cal. App. 141, 218 P. 296; *Baar v. Smith*, 201 Cal. 87, 255 P. 827; *Johnson v. Polhemus*, 99 Cal. 240, 33 P. 908.

[3,4] Appellants claim also that the Texas decree is conclusive against plaintiff's claim to an interest in any community property for the reason that the Texas decree is final upon that subject. Appellants cite cases, of which *Metropolitan Life Insurance Co. v. Welch*, 202 Cal. 312, 260 P. 545, 547, and *Brown v. Brown*, 170 Cal. 1, 147 P. 1168, are typical. In the latter case plaintiff alleged that there was no community property and defendant defaulted. In such a situation the courts hold that where a judgment is rendered

upon such a complaint and no appearance is made by defendant it becomes in effect a contract between the parties and the judgment is final in respect to everything properly embraced within the allegations of the complaint and in the prayer for relief. The decree, although silent as to any property, operates, nevertheless, as an adjudication that at the time the action was begun there was no community property. In the case of *Metropolitan Life Insurance Company v. Welch*, supra, an action in interpleader was filed by plaintiff insurance company to require the defendants to litigate the right to the proceeds of a certain insurance policy. Prior to the date of the commencement of this action the defendant wife, as plaintiff, had filed a complaint in an action for divorce in which certain property was enumerated as community property, no mention, however, being made of the insurance policy in question. The husband having defaulted, a decree was entered awarding all the community property to the wife. The court held that this provision of the decree could not be deemed to extend to any property other than that described in the complaint, the court saying:

"The parties having had an opportunity to litigate the question as to what part or portion of their property is community property, and having actually, under proceedings in which all of the community property apparently was involved, obtained a final decree establishing and determining the respective rights of the parties to said community property, said decree must be held to be a conclusive determination of all the rights of said parties in and to not only the community property described therein, but in and to all property owned by either of them. This rule, of course, would not be applicable when the final decree makes no disposition whatever of the community property. In such a case the former spouses become tenants in common in the community property, and their rights thereto could be determined in a subsequent action. *Estate of Brix*, 181 Cal. 667, 676, 186 P. 135."

In the present case the Texas decree was obtained by publication of citation. No actual notice was received by plaintiff of the commencement or pendency of the divorce action until shortly prior to the commencement of the present action; also in the cited cases relied upon by appellants fraud was not an issue, whereas in the present case it becomes a vital factor in

the determination of the case. Appellants also contend that it affirmatively appearing in the answer to plaintiff's complaint herein that defendant had procured a divorce, the court in the present action had no power to proceed until it was determined that a marriage relation existed between the parties. The case of *Hite v. Hite*, 124 Cal. 389, 57 P. 227, 228, 45 L. R. A. 793, 71 Am. St. Rep. 82, is cited in support thereof. In that case the wife sued for divorce and defendant in his answer made a complete denial of the facts alleged by plaintiff as constituting a marriage. The trial court granted her prayer for alimony and counsel fees, which order was upon appeal set aside, the court holding, "to justify alimony, marriage must be admitted or proven."

In the instant case no alimony nor counsel fees were asked and it is not with those subjects we are here concerned. Furthermore, an order for temporary alimony, being a final judgment, from which an appeal might be taken, it was necessary that the marriage upon which the liability was predicated must be first established. In the instant case the court found at the time of the Texas decree the parties thereto owned as a community certain property. The fact that there was no reference to such property in the decree did not vest title thereto in Lorraine, but the parties then became owners in common in the property which the court in the present action could partition and specifically award. *Metropolitan Life Insurance Co. v. Welch*, supra. The complaint was so framed and the court so held.

[5] In an action commenced in equity the court will grant such relief whether legal or equitable as the parties are entitled to. In *Spalding v. Spalding*, 75 Cal. App. 569, 243 P. 445, 450, a divorced wife brought an action against her former husband and his parents to compel conveyance to her of property awarded plaintiff in a divorce action, but by reason of the fact plaintiff had title to only a portion of the real property the court allowed a money judgment for the deficiency, saying:

"It is, indeed, the duty of a court of equity, when all the parties to the controversy are before it, to adjust the rights of all and leave nothing open for further litigation." To the same effect is *California Raisin Growers' Ass'n v. Abbott*, 160 Cal. 601, 117 P. 767.

In the case of *Marshall v. Marshall*, 138 Cal. App. 706, 33 P.(2d) 416, 417, the plaintiff wife brought an action for divorce and alleged that there was no community property, but that plaintiff was the owner of certain property as her separate estate and that if the defendant made any community claim thereto he be required to set forth the nature of such claim. In his answer the defendant alleged that the property claimed by plaintiff was the community property of the plaintiff and the defendant. The court denied the divorce to the plaintiff and quieted plaintiff's title to the property in question. The court in holding it had jurisdiction in divorce actions to quiet title to separate property of one of the parties, even though the divorce be denied, said:

"But the superior court in which the action for divorce must be brought is also vested with general jurisdiction to determine title to real property, whether based on legal or equitable claims, and if the parties in a divorce proceeding see fit to make the character of property held by them—whether separate or community—an issue in the proceeding, as the court is vested with jurisdiction to determine that question as fully as if the title were put in issue in a direct action brought for that purpose, the same effect must be given to its judgment as if such an action had in fact been brought." The same doctrine was restated and applied in *Carr v. Carr Co.*, 39 Cal. App. 53, 177 P. 856, 857, wherein the court said: 'Conceding that in an ordinary proceeding for divorce the court is not authorized to dispose of the separate property of either party, that rule does not apply in a case where the action is dual in its character, seeking not only a divorce but an adjudication as to the separate character of certain described property and a decree in effect quieting plaintiff's title thereto. The issue as to the property having been fairly made and by both parties submitted to the court for determination, the court had jurisdiction to determine the question involved as to the character of the property, and to quiet the title of the rightful owner thereto. *Glass v. Glass*, 4 Cal. App. 604, 88 P. 734; *Allen v. Allen*, 159 Cal. 197, 113 P. 160.' Another case holding to the same effect is *Barrow v. Barrow*, 42 Cal. App. [50] 51, 183 P. 364. * * *

"On the issues thus framed and submitted for determination, the trial court after

denying plaintiff a divorce found that the parties had acquired community property but held that no disposition would be made thereof; and then with respect to the real property found as alleged in the complaint, "That plaintiff herein is the owner of the following described property located in the County of Los Angeles, California, as her sole and separate property (here followed the description); the Court further finds that the defendant herein has no right, title, claim or interest in or to said real property." The conclusions of law and the judgment conformed to the findings.

"The appeal having been taken on the judgment roll alone, it must be presumed, of course, that evidence was introduced on the contested issue relating to the title to the real property and that the findings and judgment are supported thereby. Therefore, since it affirmatively appears that plaintiff's action was dual in its character, in that she sought not only a divorce but an adjudication as to the character of the real property described therein and a decree quieting her title thereto, and that defendant joined in asking the trial court to adjudicate that issue, it must be held here, in conformity with the rule of the cases cited, that the trial court did not exceed its jurisdiction in determining the issue."

Therefore, the question of the respective rights of the parties to the property in question having been submitted to the trial court without objection, and the court having determined that at the date of the divorce the parties thereto owned certain community property and no disposition thereof having been made, the court had the right to pass upon the interests of the parties in and to the same and to award to each one-half of the property then held in common by the former husband and wife.

[6] It is the contention of appellants that if the parties became tenants in common of their former community property on and after the date of the Texas decree and being tenants in common of such common property, Lorraine was left in possession thereof without objection by his cotenant, the tenant out of possession cannot recover rent for the cotenant's occupancy of the property nor for profits derived from the property by means of the occupant's own labor, either in law or in equity, citing in support thereof *Pico v.*

Columbet, 12 Cal. 414, 73 Am. Dec. 550; *Howard v. Throckmorton*, 59 Cal. 79, and *McWhorter v. McWhorter*, 99 Cal. App. 293, 278 P. 454. It will be noted, however, that these cases involved the right of tenants out of possession to recover rents, issues, and profits realized from the use and cultivation of real property. Neither was the possession of the property there involved obtained by fraud, whereas we again recall that Lorraine, as one of the tenants in common, obtained possession and control of plaintiff's right to the property in question by fraudulent means.

In the case of *Coats v. Coats*, 160 Cal. 671, 118 P. 441, 444, 36 L. R. A. (N. S.) 844, plaintiff and defendant were married and several years later defendant procured a decree of annulment. Thereafter the plaintiff brought an action for division of the property. The court, pointing out that the property acquired through the joint efforts of the parties constituted community property to the time of annulment, and although it ceased to be community property on entry of decree of annulment, nevertheless, it should be divided as community property, said:

"Until the making of the annulment decree, the marriage was valid, and the property in question was impressed with the community character. Upon annulment, such property, even though it be no longer community property, should be divided as community property would have been upon a dissolution of the marriage by divorce or the death of the husband."

[7, 8] It is also the contention of appellants that patents issued to David G. Lorraine and by him transferred to the Lorraine Corporation were the separate property of defendant David G. Lorraine. These inventions consisted of a device or method of separating oil and gas and was referred to as an oil and gas trap. The record shows that but one application had been made for a patent prior to the marriage, which was rejected by the patent office, and the same was not issued until five years after the marriage. The court found that after the marriage plaintiff advanced to defendant Lorraine over a period of approximately eighteen months a large sum of money upon the understanding the same was to be invested in the Lorraine gas trap and that the plaintiff would share equally with defendant Lorraine in the proceeds realized by the manufacture and sale of such trap. The court

also found that the various patents of Lorraine, and which had been assigned by him to the Lorraine Corporation, were the community property of the plaintiff and defendant. This was a question of fact upon which the court had a right to find, and having found upon conflicting evidence that the same was community property, we are bound thereby. The evidence shows that the patents were in fact all applied for after the marriage, with the one exception referred to above and that was rejected. The presumption is that they were community property and the burden was upon defendants to overcome such presumption by clear and convincing evidence, which they failed to do. The evidence also disclosed that at the time of the marriage plaintiff had funds which she made available for the use of defendant to prosecute the application for his patents and to develop and improve the idea involved in the application made for the patent on the separator and valve combination, which advances were made with the understanding they were to be used in the business of manufacturing and selling the gas trap and that plaintiff should have a half interest in the profits realized from the venture. The funds of plaintiff and the earnings of Lorraine and the income from the business were apparently indiscriminately commingled and there was no attempt at the trial of this action to trace the funds so commingled. The rule is well established that when separate and community property are commingled in such manner that it is impossible to trace the funds, the character of the whole fund will be treated as community property and the burden is upon the spouse who claims the property is separate in its nature to affirmatively prove the assertion. 5 Cal. Jur. p. 298.

[9] No advantage is to be gained by a further discussion of the many points urged by appellants, but it is sufficient to say that plaintiff assisted defendant David G. Lorraine financially before and during their marriage, and while they were married Lorraine continued to work on his inventions and in the development of his business and that his wife made substantial contributions to the same and that the evidence is amply sufficient to justify the trial court in determining that the patents were in fact community property and that any profits therefrom were likewise community

property. We are also convinced that the evidence justified the court in its conclusion that by fraud and misrepresentation plaintiff was led into a property settlement. We are also of the opinion that the court was justified both by the law and the facts in setting aside the property settlement and awarding to plaintiff an equal division of the property belonging to the community at the date of the divorce and the increase therefrom.

The judgment therefore should be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.



8 Cal.App.2d 742

**SHIRREFFS et al. v. ALTA CANYADA
CORPORATION et al.**
Civ. 1713.

District Court of Appeal, Fourth District,
California.
Aug. 14, 1935.

1. Appeal and error ⌚1010(1)

In action to rescind contract of purchase testimony of purchasers that they relied on alleged false representation of vendor *held* to support finding that such representation was relied upon by purchaser, since trial court's finding may not be disturbed if record contains any evidence to support it.

2. Action ⌚7

Motive of purchaser in commencing action for rescission of contract for purchase of land may not be inquired into.

3. Evidence ⌚383(7)

In action for rescission of contract for purchase of land, trial court *held* authorized to disregard evidence of letters written by purchaser, asking that vendor take back property and not mentioning representation made basis for action, in determining whether purchaser relied upon that representation, since at most it created conflict in evidence respecting question of reliance.

4. Contracts ⌚94(2)

Test of materiality of representation is that contract sought to be rescinded would not have been made if representation had been absent.

5. Appeal and error ⇨1010(2)

In action for rescission of contract for purchase of land, finding that representation relied upon as ground for rescission was material *held* conclusive where record indicated presence of evidence supporting finding.

6. Vendor and purchaser ⇨33

Misrepresentation alleged to have induced purchase of land *held* sufficiently definite as basis of action for rescission of contract of purchase, where trial court found that representation was that specific hundred acres in definite location had been reserved for park for use of purchasers of land, and vendor conceded that such finding had evidentiary support.

7. Vendor and purchaser ⇨44

Letter sent by vendor to lot owners affirming statements that reservation of land for park for use of lot owners would be made, that association of owners to keep up park had been intended, and that none had been formed, *held* to show that no reservation of land for park purposes had been made, thereby entitling purchasers, who had relied upon representation that land for park would be reserved, to rescind contract of purchase.

8. Vendor and purchaser ⇨43(1)

Payment of installment of purchase price of land, bought in reliance upon representation that park would be created to which purchasers would have access, made after receipt of letter from vendor stating that canyon, part of which was to be used for park, would be closed, *held* not waiver of right of rescission, since letter did not indicate that representation respecting creation of park was not true.

9. Vendor and purchaser ⇨43(1)

Purchasers who bought in reliance upon representation *held* not to have waived right to rescind contract on ground that representation was false by paying installment of purchase price, even though payment was made subsequent to notice that representation was false, since purchasers were entitled to preserve rights in property so that they might be in position to tender back if they rescinded.

10. Vendor and purchaser ⇨116

Purchasers *held* entitled to rescind contract of purchase and recover amount paid under contract, notwithstanding contention that parties could not be restored to original positions because land had depreciated in value over half and money which vendor would be compelled to return had higher value at time action was begun than when paid, since action for rescission is for recovery of all money paid, and purchaser is not chargeable with subsequent depreciation of land.

11. Appeal and error ⇨1008(1)

In action to rescind contract for purchase of land, question of laches is for trial court.

12. Vendor and purchaser ⇨123

Evidence *held* to support finding that purchasers were not guilty of laches in bringing action for rescission of contract, where purchasers had no occasion to inquire into truth or falsity of representations inducing purchase until less than three months before action was brought, and where notice of rescission was given within one month of discovery of falsity of representations.

13. Vendor and purchaser ⇨341(5)

Purchasers seeking rescission of contract and recovery of amount paid thereon *held* not entitled to recover interest on money paid from dates of payment of installments, since law awards interest only from time money is due, and nothing was due purchaser until notice of rescission was given.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Jim Shirreffs and another against the Alta Canyada Corporation and others. Judgment for plaintiffs, and named defendant appeals.

Affirmed and remanded for modification.

Pease & Dolley and Adolph H. Levy, all of Los Angeles, for appellant.

William P. Mealey, of Los Angeles, for respondents.

JENNINGS, Justice.

Plaintiffs instituted this action for the purpose of rescinding a contract which they had made with the defendant Alta Canyada Corporation, whereby they agreed to purchase from said corporation a parcel of land in Los Angeles county. In addition plaintiffs sought to recover the amount paid by them under the contract together with interest thereon. From a judgment in favor of plaintiffs decreeing rescission of the contract and permitting recovery of the purchase price with interest, the defendant Alta Canyada Corporation has appealed.

The ground upon which rescission was granted was that prior to the execution of the above-mentioned contract the president of the corporation had falsely represented to plaintiffs that the corporation had reserved and set aside for park purposes for the use of purchasers of lots a

tract of land containing 100 acres in the Alta Canyada canyon. The undisputed evidence showed that the corporation was the owner of the entire canyon, which contained approximately 400 acres of land none of which at any time material to this proceeding had been subdivided or offered for sale. The evidence also showed that the corporation owned a tract of land adjacent to the canyon which had been subdivided into lots that were being offered for sale by the corporation. At the time plaintiffs entered into the contract for the purchase of one of these lots, a number had been sold, some of which had been improved by the erection thereon of houses.

Before entering upon a consideration of the various contentions advanced on this appeal, certain concessions of the appellant may properly be noted. It is conceded that certain literature printed and distributed by the appellant in its selling campaign contained a statement that a hundred acres in the canyon "*had* been reserved and set aside" (italics ours) as a park and picnic ground for the use of purchasers of lots, their families and friends. In connection with this concession it should be mentioned that respondents testified that they had received and read this literature prior to the time they made the contract for the purchase of the lot. This evidence is undisputed. It is also conceded that the evidence of respondents showed that prior to the time respondents entered into the contract, the president of appellant went into the canyon with respondents and, standing on a knoll, swept his arm and pointed, saying as he did so, "This is the hundred acres." The obvious effect of this concession is that it must here be assumed that prior to the time the contract for the purchase of the land was made, it was orally represented to respondents that a hundred acres of land in the Alta Canyada canyon had been reserved and set aside by appellant for park purposes for the use of lot owners, their families and friends. It is further conceded that the trial court's finding that it was represented that a specified hundred acres of land in the lower end of the canyon had been reserved and set aside is not lacking in evidentiary support and may not therefore be successfully attacked on this appeal.

Appellant advances the following contentions: (1) Respondents did not place

any reliance on the aforesaid representation and would have purchased the lot although such representation had not in fact been made. (2) The representation was not material. (3) The representation was so vague, indefinite, and incomplete that respondents were not justified in relying upon it. (4) The one hundred acres was actually reserved and set aside for park purposes by appellant. (5) Respondents waived any alleged misrepresentation by making payments in accordance with the provisions of the contract after they had knowledge of the fraud. (6) The remedy of rescission granted by the trial court is not justified in this case for the reason that the parties cannot be placed substantially in the respective positions which they occupied prior to execution of the contract. (7) Respondents are guilty of laches and the action is barred by the statute of limitations.

With respect to the contention that respondents did not sustain the burden placed upon them of establishing the necessary factor of reliance on the representation, it is urged that the only evidence which was produced in proof of reliance consisted of the bald testimony of the respondents that they believed the representation and relied upon it in making the contract of purchase. This evidence is criticized as being a purely stereotyped statement relative to a state of mind. In opposition thereto it is pointed out that the evidence showed that respondents made no investigation for a period of more than four years for the purpose of discovering whether the representation was true or false; that the representation was not included in the written contract to which they affixed their signatures; that no mention of it was made in the deed which they received from appellant more than two years after the original contract was executed; that the representation was not mentioned in the deed of trust which respondents gave to secure the balance of the purchase price; that no mention of the representation was made in certain letters sent by respondent Jim Shirreffs to appellant wherein the aforesaid respondent sought to have appellant take back the lot and return to him the amount which he had paid under his contract.

[1] It is obvious that this contention simply amounts to an attack on the trial court's finding that respondents relied on the representation on the familiar ground

of evidentiary nonsupport. The usual rule is therefore applicable and the finding may not be disturbed if the record contains any evidence to support it. Appellant concedes that the testimony of respondents was that they did believe and rely on the representation. This evidence may not be disregarded. The question was one of fact for the trier of facts. The reviewer of the cold record may entertain an opinion that the evidence would have supported a contrary finding. He is not, however, warranted in substituting this opinion in place of a finding made by the trial court from the testimony of witnesses whose conduct and demeanor it was privileged to observe and to weigh. The element of reliance in cases of this character necessarily relates to a state of mind. The task of discovery is difficult for the trial court. It would be more difficult for an appellate court. It is our conclusion that the finding of reliance is not so lacking in evidentiary support that we are justified in overturning it.

There is some suggestion by appellant that the trial court erroneously failed to appreciate the effect of certain undisputed evidence which bore on the question of whether or not respondents placed reliance on the representation regarding the reservation of land for park purposes. This evidence consisted of three different letters addressed by respondent Jim Shirreffs to appellant on the dates of July 25, 1930, July 31, 1930, and February 22, 1932. In each of these letters the writer expressed a desire that appellant take back the property and repay him therefor the money which he had invested in it or a portion thereof. In none of the letters is to be found any mention of the representation which was later made the basis for the present action. It is conceded that the motive which prompted respondents to institute the present action may not be investigated but it is argued nevertheless that this evidence effectually contradicted the obviously self-serving and tardy testimony of respondents that they relied on the representation and that the trial court therefore erred in finding that they did place reliance in the representation in the face of this evidence.

[2,3] This argument is useless. Appellant's concession that the motive which animated respondents in commencing the action for rescission may not be inquired into is a proper concession and one that is

amply sustained by the authorities. *Crim v. Umbesen*, 155 Cal. 697, 702, 103 P. 178, 132 Am. St. Rep. 127; *Conlin v. Osborn*, 161 Cal. 659, 668, 120 P. 755; *De Bairos v. Barlin*, 46 Cal. App. 665, 672, 190 P. 188. The trial court was therefore at liberty to disregard entirely the last-mentioned evidence. In any event, the most that may be said for it is that it created a conflict in the evidence respecting the feature of reliance which was resolved in favor of respondents and which under the familiar rule governing a reviewing court may not now be disturbed.

[4,5] Appellant's contention that the representation was not material is likewise unconvincing. The test of materiality is that the contract sought to be rescinded would not have been made if the representation had been absent. *Colton v. Stanford*, 82 Cal. 351, 399, 23 P. 16, 16 Am. St. Rep. 137; *Craig v. Shea*, 45 Cal. App. 351, 354, 188 P. 73. Here again is a question of fact which was presented for the determination of the trial court. The court found that respondents believed the statements made by appellant's president relative to the reservation of land for park purposes and relied thereon. Examination of the record indicates the presence of evidence supporting the finding. It may not therefore be disturbed. It may be remarked in passing that the contention of immateriality comes with poor grace from a seller who admits that it included the representation in a printed prospectus which was prepared and distributed in a deliberate effort to interest prospective purchasers and to induce the very action which respondents took, viz., the purchase of a lot.

[6] Appellant's objection that the misrepresentation which constituted the basis for the trial court's action in decreeing rescission and recovery of the amount paid under the contract was so vague, indefinite, and uncertain that respondents were not justified in relying upon it is likewise lacking in merit. As hereinabove noted, appellant concedes that the trial court's finding that it was represented that a specific hundred acres of land in the lower end of the canyon had been reserved is not lacking in evidentiary support. This concession, which in our opinion was proper, renders the objection of vagueness and uncertainty entirely ineffective. Since the court found that the representation was that a specific hundred acres in a definite

location had been reserved and it is conceded that the finding to this effect has evidentiary support, it may not be successfully argued that the representation was vague and indefinite. The location of the acreage which it was declared had been reserved was definitely placed. The quantity of land reserved was specifically stated. The finding is further restricted in that it states that the representation was that a specific hundred acres had been reserved. We do not understand that it is now contended that the reserved land should have been described by metes and bounds. It is our opinion that the objection here considered is entirely without merit in the face of the above-mentioned concession.

[7] Appellant challenges the trial court's finding that the representation regarding a reservation of specific acreage for park purposes was not true by its contention that the evidence showed that a reservation of one hundred acres of land in the canyon for park purposes was actually made. In this connection, it is pointed out that the evidence produced by appellant showed that appellant was a close corporation, the sole purpose of whose existence was the subdivision and development of the land which it owned and all of whose stock was owned by four or five persons, that by reason thereof any corporate action which was taken by appellant was not attended with the formality which characterizes similar action by large corporations whose stock is owned by the public, that the directors of appellant usually held but one annual meeting, and that the board often failed to act formally on many important matters. It is further urged that the undisputed evidence showed that none of appellant's canyon land was sold after the date on which the contract between appellant and respondents was executed and that the entire canyon acreage was intact at the date of trial, hence there was no occasion for any formal reservation of land for the use of lot purchasers for park purposes, that the subject of the canyon park was discussed on numerous occasions by appellant's officers and directors, and it was clearly understood and agreed among the directors and officers that not all of the canyon acreage would ever be sold but that one hundred acres thereof must and would be reserved from sale and set aside for park purposes. The argument concludes with the definitions of the terms "set aside" and "reserve" as given in Webster's New International

Dictionary and in Ballantine's Law Dictionary. From these definitions it is made to appear that the two terms are practically synonymous and that the generally accepted meaning of both of them is to keep back, to withhold. It is then declared that the failure of appellant to subdivide or to sell any land in the canyon and more particularly the clear understanding among all of its officers and directors that one hundred acres in the canyon would never be sold but would be withheld and retained for park purposes constituted a sufficient compliance with the representation that a hundred acres had been reserved to remove from the representation the stigma of falsity placed upon it by the trial court.

The argument thus presented is ingenious but lacks conviction. In the final analysis, it simply amounts to a contention that a representation that a certain acreage had been reserved is fully satisfied by a showing that those individuals who were empowered to act for the corporation had agreed among themselves that at some future time a legal reservation of a hundred acres in the canyon for park purposes should be made and that if the canyon acreage were sold some unidentified and indefinite hundred acres should be withheld from sale and retained for the specified purpose. It is our opinion that the representation that a hundred acres in the canyon had been reserved and set aside for park purposes was not fulfilled by the declared mental reservation of appellant's directors and that respondents were warranted in believing that some appropriate corporate action had been taken to insure to the lot owners the actual legal reservation of a specific hundred acres in the canyon. Furthermore, appellant's argument in this regard is not consistent with its concession that the court's finding that it was represented that a specific one hundred acres in a definite location had been reserved may not successfully be attacked for evidentiary insufficiency. If the representation was as the court found it to be, it was not fulfilled by a showing that appellant's officers and directors did no more than discuss the matter and agree among themselves that some unidentified hundred acres would at some future time be set aside at some indefinite location in the canyon. Finally, the weakness of appellant's position in this regard is strikingly indicated by the letter of appellant's president addressed to "Property Owners" under date of July 14, 1932. It

is there declared that it had been stated in literature and through salesmen of the corporation that a portion of the canyon "would be reserved for property owners" and that this was qualified by a statement that it was expected that an association of property owners would be formed "which would maintain the parkways in the tract proper and the canyon." The letter then went on to declare that at various times the corporation had attempted to form such an association but that the mere mention of assessments without which the association could not function was sufficient to defeat the proposal, that consequently the corporation itself had undertaken to pay the expenses of caring for parkways and canyon with very slight assistance from the property owners, that the canyon upkeep had proved to be an enormous burden to the corporation and since the property owners had failed to form an association to maintain it, "it was never dedicated" and no easement or license was created "either through usage or deed." The letter concluded with an expression of willingness to convey to an association of property owners, who will assess themselves to *properly maintain* and police it, a section of the canyon, where there will be no chance of contamination of the water supply." In this communication it is for the first time suggested to respondents that, in order to secure a reservation of land for park purposes, it was required that an association should be formed which should consist of property owners in the adjacent subdivision who would assume the burden of maintaining the tract to be conveyed for park purposes. Since it was made evident that no reservation of land in the canyon for park purposes had theretofore been made and it was clearly announced that none would be made until an association of property owners had been formed, the difficulty of procuring a site for the hundred-acre park that would be mutually agreeable to the corporation and the proposed association is apparent. Assuming that the association were formed and proceeded to select a site in the canyon for the park, the corporation which retained full dominion and control over the land in the canyon might not agree with the selection or any selection that might be made so that the practical result would be that no reservation for park purposes would ever be made. The uncertainty of the program suggested in the above-mentioned letter

indicates the incorrectness of appellant's contention that a reservation of land had in fact been made because appellant's directors had discussed the matter and had agreed among themselves that such a reservation would be made at some undetermined time in the future.

[8,9] Appellant's contention that respondents had waived whatever right they might have had to the remedy of rescission by making payments under the contract after they had knowledge of the alleged fraud which formed the basis of the present action deserves but slight consideration. The trial court found that the first notice which respondents had that the one hundred acres had not been set aside or reserved was conveyed to them about July 14, 1932, which was the date on which the letter mentioned in the preceding paragraph was addressed to the property owners by appellant's president. The record indicates that this finding is not vulnerable to attack on the ground of evidentiary nonsupport. The record is bare of evidence tending to show that respondents made any payment under their contract after the contents of the aforesaid letter were made known to them. It is appellant's contention that a letter addressed directly to respondents on June 7, 1932, by appellant's president gave them notice and that two payments were thereafter made under the contract by respondents, the dates of such payments being June 8, 1932, and July 12, 1932. It is conceded that the evidence did not with certainty establish that the payment of June 8 was made after receipt of the last-mentioned letter but it is maintained that the payment of July 11 was made long after receipt of the letter and eleven days after the canyon was closed on July 1, 1932. The letter on which reliance is thus placed is as follows: "Due to cost of maintenance and stringency of the times we will have to close the canyon on and after July 1st, 1932. We regret this very much but trust that you will bear with us and appreciate the position we are in." It is at once apparent that this letter contained no intimation that the representation respecting the reservation of the hundred acres for park purposes was not true. It may not therefore be successfully argued that the communication so clearly conveyed notice of the falsity of the representation that the single installment payment thereafter made operated as a waiver of the fraud

which the court found was perpetrated on respondents. Furthermore, even if it be assumed that the above-quoted letter did amount to notice of the falsity of the representation, respondents were fully justified in paying the July installment without subjecting themselves to the penalty which the doctrine of waiver would place upon them. Respondents were entitled to preserve their rights in the property so that they might be in a position to tender it back if they should rescind the contract. *Munson v. Fishburn*, 183 Cal. 206, 215, 190 P. 808; *Sutton-Watts v. Sarnow*, 80 Cal. App. 91, 96, 251 P. 654.

[10] Appellant strenuously objects to the trial court's judgment permitting rescission and recovery of the amount paid under the contract for the further reason that the parties are not thereby restored to the positions which they occupied at the time the contract was executed. In this connection, it is pointed out that the evidence showed that the land had depreciated in value during the four-year period which intervened between the date of the original contract and the date on which the action for rescission was commenced. The price agreed to be paid for the lot under the contract was \$4,750. The respondent Jim Shirreffs testified that if the representation respecting the reservation of land for park purposes had been true the lot would have been worth the agreed price at the time of purchase but that the falsity of the representation depreciated its value at the time by \$1,000 to \$1,200. Appellant's evidence indicated that the lot had a value of \$4,750 at the date of purchase without regard to the truth or falsity of the representation. It is declared that the undisputed evidence showed that at the time the present action was instituted on September 12, 1932, the lot was worth about \$2,000 irrespective of whether or not the representation was true or false. It is therefore declared that the cardinal principle of restoration is not and cannot be effected by permitting respondents to return property which has depreciated in value more than 50 per cent. when appellant is compelled to return the full amount paid to it under the contract which was shown to be the sum of \$4,998.27, including interest paid on deferred payments. The inequity of the decree is declared to be further magnified by reason of the fact that the money which respondents will receive had a much larger value at

the time the action was commenced in 1932 than it had at the time of payment in 1928. It is suggested that the money was worth 60 per cent. more in 1932 than in 1928 and it is therefore declared that by the decree respondents are allowed to recover an amount which is equivalent to approximately \$8,000 under the dollar measuring standard of 1928 and appellant is compelled to take back a parcel of land whose value at the time the remedy of rescission was sought amounted to no more than \$2,000.

This contention is devoid of any merit. In the first place, it entirely fails to take into account the undisputed fact that the entire purchase price was not paid in the year 1928. The evidence showed that the sum of \$500 was paid on June 1, 1928, the date of the execution of the sale agreement and on July 1, 1928, a further sum of \$800 was paid. Thereafter payments of monthly installments of \$50 plus interest were made until July 16, 1929, when a payment of \$650 was made on the principal of the purchase price. On August 1, 1929, a further payment of \$150 to apply on the principal was made. The monthly payments of \$50 plus interest were then resumed and continued until July 9, 1930, when a payment of \$250 to apply on the principal was made. The last-mentioned payment reduced the amount then due on the principal of the purchase price to \$1,400. On July 9, 1930, a new arrangement was made between the parties. Appellant deeded the lot to respondents, who thereupon executed a promissory note in appellant's favor for \$1,400 and to secure payment thereof they executed a deed of trust to the property in favor of appellant as beneficiary. Thereafter respondents made monthly payments of \$40 plus interest on the aforesaid note until July, 1932. That portion of appellant's argument which is based on the assumption that the entire purchase price was paid in the year 1928 therefore falls in view of the above-described evidence respecting the manner in which payment of the purchase price was actually made.

Equally unimpressive is that part of appellant's argument which is based on the fact that the value of the lot had depreciated more than 50 per cent. in value between the date on which the contract of purchase was executed and the date of the institution of the action. Appellant entirely overlooks a fundamental principle ap-

plicable to the character of action which was here instituted. This is not an action wherein respondents affirm the contract but seek damages alleged to have been caused by appellant's fraud. It is an action for rescission wherein complainants disaffirm the contract and seek recovery of all money paid by them under its provisions. Rescission goes back to the date of the contract which is sought to be rescinded. Whatever fraud was committed occurred at that time. The marked depreciation in value of the land which took place since then is not chargeable to respondents. *Goodrich v. Lathrop*, 94 Cal. 56, 29 P. 329, 28 Am. St. Rep. 91. Attention may also properly be called to the fact that the value of the money which appellant is required to pay back to respondents has likewise suffered a marked depreciation in value since the dates of payment. *Shaffer v. Security Trust & Savings Bank* (Cal. App.) 41 P.(2d) 948.

[11,12] Appellant urges that the evidence shows that respondents were guilty of laches and that the action is in fact barred by the statute of limitations. This contention is based on the fact that four years elapsed after the contract was executed and before respondents gave notice of rescission during all of which time it is declared the means of knowledge were open to respondents, who gave no hint that they suspected that any false representation of any character had been made to them. Unfortunately for appellant, the trial court specifically found that "in order to further mislead and deceive these plaintiffs and other purchasers of said lots or estates" appellant "permitted the said plaintiffs and said purchasers to use said canyon and picnic grounds at all times until on or about the first day of July, 1932, at which time it closed said canyon to the use of said plaintiffs and said purchasers." Examination of the record discloses the presence of evidence sufficient to support the finding which furnishes a complete answer to the argument. Certainly, so long as appellant permitted to respondents and other lot owners free access to and unlimited use of the entire canyon there was no occasion for respondents to inquire as to the truth or falsity of the representation. Notice of rescission was given on July 23, 1932, and the action was instituted on September 12, 1932. The question of laches was one for the trial court to determine. It has done

so by specifically finding that they were not guilty of laches. It is our conclusion that the finding has ample evidentiary support. The related contention that the action was barred by the statute of limitations depends on the date of discovery by respondents of the fact that the representation was false. The court's finding that respondents did not discover the fraud sooner than July 1, 1932, is not lacking in evidentiary support. The suit was brought less than three months thereafter. The claim that the statute barred the action is not therefore sustainable.

[13] Appellant's final contention is that the trial court erred in permitting recovery of interest at the rate of 7 per cent. on the money paid by respondents under the contract of purchase. The record shows that the trial court found that respondents had been damaged by the false and fraudulent representation of appellant in the full sum of \$4,998.27, together with interest thereon as set forth in paragraph VIII of the complaint. Reference to the specified paragraph discloses that it is there alleged that respondents were damaged in the above-mentioned amount "together with interest thereon from the dates of the payment of the instalments as set forth in said 'Exhibit B' at the rate of seven per cent. (7%) per annum." Exhibit B attached to the complaint is a copy of the original contract of purchase entered into between respondents and appellant. The court carried into its conclusions of law the allowance of interest by declaring therein: "That the plaintiffs are entitled to judgment in the sum of four thousand nine hundred ninety eight dollars and twenty-seven cents (\$4,998.27) together with interest thereon from the dates of the instalment payments as set forth in the said complaint at the rate of seven per cent. (7%) per annum." The judgment orders that respondents recover from appellant "the full sum of six thousand one hundred seventy six dollars and fifty-seven cents (\$6,176.57)." Subtraction of the sum of \$4,998.27 claimed by respondents, exclusive of interest, from the total amount of the judgment demonstrates that the trial court permitted recovery of the sum of \$1,178.30 as interest on the various installment payments made by respondents under the contract of purchase. In so doing the court erred. In an action of this character the law awards interest upon money only from the time it becomes

due. The action here instituted by respondents was not based upon any provision of their contract of purchase. They sought recovery of the purchase price on the theory that appellant had received money rightfully due them because of a failure of consideration which was caused by a false representation. Until respondents gave notice of rescission nothing was due and the allowance of interest for any period of time prior to the giving of notice was incorrect. *Hayt v. Bentel*, 164 Cal. 680, 686, 130 P. 432; *Taber v. Piedmont Heights Bldg. Co.*, 25 Cal. App. 222, 230, 143 P. 319; *Knight v. Bentel*, 39 Cal. App. 502, 511, 179 P. 406; *Wilson v. Rigali & Veselich*, 138 Cal. App. 760, 768, 33 P.(2d) 455.

The cause is remanded, with directions to the trial court to correct its findings and conclusions of law in accordance with the views expressed herein and to modify the judgment by deducting from the total amount allowed to be recovered therein the sum of \$912. As so modified the judgment shall stand affirmed.

We concur: BARNARD, P. J.; MARKS, J.



8 Cal.App.2d 738

JAQUES v. SOUTHERN PAC. CO. et al.
Civ. 9729.

District Court of Appeal, First District,
Division 2, California.
Aug. 14, 1935.

Hearing Denied by Supreme Court
Oct. 10, 1935.

1. Railroads ⇨398(1, 2)

In action to recover for injury sustained when plaintiff was run over by train while waiting for street car, evidence of excessive speed and failure to give warning held sufficient to charge of negligence.

2. Railroads ⇨389(1)

Where suction from passing train drew plaintiff's coat from her so that she lost her balance and fell under train and was injured, that defendant could not have foreseen unusual consequences resulting in injury to plaintiff held not to require reversal of judgment for plaintiff where plaintiff's right of recovery did not depend on railroad's failure to take precautions against unusual conse-

quences but on direct evidence of negligent operation of train.

3. Railroads ⇨400(10)

Where suction from passing train drew plaintiff's coat from her so that she lost her balance and fell under train and was injured, whether plaintiff should have anticipated danger from suction to person standing near railway track held for jury.

4. Damages ⇨132(9)

\$25,000 held not excessive for loss of leg slightly below knee of eighteen year old school girl.

5. Appeal and error ⇨1004(1)

Amount of award is for determination of trial court and jury, and appellate court cannot fix different amount in absence of showing that verdict was result of passion or prejudice.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Patricia Jaques, a minor, by and through her guardian ad litem, W. R. Jaques, against the Southern Pacific Company and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Elliott Johnson, of Oakland, for appellants.

Brown, Ledwich & Rosson, of Oakland, for respondent.

NOURSE, Presiding Justice.

In an action for damages for personal injuries the plaintiff had a verdict for \$35,000 which the trial court reduced to \$25,000. The defendant appeals from the judgment as so modified.

[1] The injuries occurred while plaintiff was standing in a painted safety zone near the intersection of Shattuck avenue and Kittredge street in the city of Berkeley. On Shattuck avenue the defendant operated two sets of railroad tracks running in a northerly and southerly direction and upon the same avenue the East Bay Street Railway Company operated two street railway tracks running in the same direction. The whole of Shattuck avenue, which is approximately 130 feet wide, including the portion occupied by the four railway tracks, was devoted to vehicular and pedestrian traffic. No exclusive right of way was held by either of the railway companies. Between the sets of tracks

of the two companies above mentioned there was maintained a safety zone approximately 50 feet long and 3 feet 10 inches wide running parallel to the rails. The outside line of this safety zone was 4 feet 9½ inches from the most easterly rail of the defendant company, but less than 22 inches from the overhang or projection of the cars operated by the company on those rails. While the plaintiff was standing in this safety zone awaiting to board an approaching car of the street railway company and with her back to the rails of the defendant company, she was pulled under a passing train of the defendant company, and suffered the loss of a leg slightly below the knee. The theory of the plaintiff, supported by substantial evidence, is that while she was standing in this safety zone with her back to the defendant's track, the train passed at an excessive and unreasonable rate of speed without any sound of warning by bell, whistle, or otherwise; that the speed of the train drew a coat which she was wearing into contact with some portion of the car so that she lost her balance and was thrown or fell under the wheels of one of the trucks. The theory of the defendant throughout the trial below was that the plaintiff carelessly and negligently ran in front of the train and was struck by some portion of the train and thrown under the wheels. Credible evidence supported defendant's theory, but it was weakened to some extent by the absence of proof that there appeared upon the body of the plaintiff any physical evidences of having been struck by the train. The jury rejected defendant's theory and found that it was negligent. The evidence of excessive speed and failure to give warning is sufficient to support the charge of negligence.

The appeal does not present any debatable question. The appellant first argues that the evidence in support of respondent's theory of the accident is inherently incredible. To create this argument appellant states that respondent contended that she was drawn under the train by suction. But such was not her contention. The evidence upon which she relies is that the suction from the train drew her coat out behind her so that she lost her balance and fell under the moving train. The evidence showed that this actually occurred and we are not permitted to indulge in conjectures as to what might or might not have happened.

[2] Secondly, it is argued that the judgment should be reversed because the defendant could not have foreseen the unusual consequences resulting in the injuries to respondent. But respondent's case does not depend upon the failure to take precautions against unusual consequences, but upon the direct evidence of the negligent operation of the train at that particular moment.

[3] It is then argued that the respondent should have anticipated the danger from suction to a person standing near a railway track and that she was therefore guilty of contributory negligence. Manifestly, if the engineer, who had operated trains for more than thirty years, was not chargeable with knowledge of this particular danger, it cannot be said as a matter of law that an eighteen year old school girl should be deemed to have anticipated the same danger. Like the question of appellant's negligence, this question of respondent's contributory negligence was one of simple fact which was properly left with the jury.

It is then argued that the trial court erred in refusing to give an instruction upon the subject of an unavoidable accident. There was no evidence upon which this instruction could be based. All the evidence tended to support the respective theories of the two parties—one that the accident was due to the careless and negligent operation of the train, the other, that it was due to respondent's negligence in running in front of the moving train. The evidence all tended to prove the respective theories—that the accident was not unavoidable, but that it could have been avoided by the other party.

[4, 5] Finally, it is argued that the damages awarded are excessive. No contention is made that the verdict was the result of passion or prejudice on the part of the jury, but the sole contention is that this court should adjudge a different amount to be the reasonable damages incurred. It is, of course, elementary that the amount of the award is a matter for the trial court and jury to determine and that an appellate court cannot fix a different amount in the absence of a showing that the verdict was the result of passion or prejudice.

The judgment is affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.

8 Cal.App.2d 379

**LOS ANGELES BREWING CO. v. CITY OF
LOS ANGELES et al.**
Civ. 1720.

District Court of Appeal, Fourth District,
California.
July 15, 1935.

**1. Statutes ⇨245
Taxation ⇨2**

Power to levy tax must be drawn from express statutory authority, and statute must be strictly construed in favor of taxpayer as against taxing body.

2. Intoxicating liquors ⇨90(1)

Ordinance requiring alcoholic liquor distributors to pay license tax on all alcoholic liquors sold, offered for sale, or delivered in city, *held* not void as imposing tax upon each individual sale.

3. Intoxicating liquors ⇨10(4)

Under charter provision authorizing municipality to license and regulate any lawful business or calling, municipality could license business of manufacturing and distributing beer within municipality (St. 1925, p. 1028, § 2 (11) (e)).

4. Intoxicating liquors ⇨16

Ordinance requiring alcoholic liquor distributors to pay license tax on all alcoholic liquors sold, offered for sale, or delivered in city, by purchasing tax stamps and attaching them to containers of beverage disposed of, *held* not void as imposing stamp tax on transactions.

5. Intoxicating liquors ⇨16

Ordinance requiring alcoholic liquor distributors to pay a license tax which was measured by volume of liquor sold, *held* not void as being discriminatory under charter provision prohibiting discrimination in amount of tax levied on persons engaged in same business except by proportioning tax to "amount" of business done, since amount of business could be measured either in dollars and cents or in total number of separate articles sold (St. 1925, p. 1030, § 3 (5)).

"Amount," when used as a noun, means the sum total of two or more sums or quantities; the aggregate; the whole quantity; a totality.

[Ed. Note.—For other definitions of "Amount," see Words & Phrases.]

6. Intoxicating liquors ⇨16

Ordinance requiring alcoholic liquor distributors to pay license tax which was measured by volume of liquor sold *held* not void as being discriminatory because it required higher rate of tax on case of beer selling at \$2.40

than on case of spirituous liquors and wines selling at \$125 per case, where sale of spirituous liquors and wines of more than 3.2 per cent. of alcohol by weight was illegal when case was filed and judgment entered (St. 1921, p. 79; St. 1933, pp. 340, 625, 1697; Volstead Act, 27 USCA § 1 et seq.; Const. U. S. Amend. 18).

7. Intoxicating liquors ⇨16

Ordinance requiring alcoholic liquor distributors to pay license tax *held* not void as imposing greater tax upon dispenser of beer manufactured outside of municipality than upon dispenser of beer made within municipality where only one set of tax stamps on container was required from time container left premises of first distributor until its contents were emptied by consumer.

8. Intoxicating liquors ⇨90(1)

Ordinance requiring alcoholic distributors to pay license tax upon all alcoholic liquors sold, offered for sale, or distributed, *held* not to impose tax on single gift of beer from one friend to another, since ordinance imposed license on a business, and single gift was not a business.

9. Intoxicating liquors ⇨16

Ordinance requiring alcoholic liquor distributors to pay license tax dealt with a municipal affair, and was not in conflict with statutes levying state excise tax on alcoholic beverages and providing for licensing of place for sale of such beverages by state, in view of provision of general law authorizing city to enact ordinances imposing license tax on holders of state licenses (St. 1933, pp. 340, 625; p. 634, § 20).

10. Intoxicating liquors ⇨16

Adoption of constitutional amendment dealing with intoxicating liquors did not make regulation as to sale of intoxicating liquor a matter of state-wide concern prior to operative date of amendment, as regards validity of ordinance requiring alcoholic liquor distributors to pay license tax (Const. art. 20, § 22, adopted November 8, 1932).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by the Los Angeles Brewing Company against the City of Los Angeles, a municipal corporation, and others. From the judgment, plaintiff appeals.

Affirmed.

Hanna & Morton, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., F. Von Schrader and Robert F. Shippee, Asst. City

Attys., and G. Ellsworth Meyer, Deputy City Atty., all of Los Angeles, for respondents.

MARKS, Justice.

This is an action by the Los Angeles Brewing Company to enjoin defendants from enforcing an ordinance imposing a license tax on the sale and distribution of alcoholic beverages which contained more than $\frac{1}{2}$ of one per cent. of alcohol by volume. The action is prosecuted upon the theory that the ordinance is unconstitutional.

Plaintiff is a domestic corporation with its principal place of business in the city of Los Angeles. It had been engaged in the business of manufacturing, selling, and distributing beer and other malt beverages. Between April 7, 1933, and September 7th of the same year the beer which it sold had an alcoholic content, by volume, of not less than $\frac{1}{2}$ of 1 per cent. and not more than 4 per cent.

The city of Los Angeles is a municipal corporation organized and existing under a charter which reserved to the city the control of its municipal affairs. The two individual defendants were officers of the city.

Early in 1933 the United States Congress passed an act which declared that beverages having an alcoholic content of not more than 3.2 per cent. by weight were not intoxicating, and authorized their sale. An alcoholic content of 3.2 per cent. by weight is equal to 4 per cent. by volume.

By an act effective April 6, 1933 (St. 1933, p. 340), the California Legislature placed an excise tax on beers and wines containing not less than $\frac{1}{2}$ of 1 per cent. and not more than 3.2 per cent. of alcohol by weight. The same Legislature passed another bill, effective April 27, 1933, levying a like excise tax on the same beverages and providing for the licensing of places of business where such beverages would be consumed on the premises with meals, and other places where they would be sold in original packages for consumption elsewhere. The latter act included practically all the provisions of the earlier act that are material here. Both acts provided that they should become operative whenever the sale in California of the beverages there mentioned were not prohibited by the laws of the United States.

On August 22, 1933, there was in full force and effect in the city of Los Angeles its ordinance, No. 56,600, which had for its purpose the licensing of certain professions,

trades, callings, and occupations carried on within the city, and, as alleged in the complaint, provided "in substance and effect that it shall be unlawful for any person, firm, or corporation to engage in any of the businesses in the City of Los Angeles defined and described in the said Ordinance without first obtaining from the City Clerk of the City of Los Angeles a license so to do, and paying the license fee provided in such Ordinance for carrying on any such business. * * *" On that date the city council adopted Ordinance No. 72,975, which amended the license ordinance and is in part as follows: "Section 1. That Sec. 35 of Ordinance No. 56,600 entitled 'An Ordinance providing for licensing and regulating the carrying on of certain professions, trades, callings and occupations' approved November 24, 1926, be and the same is hereby amended to read as follows:

"Sec. 35. For the purpose of this ordinance a distributor of alcoholic liquors shall mean and include every natural person, partnership, association, company, corporation, organization, or manager, agent, servant, officer, or employee of any of them, who, within the City of Los Angeles produces, brews, ferments or manufactures any alcoholic liquors as defined herein, or who, in the case of an alcoholic liquor, produced, brewed, fermented, or manufactured outside the City of Los Angeles, sells, offers for sale, delivers or distributes any such alcoholic liquors to any person or place within said city.

"The term 'alcoholic Liquors' as used herein shall mean and include all spirituous, vinous and malt beverages and any other beverage or mixture of beverages which contain more than one-half of one per cent by volume of alcohol.

"Each and every distributor of alcoholic liquors, as defined herein, shall pay a license tax in the sum and in the manner hereinafter provided upon all alcoholic liquors sold, offered for sale, or delivered by such distributor or his agent, in or to any place within said city.

"The rate of license tax as hereinabove provided shall be as follows:

Per barrel.....	31 cents
Per one-half barrel.....	16 cents
Per one-third barrel.....	11 cents
Per one-fourth barrel.....	8 cents
Per one-sixth barrel.....	6 cents
Per one-eighth barrel.....	4 cents
Per one case or fractional part thereof	3 cents

and for the purpose of this ordinance a barrel is defined to be equal to thirty-one (31) gallons. A case is defined to be twelve (12) bottles containing more than sixteen (16) and not more than thirty-two (32) fluid ounces or twenty-four (24) bottles containing sixteen (16) or less fluid ounces.

"Such license tax shall be paid and collected by means of revenue stamps issued and sold by the City Clerk of said city.

"Each such distributor shall affix to every barrel or fractional part thereof, or case of such alcoholic liquor, revenue stamps in the amount set forth in this section." This amendatory ordinance went into effect October 1, 1933.

On September 7, 1933, plaintiff brought this action to enjoin defendants from enforcing the provisions of section 35 of the license ordinance as amended. In addition to the facts already detailed, the complaint and an amendment to it alleged that plaintiff had obtained a license from the state board of equalization, as provided in the two excise tax bills we have mentioned, and proposed to manufacture and distribute beer in the city of Los Angeles; that defendants threatened to arrest plaintiff's employees under the penal clause of the license ordinance if the license stamps were not procured and attached to the containers of its beer; that the city stamp tax was illegal and void for various reasons.

Defendants filed a general and special demurrer to the complaint as amended, which was sustained without leave to amend. The case comes before us on the judgment roll on appeal from the judgment entered following the sustaining of the demurrer. The order sustaining the demurrer was made and the judgment rendered on September 20, 1933.

The charter of the city of Los Angeles contained the following provisions pertinent to this action: (St. 1925, p. 1024 et seq., as amended): "Sec. 2. The City of Los Angeles, in addition to any other rights and powers now held by it, or that hereafter may be granted to it under the constitution or laws of the state, shall have the right and power, subject to the restrictions in this charter contained: * * * (4) To make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this charter; provided, however, that nothing herein shall be construed to prevent or restrict the city from exercising or consenting to, and the city is hereby authorized to

exercise, any or all rights, powers and privileges heretofore or hereafter granted or prescribed by general laws of the state. * * * (6) To make and enforce within its limits all such local, police, sanitary, safety, welfare and other regulations as are not in conflict with general laws, and to exercise such jurisdiction outside its limits in such manner as may be authorized by law. * * * (11) * * * (a) To enforce law and promote the public peace, health, safety and welfare; * * * (c) to license and regulate under general and uniform laws, any lawful business or calling, and to impose other license fees; * * * Sec. 3. * * * (5) No discrimination in the amount of license tax shall be made between persons engaged in the same business, otherwise than by proportioning the tax to the amount of business done." St. 1925, p. 1028.

Plaintiff presents four grounds for a reversal of the judgment: (1) That the tax in question was a stamp tax on transactions and not a license tax for conducting a business, and therefore illegal and void; (2) that the tax imposed was discriminatory, and therefore void; (3) that the amendatory ordinance imposing the tax did not deal with a municipal affair; (4) that the ordinance was in conflict with the general laws of the state.

[1] In considering the first ground for a reversal of the judgment, plaintiff urges that the power to levy a tax must be drawn from express statutory authority, and the statute must be strictly construed in favor of the taxpayer and against the taxing body. *R. C. A. Photophone, Inc., v. Huffman* (Cal. App.) 42 P. (2d) 1059. This rule is too well established in California to need further citation of authority. From this premise it is argued that the license tax in the instant case is not a license for conducting a business, but a tax upon each individual sale; that the Los Angeles City Charter must be construed as limiting the power of the city to do other than impose a license on the privilege of conducting a business within the city; that as the provisions of the ordinance in question impose a transaction tax and not a license on business, it is unenforceable.

This phase of plaintiff's argument is based chiefly upon the case of *Merced County v. Helm*, 102 Cal. 159, 36 P. 399. Without attempting to detail or criticize the subtleties of distinction whereby defendants seek to distinguish that case from the one we

are considering, it is sufficient to state that we construe it as supporting the position assumed by plaintiff. *Merced County v. Helm*, supra, has been cited with approval on the question we are considering in the cases of *Arfsten v. Superior Court*, 20 Cal. App. 269, 128 P. 949, and *In re Dees*, 46 Cal. App. 656, 189 P. 1050.

The case of *Ex parte Mansfield*, 106 Cal. 400, 39 P. 775, was decided within a year from the decision of the *Merced County Case*. The two cases are factually quite similar. In the *Mansfield Case* the Supreme Court reached an opposite conclusion from that reached in the *Merced County Case* and made an attempt to distinguish the two cases. The question we are considering was again before the Supreme Court on facts analogous to those of the instant case in *Ex parte Seube*, 115 Cal. 626, 47 P. 596, where it was said: "He [petitioner] claims that his imprisonment is unlawful, because the ordinance is void, and he bases this contention upon the decision in the case of *Merced County v. Helm*, 102 Cal. 159, 36 P. 399, in which it was held that an ordinance in some respects similar to the Colusa county ordinance was in excess of the powers of the board of supervisors, because it attempted to impose a license tax upon each single sale, and not upon the business of selling. I have always considered that the rule of construction applied in that case went to the extreme verge of strictness, and the court has been disposed to limit, rather than extend, its application, as appears from the manner in which the case of *Ex parte Mansfield*, was distinguished in 106 Cal. 400, 39 P. 775. In this case the language of the ordinance differs from that of the ordinance construed in *Merced County v. Helm*, and clearly supports a construction which brings it within the conceded power of the board of supervisors 'to license for the purposes of regulation and revenue all and every kind of business not prohibited by law and carried on in such county.' St. 1891, p. 306.

* * * The claim of petitioner is that section 4 must be read by itself, and without reference to the other sections and parts of the ordinance, and that, so read, it is fatally affected by the vice found in the *Merced county ordinance*; that is to say, that it attempts to impose the license tax upon every single act of selling. But we know of no rule of statutory construction which requires us to take one section of the ordinance by itself and give it a construction at variance with other sections. On the contrary, the rule is to look at the whole ordi-

nance, and to give each section a construction which will make the whole consistent and operative according to the apparent intent of the framers. * * * If the letter of the ordinance embraces all who sell, it certainly embraces all who make a business of selling; and petitioner cannot claim that the acts charged in the complaint upon which he was convicted do not come within the letter of the ordinance. The only point he can urge is that the whole ordinance is void because it imposes, or attempts to impose, a license tax upon every single sale. Speaking for myself, I should say that if the ordinance, looking exclusively to section 4, necessarily bore that construction, it would only be void pro tanto. But this point need not be decided, because it is perfectly clear from all the provisions of the ordinance that the intention of its framers was to impose the tax only upon the business of selling. It is only those who carry on the business who incur the penalty, and it was for carrying on the business that the petitioner was arrested and prosecuted." The cases of *Ex parte Mansfield*, and *Ex parte Seube*, have been followed in the following cases: *San Luis Obispo County v. Greenberg*, 120 Cal. 300, 52 P. 797; *County of Los Angeles v. Eickenberry*, 131 Cal. 461, 63 P. 766, 767; *Cuzner v. California Club*, 155 Cal. 303, 100 P. 868, 20 L. R. A. (N. S.) 1095, and, *In re Pierce*, 12 Cal. App. 319, 107 P. 587.

[2-4] It is our conclusion that the rule announced in *Ex parte Seube*, supra, and the cases following it must be controlling here. As we have observed, the complaint alleges that the license tax was only to be imposed on those engaged in business in the city of Los Angeles. It is admitted that plaintiff was engaged in the business of manufacturing and distributing beer within the city of Los Angeles. This business was one which the city of Los Angeles was empowered to license.

Plaintiff urges further that, assuming the conclusions which we have just reached to be correct, still the method of computing and collecting the tax provided for in the ordinance makes it strictly a transaction tax, and no other, which the city of Los Angeles had no power to impose. It is true that the ordinance required the distributor of beer to purchase license tax stamps and attach them to the containers of the beverage disposed of. We can find no serious objection to this procedure. It was but a convenient method of determining the volume of business done

and of collecting the license upon such volume.

[5] Plaintiff next urges that the license tax was discriminatory, and therefore void. In this connection it first calls attention to subdivision 5 of section 3 of the City Charter (St. 1925, p. 1030) which prohibits discrimination in the amount of license tax levied on persons engaged in the same business except "by proportioning the tax to the amount of business done." Plaintiff urges that in the phrase "to the amount of business done" the word "amount" must be held to mean the volume measured in money and not in quantity. Webster defines "amount," when used as a noun, as "the sum total of two or more sums or quantities; the aggregate; the whole quantity; a totality." We can see no more valid reason for holding that the use of the word in the quoted phrase need be restricted to the total of sales, when measured in dollars and cents, than to the total quantity when measured in the total number of separate articles sold. Both usages being correct according to common and accepted practice, either may be made applicable. A very similar contention was made in the case of *Los Angeles v. Los Angeles Independent Gas Co.*, 152 Cal. 765, 93 P. 1006, and is resolved against the argument of plaintiff here. That case arose under the provisions of the *Los Angeles City Charter of 1889* (St. 1889, p. 455), where a provision appeared similar to subdivision 5 of section 3 of the present Charter.

[6] Plaintiff further argues that the questioned provisions of the ordinance were discriminatory and void because they required plaintiff to pay a much higher rate of tax, when measured on the monetary volume of sales of its beer at \$2.40 per case, than it required of a dealer in wines and spiritous liquors sold at \$125 per case. This argument is answered by the case of *Los Angeles v. Los Angeles Independent Gas Co.*, supra. Further, the instant case was filed and judgment entered in September, 1933. At that time the Eighteenth Amendment to the Federal Constitution, the Volstead Act, and the Wright Act (St. 1921, p. 79), prohibited the sale of beverages containing more than 3.2 per cent. of alcohol by weight, except on a physician's prescription by a registered druggist. (See, also, St. 1933, pp. 340, 625, and 1697.) We cannot assume that the officials of the city of Los Angeles would attempt to license the sale of wine, whisky, or other beverages of high alcoholic content while their sale was prohibited by both fed-

eral and state laws. They could only license the sale of alcoholic beverages containing not more than 3.2 per cent. of alcohol by weight, which was the same grade as those sold by plaintiff. A court of equity would find great difficulty in restraining the collection of a license on a legal business because some other persons might be making sales of other articles contrary to the provisions of the law.

[7, 8] Plaintiff also urges that the portion of the license ordinance in question was discriminatory and void because it imposed a greater tax upon a dispenser of beer that was manufactured outside the city of Los Angeles than upon one distributing beer made within the city. Plaintiff urges that there was but one license tax placed upon beer manufactured and sold within the city while there was a license tax placed on each transfer of beer which had been made outside of Los Angeles and sold within the city. Plaintiff further argues that a tax had to be paid on a single gift of beer from one friend to another if manufactured outside the city. Of course this last argument is without merit. The ordinance must be construed as a whole. *Ex parte Seube*, supra. It imposed a license only on a business. A single gift is not a business (*County of Los Angeles v. Eickenberry*, supra), and is not subject to the provisions of the ordinance. The ordinance contained a provision to the effect that if any portion of it be declared unconstitutional, such action should not impair the effectiveness of the balance of its provisions. A fair reading of the provisions of the ordinance in question here leaves the conclusion that there need have been but one set of stamps attached to each container sold within the city of Los Angeles. We are aided in this construction by the following from the case of *County of Los Angeles v. Eickenberry*, supra, where a license ordinance was being construed: "It is said by this court in *Ex parte Haskell*, 112 Cal. [412], 416, 44 P. 725, 32 L. R. A. [527], 529, in speaking of the duty of courts in upholding ordinances: 'Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the lawmaking power, and a contrary conclusion will never be reached upon light consideration. It is the province and right of the municipality to regulate its local affairs, within the law, of course; and it is the duty of the courts to uphold such regulations, except it manifestly appear that the ordinance or by-law transcends the power of the municipality, and contravenes rights secured to

the citizen by the constitution, or laws made in pursuance thereof.'" One of the clauses of section 1 of the amendatory ordinance provided that the absence of a proper tax stamp from a container, after its removal from the premises of a distributor, shall be prima facie evidence that the tax had not been paid. Another clause of the same section placed the duty on the consumer who emptied the container, to destroy the tax stamps. From this the conclusion may be drawn that one set of stamps on the container from the time it first left the premises of the first distributor until its contents were emptied by the consumer would satisfy the requirements of the ordinance. With this construction placed upon the ordinance, the license tax fell equally upon the distributor who manufactured the beer in Los Angeles and the one who imported his beer into the city for sale there.

[9, 10] The third and fourth specifications of error may be considered together. Plaintiff would seem to admit that if the license ordinance be considered a municipal affair, the right of the city to tax the business of distributing beer might be upheld. Plaintiff urges that at the time of the passage of the amendatory ordinance the regulating and licensing of the sale of alcoholic liquors could not be held to be a municipal affair, although the levying of a license for revenue by a chartered city had previously been held to be such. *Trebilcox v. City of Sacramento*, 91 Cal. App. 257, 266 P. 1015; *In re Nowak*, 184 Cal. 701, 195 P. 402. Plaintiff argues that there can be no precise and lastingly inflexible definition of a municipal affair; that by changes in circumstances what may be a municipal affair today may become of general state-wide concern tomorrow. In support of this argument, plaintiff cites the following cases which we do not consider it necessary to review in detail: *Helmer v. Superior Court*, 48 Cal. App. 140, 191 P. 1001; *City of Marysville v. County of Yuba*, 1 Cal. App. 628, 82 P. 975; *Hyatt v. Williams*, 148 Cal. 585, 84 P. 41; *Von Schmidt v. Widber*, 105 Cal. 151, 38 P. 682; *Ex parte Daniels*, 183 Cal. 636, 192 P. 442, 21 A. L. R. 1172; *Atlas Mixed Mortar Co. v. City of Burbank*, 202 Cal. 660, 262 P. 334. Plaintiff then urges that by the passage of the two excise tax laws by the Legislature (St. 1933, pp. 340 and 625), and the proposal as an initiative measure of a new section of the Constitution (art. 20, § 22) to be voted on at the November election in 1932, that when it was adopted a positive determination was

evidenced by the people to take the regulation and sale of alcoholic liquors out of the realm of municipal affairs and place them within the classification of those of state-wide concern. We do not so understand these two legislative acts. Section 20 of the second excise tax law (St. 1933, pp. 625, 634) gives the power to counties, cities and counties, and cities, to impose by ordinance a license tax on the holders of state "on sale" and "off sale" licenses. Far from showing an intention to remove the licensing of the business of dispensing liquor from municipal control and giving this function over to the state this section shows an express intent to leave such licensing, within certain limitations, to local control. The effect of the act is to give two separate political bodies the right to license, for revenue, dealers in liquor. This right has been recognized by our courts. *County of Los Angeles v. Eickenberry*, supra. The license tax imposed by the ordinance in question is within the limit fixed by the Legislature. Therefore there is no conflict between the two enactments. The initiative measure which added section 22 to article 20 of the Constitution did not become operative until after the judgment in this case was entered. The adoption of a constitutional amendment, which by its terms was not to become operative until the happening of a future event, should not be held to declare the public policy of the state or the intention of the people adopting it, until its operative date, and until such time it would appear to be the intention of the people to let existing conditions continue undisturbed. As was said in *People v. Draper*, 134 Cal. App. (Supp.) 787, 22 P.(2d) 604: "Section 22, recently added to article 20 of our State Constitution, does not influence this case. Assuming without deciding that when that section becomes operative the ordinance may no longer be enforced, because all control will be in the state as distinguished from its political subdivisions, it is plain that the section is not yet operative. By its own terms two conditions must concur before it becomes effective: 'In the event' the Wright Act (St. 1921, p. 79) is repealed; 'and if and when it shall become lawful under the Constitution and laws of the United States to manufacture, sell, purchase, possess or transport intoxicating liquor for beverage purposes within the United States.' The first event has taken place, but until the repeal of the Eighteenth amendment to Federal Constitution, the second condition will not be satisfied, for by that amendment the

manufacture, etc., of intoxicating liquor for beverage purposes is prohibited. For the present, then, section 22, art. 20, of the State Constitution has no effect whatever, and a city may still without its limitations 'make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.' Section 11, art. 11, State Const."

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



8 Cal.App.2d 391

**LOS ANGELES BREWING CO. v. CITY OF
LOS ANGELES et al.**

Civ. 1729.

District Court of Appeal, Fourth District,
California.

July 15, 1935.

1. Licenses ☞

Imposition of license tax may be for purpose of either raising revenue or for regulation.

2. Intoxicating liquors ☞

Constitutional provision giving state exclusive right and power to control, license, and regulate manufacture, sale, purchase, possession, transportation, and disposition of intoxicating liquor within state held to take away from political subdivisions of state right to impose license tax for purpose of revenue upon any such business (Const. art. 20, § 22, adopted November 8, 1932).

3. Intoxicating liquors ☞

Constitutional provision giving state exclusive right to control, license, and regulate manufacture, sale, purchase, possession, transportation, and disposition of intoxicating liquor within state, vested in state exclusive rights to license for purpose of revenue those engaged in manufacturing, dealing in, or handling intoxicating liquors, notwithstanding that under earlier general constitutional provision authorizing chartered cities to make and enforce all laws and regulations in respect to municipal affairs, licensing of business for purpose of revenue was municipal affair (Const. art. 11, § 6, amended in 1914, art. 20, § 22, adopted November 8, 1932).

4. Intoxicating liquors ☞

After operative date of constitutional provision giving state the exclusive right and

power to control, license, and regulate manufacture, sale, purchase, possession, transportation, and disposition of intoxicating liquors within state, chartered city could not impose license tax for purpose of revenue upon business of corporation engaged in manufacturing, distributing, and selling intoxicating liquors (Const. art. 20, § 22, adopted November 8, 1932).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Suit by the Los Angeles Brewing Company against the City of Los Angeles and others. From the judgment, the defendants appeal.

Affirmed.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and G. Ellsworth Meyer, Deputy City Atty., all of Los Angeles, for appellants.

J. Leroy Johnson, of Stockton, amicus curiæ.

Hanna & Morton, of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from a judgment permanently enjoining defendants from attempting to impose upon and collect from plaintiff a license tax upon its business of manufacturing beer and distributing beer, wines, and liquors within the city of Los Angeles.

Plaintiff is a domestic corporation with its principal place of business in the city of Los Angeles, and prior to December 6, 1933, had been engaged in the business of manufacturing and distributing beer having an alcoholic content of more than $\frac{1}{2}$ of 1 per cent. and not more than 3.2 per cent. by weight, which is equal to 4 per cent. by volume. Prior to December 6, 1933, it had obtained licenses under the provisions of two excise tax laws passed by the Legislature. (St. 1933, pp. 340 and 625.) On that date it obtained several licenses under the provisions of a third act of the Legislature which then became operative. (St. 1933, p. 1697.) It then obtained from state authorities licenses permitting it to carry on the following businesses: "Off sale" beer and wine license, "off sale" license for liquor other than beer or wine, wholesale dealer's license for liquor other than beer or wine, wholesale dealer's license for beer and wine, brewery

license, importer's license, and proceeded to engage in such businesses. All these licenses were in full force and effect at the time this action was instituted.

The city of Los Angeles is and has been a municipal corporation organized under a freeholders' charter which reserved to the city the control of its municipal affairs. St. 1925, p. 1024 et seq., as amended. The individual defendants are officers of the city of Los Angeles to which we will refer as the city.

Since 1926 there was in full force and effect the city's ordinance No. 56,600 which provided for the licensing of certain professions, trades, callings, occupations, and businesses within the city and imposing a license tax upon them. This ordinance contained a penal clause which provided penalties for those violating its terms. On August 22, 1933, the city council passed, and the mayor approved, Ordinance No. 72,975, which amended section 35 of the license ordinance and imposed license taxes on distributors of alcoholic liquors within the city. The pertinent terms of this amendatory ordinance and their effect prior to December 6, 1933, are sufficiently set forth and discussed in the case of *Los Angeles Brewing Company v. City of Los Angeles* (Cal. App.) 48 P.(2d) 65, bearing our Civil Number 1720, so those matters need not be repeated here. On December 5, 1933, the city council passed another ordinance again amending section 35 of the general license ordinance. This amendatory ordinance was approved by the mayor on December 6, 1933, and in the usual course would have gone into effect on January 5, 1934. This ordinance contained the following provisions:

"Each and every person conducting, managing and/or carrying on the business of selling or offering for sale alcoholic liquor in the City of Los Angeles shall pay a license fee or tax based upon the gross receipts of such business as follows:

On sale dealer.....	\$30.00
For each \$10,000 of gross receipts or fraction thereof, semiannually.	
Off sale beer and wine dealer.....	15.00
For each \$10,000 of gross receipts or fraction thereof, semiannually.	
Off sale liquor dealer.....	60.00
For each \$10,000 of gross receipts or fraction thereof, semiannually."	

"Each of said classifications shall pay a separate tax or fee. The tax or fee for 'on sale' shall not include the 'off sale.'"

On December 14, 1933, plaintiff instituted this action to enjoin defendants from enforcing the provisions of and collecting the license tax imposed by both amendatory ordinances. A temporary injunction was issued which was later made permanent, and this appeal followed.

The same questions are presented by counsel here as those decided in *Los Angeles Brewing Company v. City of Los Angeles*, bearing our Civil Number 1720, supra. They are sufficiently disposed of in that case so that no further mention need be made of them here. An additional question is presented on this appeal which is of first impression in California, namely, the effect of section 22 of article 20 of the Constitution which became operative on December 5, 1933, concurrently with the repeal of the Eighteenth Amendment to the Federal Constitution (*Parente v. State Board of Equalization*, 1 Cal. App. (2d) 238, 36 P.(2d) 437) on the right of chartered municipalities, which have reserved to themselves control of their municipal affairs, to license the sale of intoxicating liquors within their boundaries.

Section 22 of article 20 of the Constitution was again amended at the election held in November, 1934. It is admitted that this amendment effectually took away from all municipalities the right to license the manufacture, disposition, or sale of intoxicating liquors. This would seem to render the questions presented here moot, as an injunction was issued restraining defendants from enforcing the amendatory ordinances. However, counsel for defendants state that each party has demands against the other, and that litigation is pending for the collection of money claimed to be due and unpaid under the provisions of one or both of the ordinances and for the recovery of money paid under protest. For this reason we have decided to proceed with the consideration of the questions necessarily presented on this appeal.

Section 22 of article 20 of the Constitution provides in part as follows: "The State of California, subject to the internal revenue laws of the United States, shall have the exclusive right and power to control, license and regulate the manufacture, sale, purchase, possession, transportation and disposition of intoxicating liquor within the State, and, subject to the laws of the

United States regulating commerce between foreign nations and among the States, shall have the exclusive right and power to control and regulate the importation into and the exportation from the State of intoxicating liquor."

[1] In presenting their argument in support of their theory that the phrase giving the state the "exclusive right and power to control, license and regulate the manufacture, sale * * * and disposition of intoxicating liquor within the State" did not deprive the city of the power to license plaintiff's business for revenue, defendants first urge that the imposition of a license tax may be for the purpose of either raising revenue or for regulation. Of course this is correct. They next point out that the license ordinance is not a regulatory enactment, but is solely a revenue measure. The correctness of this statement may be conceded. They then urge that the word "license" as used in the quoted phrase means *permit to operate* as distinguished from the power to impose a license tax for the purpose of revenue only as the words "tax" and "revenue" do not appear in the amendment. From this premise they conclude that the section of the Constitution gives the state exclusive police power over manufacturers and dispensers of liquor with the exclusive power to determine who may manufacture or dispense liquor and when and where such business may be conducted, but without the exclusive power to impose a license tax upon the operation of such business.

[2] The phrase "license and regulate" has received judicial interpretation from the Supreme Court of California. By an act of the Legislature approved March 30, 1872, it was provided that "the Board of Supervisors of the City and County of San Francisco shall have power, by ordinance, to license and regulate all such callings, trades, and employments as the public good may require to be licensed and regulated, and as are not prohibited by law, * * *". The board of supervisors of San Francisco passed an ordinance imposing a license tax on certain businesses conducted within the city. In the case of *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642, it was contended that the power to "license and regulate" business given in this act did not include the power to impose a license tax for revenue purposes on such business. The Supreme Court could not approve this reasoning and held the power to "license

and regulate" business included the power to impose and collect a license tax for revenue. In the case of *San Jose v. San Jose, etc., Co.*, 53 Cal. 475, and in the case of *Ex parte Braun*, 141 Cal. 204, 74 P. 780, similar conclusions were reached. The same question was before the Supreme Court in the case of *In re Nowak*, 184 Cal. 701, 195 P. 402, 403, where it was said: "Petitioner insists that the use of the term 'license and regulate,' in defining the power of the city over lawful businesses and occupations, restricts the municipality to the imposition of license taxes for purposes of regulation only, and we are indebted to counsel for a learned and comprehensive analysis of authorities from other jurisdictions in support of this proposition. However persuasive we might find the reasoning of the cases and texts thus called to our attention had the language in question never received interpretation in this state, we are now bound by previous decisions wherein a grant by the Legislature of authority to 'license and regulate' has been held to include authority to impose a license tax for revenue only." We therefore conclude that when section 22 of article 20 of the Constitution provided that the state "shall have the exclusive right and power to control, license and regulate the manufacture, sale, purchase, possession, transportation and disposition of intoxicating liquor within the State" it took away from the political subdivisions of the state the right to impose a license tax for the purpose of revenue upon any such business.

But one other argument of defendants requires special consideration here. They urge that the licensing of businesses within a chartered city for the purpose of revenue has always been held to be a municipal affair. That this was true prior to the operative date of section 22 of article 20 of the Constitution is too well settled to need citation of supporting authority. They cite the following portion of section 6 of article 11 of the Constitution: "Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, and cities and towns heretofore organized by authority of this Constitution may amend their charters in the manner authorized by this Constitution so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restric-

tions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws." Defendants urge that as the power to impose a license tax on business in chartered cities is derived from this section of the Constitution we should not hold that the power to impose a license tax for revenue purposes on those engaged in the manufacture, sale, or distribution of intoxicating liquors is vested exclusively in the state, but is possessed jointly by the state and those chartered cities which have reserved to themselves control of their municipal affairs.

There is no precise, lasting, and inflexible definition of a municipal affair. Changes in the circumstances of life may transfer that which is strictly a municipal affair today into something of general state-wide concern tomorrow. See *Helmer v. Superior Court*, 48 Cal. App. 140, 191 P. 1001; *Atlas Mixed Mortar Co. v. City of Burbank*, 202 Cal. 660, 262 P. 334; *Civic Center Ass'n v. Railroad Commission*, 175 Cal. 441, 166 P. 351. It is logical to conclude that in adopting section 22 of article 20 of the Constitution the people intended to and did change the power to impose a license tax for revenue upon those engaged in the liquor business from a municipal affair to one of general state-wide concern, and therefore removed such power from the protection of section 6 of article 11 of the Constitution when they gave the state "exclusive right and power to control, license and regulate" such business.

[3, 4] It is said in *Winchester v. Mabury*, 122 Cal. 522, 55 P. 393, 394, that "the fact that the language to be construed here is a part of the constitution of the state, and not a statutory provision, makes no difference. The rules of construction by which the meaning of the language is to be ascertained, and the rights and remedies which grow out of it, are the same, no matter where the language to be construed is found." See, also, *Boyarsky v. Ross*, 123 Cal. App. 267, 11 P.(2d) 641; *Civic Center Ass'n v. Railroad Commission*, supra.

It has been held that where two conflicting statutes or constitutional provisions have been passed on the same subject, that which was last passed must prevail. *People v. Dobbins*, 73 Cal. 257, 14 P. 860; *Davis v. Whidden*, 117 Cal. 618, 49 P. 766; *Civic Center Ass'n v. Railroad Commission*, supra. It has also been held that "it is well settled that statutes bearing upon the same subject-matter must, if possible, be construed together, and that a general provision will be controlled by one that is special." *Bateman v. Colgan*, 111 Cal. 580, 44 P. 238, 240; *Civic Center Ass'n v. Railroad Commission*, supra. In point of time section 22 of article 20 of the Constitution was passed much later than section 6 of article 11. Section 22 of article 20 of the Constitution deals exclusively with the control of, the licensing and regulating the business of manufacturing and dealing in intoxicating liquors. Section 6 of article 11 of the Constitution, in so far as the issues of this case are concerned, is general in its terms in giving chartered cities control of all their municipal affairs. As section 22 of article 20 was adopted last, as it is special in dealing with this subject of the control, licensing, and regulating of "the manufacture, sale, purchase, possession, transportation and disposition of intoxicating liquor within the State" and as it shows an intention to remove the licensing for revenue of those so dealing in intoxicating liquors from the realm of a municipal affair to that of a matter of general state-wide concern, its provisions must be held to control over those of section 6 of article 11 of the Constitution and vest in the state the exclusive and sole right to license for the purpose of revenue those engaged in the business of manufacturing, dealing in or handling intoxicating liquors. It follows that the city of Los Angeles had no right to impose a license tax for the purpose of revenue upon the business of plaintiff after the amendment became operative.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

8 Cal.App.2d 762

BOHEMIAN DISTRIBUTING CO., Limited
(a Corporation), Plaintiff and Respondent, v.
CITY OF LOS ANGELES (a Municipal Corporation), Frank L. Shaw, as Mayor of the City of Los Angeles, and James E. Davis, as Chief of Police of the City of Los Angeles, Defendants and Appellants.

Civ. 1730.

District Court of Appeal, Fourth District,
California.

July 15, 1935.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and G. Ellsworth Meyer, Deputy City Atty., all of Los Angeles, for appellants.

Hanna & Morton, of Los Angeles, for respondent.

MARKS, Justice.

This case presents the identical questions decided in the case of Los Angeles Brewing Company v. City of Los Angeles (Cal. App.) 48 P.(2d) 65, and Los Angeles Brewing Company v. City of Los Angeles (Cal. App.) 48 P.(2d) 71.

For the reasons given in those cases, and upon the authorities there cited, the judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



8 Cal.App.2d 761

John G. ZOBELEIN, Plaintiff and Appellant, v.
Robert DOMINGUEZ, as City Clerk of the City of Los Angeles, **John S. Myers**, as Controller of the City of Los Angeles, and **N. T. Powell**, as Treasurer of the City of Los Angeles, Defendants and Respondents.

Civ. 1721.

District Court of Appeal, Fourth District,
California.

July 15, 1935.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Hanna & Morton, of Los Angeles, for appellant.

Ray L. Chesebro, of Los Angeles, for respondents.

MARKS, Justice.

In this case all issues presented are identical with those in the case of Los Angeles Brewing Company v. City of Los Angeles (Cal. App.) 48 P.(2d) 71, the opinion in which has this day been filed.

For the reasons there given, and upon the authorities there cited, the judgment in this case is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



8 Cal.App.2d 552

CITY OF LOS ANGELES v. HARPER et al.

Civ. 9457.

District Court of Appeal, Second District,
Division 1, California.

July 31, 1935.

Rehearing Denied Aug. 29, 1935.

Hearing Denied by Supreme Court
Sept. 26, 1935.

1. Stipulations ⇨18(7)

Where agreed statement of facts in condemnation proceeding by city containing stipulation that landowner would suffer severance damage of \$25,000 was signed by deputy city attorney, trial court held justified in striking out such statement where deputy had not intended to stipulate as to amount of damage but only as to amount allowable if landowner's damage theory was sustained.

2. Stipulations ⇨18(7)

In condemnation proceeding by city, striking out agreed statement of facts containing stipulation that landowner would suffer severance damage of \$25,000, which had been signed by deputy city attorney, held justified, where landowner subsequently failed to prove any severance damage.

3. Eminent domain ⇨205

Evidence held to support finding of no severance damages in condemnation proceeding, in which claim was based on cost of moving building wall in order to build spur track on west side of building, where landowner was served by spur on north side of property, could use existing drill track on west side,

and land would have same value after removal of condemned strip.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Proceeding by the City of Los Angeles against Robert B. Harper and the A. Brownstein Building Corporation. From a judgment allowing defendant A. Brownstein Building Corporation the value of the land taken but denying severance damage, the corporation appeals.

Affirmed.

See, also, 139 Cal. App. 331, 33 P.(2d) 1029.

Louis M. Lissner, of Los Angeles (I. H. Prinzmetal, of Los Angeles, of counsel), for appellant.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Arthur W. Nordstrom and Charles F. Reiche, Deputy City Attys., all of Los Angeles, for respondent.

SHINN, Justice pro tem.

In this action to condemn a narrow strip of land from the edge of certain lots, A. Brownstein Building Corporation, as owner, was allowed the value of the land taken, but was denied severance damage; wherefore it appeals from the judgment.

The lots in question are located in an industrial district of Los Angeles. Violet alley, 15 feet wide, extends along the westerly side of the lots, and along the center of this alley extends a "drill track" of the Southern Pacific Railroad. Under general order of the Railroad Commission, the center line of standard gauge railroad tracks must be 8½ feet from the sides or nearest projection of buildings. Because some buildings along the alley were built flush with the property line, it became necessary to widen the alley to 17 feet and this proceeding was instituted to take 2 feet from the west side of appellant's property. The property is improved with a two-story concrete building, set back 14 feet from the alley, which intervening space now is reduced to 12 feet by reason of these proceedings. Another order of the Railroad Commission requires minimum clearance of 13 feet between the center lines of parallel tracks of standard gauge railroads. Appellant's building is so located that appellant could lawfully build and maintain a spur track upon the unoccupied 14 feet

of its lots adjoining the alley. Now that the Southern Pacific track is located in the middle of the alley and 1 foot nearer to appellant's building than before, appellant cannot build or maintain a spur track upon its property parallel to the track in the alley, because there would not be sufficient room to give the required clearance between the center of such private spur track and appellant's building on the one side, and the center of the railroad's spur track in the alley on the other, although this could be done by setting back the west wall of appellant's building at a cost of \$24,705.

[1] The first point advanced by appellant is that the court erred in striking out an agreed statement of facts which had been signed by appellant's counsel, and by a deputy city attorney on behalf of respondent, under the following circumstances: Appraisers for the parties had examined the property and formed opinions as to values and damages; several days before the trial the case was reassigned for trial from the deputy city attorney who had it in charge to another deputy. On the morning of the trial the deputy who had been relieved from further service in the case, without consulting the deputy to whom the case had been assigned or the city attorney, signed the stipulation of facts. Upon the trial, the deputy city attorney in charge moved the court to strike out the statement upon the grounds that it had been signed without authority and through inadvertence. This motion was granted after the court took evidence on the motion. We see no error in the ruling. By the terms of the stipulation it was agreed that appellant's land would suffer severance damage of \$25,000, this supposed damage consisting principally of the cost of setting back the west wall of appellant's building to make room for a spur track, in case appellant should ever desire to build one. The testimony of the deputy who had signed the stipulation sufficiently shows that he had not intended to stipulate to the fact that damage would be sustained in any amount, but only as to the amount that would be allowable in case appellant's theories as to damage were sustained. It further appears that he had read the stipulation hurriedly and had not given it close consideration. Upon these facts alone the court was fully justified in striking out the statement. *Owen v. Herzihoff*, 2 Cal. App. 622, 84 P. 274; *Bare v. Parker*, 51 Cal. App. 106, 196 P. 280; *Baucus v. Riveroll*, 95 Cal. App. 224, 272 P. 760.

[2] There is another and broader ground which we think justifies the court's action. The responsibility of awarding public money for property taken for public uses is that of the court, and it is for the court to say what evidence of values or damages should be presented for the court's consideration and guidance in giving judgment. Neither the responsibility nor the duty of the court to render a just judgment should be shifted to counsel in the case. While it is entirely proper for the court to accept stipulations of counsel which appear to have been made advisedly, and after due consideration of the facts, the court cannot surrender its duty to see that the judgment to be entered is a just one, nor is the court to act as a mere puppet in the matter. Had the court accepted and acted upon the stipulation, judgment would have followed in appellant's favor for the sum of \$25,000 severance damages. As a result of the testimony taken upon this issue, the court found that no damage would be caused by the condemnation. Appellant was given full opportunity to prove its severance damage and failed in that attempt. It, therefore, appears that if the finding that no damage was sustained is supported by the evidence, appellant would have been unjustly enriched in the sum of \$25,000 if the court had acted in reliance upon the stipulation.

[3] The remaining point is that the evidence shows without substantial contradiction that appellant's land was depreciated in value by reason of the condemnation. This, it is claimed, will be the effect of depriving appellant of the right to have a spur track on its private property along the west side of its building. It appears, however, that appellant's property is already served by another private spur track upon the north side of its property and that the drill track in Violet alley will be available for appellant's use. While the experts who testified were not in agreement as to whether the additional spur track would be of any advantage to appellant, there was evidence that the existing drill track, upon which five cars could be spotted, would furnish better service than would a private spur track, upon which two, or at most three cars, could be spotted. Experts testified for respondent that appellant's land would suffer no damage on account of appellant's inability to have the additional spur track and that the remainder of the land would have the same value

after the two-foot strip was taken, as before. The court heard the evidence fully and decided the question of damages in favor of respondent. The finding that there was no damage is purely one of fact and finds ample support in the evidence. We see no reason for disturbing the judgment.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.



In re SWAN'S ESTATE. *

SWAN et al. v. BLOOM et al.
Civ. 10249.

District Court of Appeal, Second District,
Division 1, California.

Aug. 5, 1935.

Rehearing Denied Aug. 29, 1935.

Hearing Granted by Supreme Court
Oct. 2, 1935.

1. Wills ⇨439, 448

Will is to be liberally construed so as to effect as far as possible intention of testator, and of modes of interpretation that one is preferred which will prevent intestacy.

2. Wills ⇨440, 441

When an uncertainty arises on face of will, the testator's intention is to be ascertained from words of will, taking into account circumstances under which it was made (Probate Code, §§ 101, 102, 105).

3. Wills ⇨487(2)

Facts relating to decedent's fortune, family, and affections afford reliable proof, not only in respect to issue as to existence of testamentary intention, but also with respect to controversy as to persons who were intended to be objects of bounty and extent of benefits to be bestowed.

4. Wills ⇨453

When judicial construction is left in doubt by language of will, the court will attribute to disputed expression meaning that is favorable to natural or disclosed objects of testator's bounty.

5. Wills ⇨470

Intention of testator must, in absence of ambiguity calling for extrinsic evidence, be gathered from four corners of will itself.

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes.

*For subsequent opinion see 55 P.2d 117L.

6. Wills ⚡687(2)

Will containing bequest of \$15,000 to be held in trust for benefit of sister-in-law and two designated nephews of testatrix until nephews reached specified age at which time corpus was to be distributed between sister-in-law and children of such nephews with provision that if no children of nephews were surviving on termination of trust such one's portion should revert to residuary estate, and containing other outright bequests to nephews, held to vest in nephews no interest in corpus of trust on termination of trust, but to provide for reversion of all of such fund to residuary estate except portion bequeathed to sister-in-law of testatrix, where there were no surviving children of nephews at time of termination of trust.

7. Courts ⚡89

In construction of wills, except for enunciation of general principles, precedents are of little aid.

Appeal from Superior Court, Los Angeles County; Charles S. Craik, Judge.

Proceedings in the matter of the estate of Frances B. Swan, deceased, between Frederick Howard Swan and others, as executors of the last will and testament of Frances B. Swan, deceased, and Frederick Howard Swan in his individual capacity against Burton Fontaine Bloom and another. Judgment for defendants, and plaintiffs appeal.

Reversed with directions.

Wilton W. Webster, of Pasadena, for appellants.

I. R. Rubin and Norman W. Neukom, both of Los Angeles, for respondents.

ROTH, Justice pro tem.

Frances B. Swan died January 31, 1933. By the terms of the fourth paragraph of an olographic will made approximately ten years prior to her death, it is provided:

"Fourth: I hereby bequeath to my brother, George C. Bloom, if he be living, at the time of my decease, the sum of Fifteen thousand dollars, (\$15,000.00) outright, but if said brother be not living at the time of my decease, then, in that case only, I give to the Pacific Southwest Trust and Savings Bank of Los Angeles, and its successors, the sum of Fifteen thousand dollars (\$15,000.00) in Trust, however, for the following purpose, and for no other, viz: To invest and keep invested, said Trust Fund, in first mortgage, or other

equally as safe securities, at the best interest safely obtainable, as long as this Trust continues, and to pay the net income received therefrom with any accrued interest thereon, as long as this Trust shall continue in semi annual payments, and in equal proportion to Minnie Perkins Bloom (wife of George C. Bloom) and to their two sons, George Thompson Bloom and Burton Fontaine Bloom, until said Burton Fontaine Bloom shall arrive at the age of forty years (40) and if he shall not live so long, then until George Thompson Bloom shall arrive at the age of forty-five years, and if he shall not live so long, then upon the death of said George Thompson Bloom said Trust shall terminate, and said Trustee shall pay over to said Minnie Perkins Bloom, if she shall then be living, one third of the entire Trust Fund, of Fifteen thousand dollars (\$15,000.00), and the remaining two-thirds of said Trust Fund, namely, Ten thousand dollars (\$10,000.00) shall be equally divided, between the children of said George Thompson Bloom, and of Burton Fontaine Bloom, if any children survive them, but if no children shall survive said George Thompson Bloom or Burton Fontaine Bloom, then such an ones portion shall revert to my residuary estate."

George C. Bloom, brother of the testatrix, predeceased his sister, and at the time of the death of the latter George Thompson Bloom was past forty-five years of age, and Burton Fontaine Bloom was past the age of forty years. Neither of the two sons of George C. Bloom had any children at the time the will in question was written, or at any time prior to the death of testatrix, or at all. Upon filing of the first account-current, report, and petition for partial distribution, decedent's executors, appellants herein, requested an interpretation of the excerpted portion of the will. At said hearing, appellants stipulated that \$5,000 should be paid to Minnie Perkins Bloom, wife of George C., but that, since there were no children of either of the nephews to take under such bequest, that the remaining \$10,000 should revert to the residuary estate. The nephews contended that the remaining \$10,000 of the bequest should be distributed equally between them. The trial court sustained the contention of the nephews and made its order requiring distribution in accordance with their request. This appeal is from that order. The hearing with reference to the instant

question was had upon stipulated facts, some of which have already been recited. In addition, the litigants agreed that the court might accept and consider as facts the following: " * * * That during the life of George C. Bloom, the father of Burton Fontaine Bloom, and the life of the decedent, Frances B. Swan, there was a strong bond of love and affection existing between said brother and sister; and likewise, between the family of Frances B. Swan and the family of George C. Bloom; that there was a strong bond of love and affection existing between the testatrix and Burton Fontaine Bloom, her nephew, and between the testatrix and George Thompson Bloom, also her nephew, and that said Burton Fontaine Bloom and George Thompson Bloom are the same persons as named in the will of the testatrix in paragraphs fourth, fifth, seventh and twenty-third; * * * that the estate is fully solvent and is fully able to take care of all bequests, administration expenses and claims that may exist against the estate, and still leave a substantial sum."

A reading of the language of the bequest indicates that no provision is made for the nephews upon the termination of the trust provided for, but that there is provision made for the surviving children of the nephews, in the event there were any such. Respondents contend that a bequest of two-thirds of the corpus of the trust was made to them by implication and assert that the testatrix *intended* that if her brother George predeceased her, that his wife and two children (the two nephews) should have the income from the trust for the duration thereof; that upon the termination of the trust, the corpus thereof should be divided equally between the wife of George C. Bloom and the two nephews of the testatrix, but if the nephews or either one of them died, then the portion of such deceased nephew should go to his surviving children, if any, and if both nephews or one of them died without surviving children, then the portion which the nephew or surviving children might have taken should go to the residue of her estate.

[1-4] It may be conceded, as respondents contend, that a will is to be liberally construed, so as to effect as far as possible the intention of the person writing it (Estate of Wilson, 65 Cal. App. 680, 697, 225 P. 283; Estate of Hoytema, 180 Cal. 430, 432, 181 P. 645); and that of two modes of interpretation that one is preferred which

will prevent intestacy; and that when an uncertainty arises on the face of a will, the intention is to be ascertained from the words of the will, taking into account the circumstances under which it was made (Probate Code, §§ 101, 102, 105; Estate of Henderson, 161 Cal. 353, 357, 119 P. 496; Estate of Koche, 8 Cal. App. 90, 96 P. 100). It may also be conceded that: "The facts relating to the decedent's fortune, family and affections afford reliable proof, not only in respect of the issue as to the existence of testamentary intention, but also with respect to a controversy as to the persons who were intended to be the objects of his bounty and the extent of the benefits to be bestowed upon them." 26 Cal. Jur. p. 893, § 209. It may likewise be granted that when a judicial construction is left in doubt by the language of the will, the court will attribute to the disputed expression a meaning that is favorable to the natural or disclosed objects of the testator's bounty. Estate of Hoytema, 180 Cal. 430, 432, 181 P. 645.

[5, 6] In the instant case, however, there is no question of intestacy, as the bequest in question specifically provides that the trust corpus, in the event the surviving children of the nephews do not take shall go to the residuary devisee. Furthermore, no rule is more universally accepted than the one that the intention of the testator must, in the absence of ambiguity calling for extrinsic evidence, be gathered from the four corners of the will itself. It has already been pointed out that there is no ambiguity in the bequest under consideration with reference to the nephews. Any ambiguity which does exist is with reference to the children, of whom there are none. With any such ambiguity, we are not concerned. Reading the will as a whole and taking into consideration the stipulated facts, as we are urged to do by respondents, we find nothing which indicates that the testatrix did not intend just exactly what she said. On the contrary, a reading of the will confirms us in the conclusion we have reached. Thus in setting up a similar trust in the same will for a sister and daughters of such sister, the testator set aside \$10,000, the income from which was to be paid to said sister, Mary Bloom Ives, so long as she shall live, "and at her death, the net income of said Trust Fund, of said Ten thousand dollars (\$10,000.00), shall then be paid in like manner, by said Trustee, in equal division, to the daughters of said

Mary Bloom Ives who are then living, namely, Anna Josephine Ives & Mary Edwina Ives; and Dorothy Cordelia Ives, until the youngest daughter, shall have reached the age of forty years, *when said Girard Trust Co. shall pay over the principal, of said Trust Fund in equal proportion to the three daughters, above named, but if any of said daughters be not living, at the time of the distribution of this Trust Fund, then any child or children, of such deceased daughter of said Mary Bloom Ives, shall share equally, in the said Mother's share, by right of representation, but if no children shall survive any of these daughters, then such an ones share, shall be divided equally between George Thompson Bloom, Burton Fontaine Bloom, and Caroline McFarland Bloom, or to their heirs, if none of these legatees are then living.*" (Italics ours.)

[7] From the foregoing, it will readily be seen that with reference to the Ives trust, the testatrix specifically provided for the very contingency the nephews claim she intended to provide for in the bequest under construction. Even though the testatrix wrote her own will, it can hardly be tenably argued that she did not know how to do what she wanted to do, when in the same will she actually and properly provided in one trust for the very contingency which it is claimed she either forgot to provide for or did not know how to provide for in the other. Furthermore, there are outright bequests (albeit small in comparison with the size of the estate) to each of the nephews in another portion of the will. The nephews argue from this that such bequests demonstrate the love and affection of the testatrix toward each of them, and her desire to give more of her estate to each of them. This contention on the part of respondents may be sound, but we feel that it may be argued with equal cogency that it also indicates an intention to give no more than the plain intent of the language used does in fact give. In construing wills, it is undoubtedly true that except for the enunciation of general principles, precedents are of little aid, since situations which are exactly parallel are rare. Estate of Coleman, 189 Cal. 612, 619, 209 P. 571; Estate of Henderson, 161 Cal. 353, 357, 119 P. 496. Such cases, however, as have been cited to us on the doctrine of bequest by implication invoked by respondents indicate that such doctrine has no application

to the facts before us. In *re* Reinhardt's Estate, 74 Cal. 365, 16 P. 13; Estate of Franck, 190 Cal. 28, 210 P. 417; Estate of Blake, 157 Cal. 448, 108 P. 287; Estate of Vizelich, 129 Cal. App. 347, 18 P.(2d) 773.

Judgment is reversed, and the trial court is directed to enter a judgment which so construes paragraph fourth of the will that the whole of said bequest therein made, except the sum of \$5,000 in favor of Minnie Perkins Bloom, shall be declared to revert to the residue of said estate, and pass with such residue to Frederick Howard Swan, as residuary legatee.

We concur: HOUSER, Acting P. J.; YORK, J.



8 Cal.App.2d 485

**BLUE v. DIVISION OF CORPORATIONS,
DEPARTMENT OF INVESTMENTS,**

et al.

Civ. 9514.

District Court of Appeal, First District,
Division 2, California.

July 24, 1935.

As Modified Aug. 9, 1935.

1. Certiorari ⇨21

Certiorari to review an order of corporation commissioner will lie only when such order is made in the exercise of some judicial function by the commissioner (Gen. Laws 1931, Act 3814, § 15; Code Civ. Proc. § 1068).

2. Certiorari ⇨24

Where application of individual for permission to sell securities of corporation to public was treated by corporation commissioner as application on behalf of corporation made solely for purpose of circumventing Securities Act, order which denied application under statutory requirement that where proposed plan of business of applicant was unfair, unjust, or inequitable, permission to sell securities should be denied, *held* administrative act and hence not subject to review on certiorari (Gen. Laws 1931, Act 3814, § 15; Gen. Laws Supp. 1933, Act 3814, § 4; Code Civ. Proc. § 1068).

3. Certiorari ⇨64(2)

Only issue on writ of certiorari to review order of corporation commissioner which de-

nled application for permission to sell securities was question of jurisdiction of commissioner to grant or refuse permit (Gen. Laws 1931 and Gen. Laws Supp. 1933, Act 3814).

4. Licenses ⇐22

Where applicant for permission to sell stock to public had secured stock from foreign corporation by which it had been issued under terms of agreement whereby applicant was to pay for stock with unsecured notes, and corporation had planned transaction to facilitate sale of its stock without statutory restrictions, order of corporation commissioner which denied application which was based on finding that sale was not in good faith *held* proper (Gen. Laws Supp. 1933, Act 3814, § 4).

5. Licenses ⇐22

Where permit to sell securities of corporation had been properly refused, order of corporation commissioner which notified brokers that such securities should not be sold to public *held* proper since brokers are not authorized to sell in absence of permit (Gen. Laws 1931 and Gen. Laws Supp. 1933, Act 3814).

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Certiorari by Ben L. Blue to review an order of the Division of Corporations Department of Investments, and Edwin M. Daugherty, Commissioner, which denied his application for permission to sell certain securities, and an order which notified certain brokers that such securities should not be sold to the public. From a decree affirming the orders, petitioner appeals.

Affirmed.

Blue & Conroy and Ben L. Blue, in pro. per., all of Los Angeles, and George B. Harris, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Ralph O. Marron, Deputy Atty. Gen., for respondents.

NOURSE, Presiding Justice.

Petitioner brought a writ of certiorari to review an order denying his application for permission to sell certain securities and an order directed to certain brokers notifying them that such securities should not be sold to the public. From the decree affirming the orders, the petitioner appeals.

The facts appear in the return filed and in the reporter's transcript of evidence taken on the hearing. The Arizona Com-

stock Corporation, a California corporation, held a permit to sell certain of its securities under specific conditions imposed by the corporation commissioner under the terms of the Corporate Securities Act (Deering's Gen. Laws, Act 3814). After some of its securities were sold under this permit, it was allowed to expire and a new corporation with the same name was organized under the laws of the state of Nevada and took over the assets of the California corporation. This concern entered into a contract with the petitioner herein agreeing to sell him 500,000 shares of its capital stock in blocks of 25,000 shares each for which he was to pay a stipulated price per share ranging from 50 cents to \$1.10. Payments were to be made by the petitioner's unsecured promissory notes bearing no interest. Petitioner immediately commenced the sale of this stock to the public through brokers trading on the San Francisco Mining Exchange at prices ranging from \$1.25 to \$1.50 per share. It further appeared that the petitioner, who is a lawyer, was financially unable to purchase the stock, and that the whole transaction was planned to facilitate the sale of the stock of the corporation without the restrictions of the Corporate Securities Act. To aid this plan the corporation agreed in the same contract that it would not issue any of its unissued stock during the term of the contract. This method was conceded to be the only means whereby the corporation was able to secure funds for its own purposes during this period. The corporation commissioner determined that the plan was an indirect scheme to dispose of the stock of the corporation with the intent of evading the Securities Act. He accordingly denied petitioner's application for leave to sell these securities in California and directed the brokers to refrain from trading in the stock.

The judgment should be affirmed for these reasons:

[1,2] Section 15 of the Corporate Securities Act (Deering's Gen. Laws 1931, Act 3814) provides that every order or act of the commissioner shall be subject to review in accordance with the provisions of chapter 1 of title 1 of part 3 of the Code of Civil Procedure (section 1067 et seq.). Section 1068 (of this chapter of the Code) provides that a writ of review may be granted when an inferior tribunal, board,

or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer. Hence, certiorari to review an order of the corporation commissioner will lie only when such order is made in the exercise of some judicial function by the commissioner. 4 Cal. Jur. p. 1065; Sweetnam v. Board of Police Com'rs, 56 Cal. App. 644, 649, 206 P. 102; Homan v. Board of Dental Examiners, 202 Cal. 593, 595, 262 P. 324.

Section 4 of the Corporate Securities Act (Deering's Gen. Laws Supp. 1933, Act 3814) provides that if the commissioner finds that the proposed plan of business of the applicant to sell securities "is not unfair, unjust, or inequitable," he shall issue a permit to sell. "Otherwise, he shall deny the application and refuse such permit. * * *" Though the application was filed by an individual claiming ownership of the securities, the commissioner treated it as in fact an application on behalf of the corporation made solely for the purpose of circumventing the protective features of the Securities Act. His refusal of the permit was not in any sense a judicial act, but was purely administrative.

[3-5] Though the proceeding was started as a writ of review, the hearing was thrown open to a complete trial of matters outside the record tending to prove petitioner's claim that the corporation was financially sound and that he should, therefore, be permitted to sell the stock to the public. No findings of fact were made on this evidence, but the decree fully affirmed the orders of the commissioner. Petitioner seeks to retry this issue on his appeal. It should be sufficient to say that, if certiorari is a proper remedy, the only question properly in issue before the trial court and on this appeal is whether the commissioner had jurisdiction (i. e., power) to grant or refuse the permit. Upon the facts before him the commissioner was fully justified in finding that the sale was not in good faith. As the statute requires him to refuse a permit to sell securities to the public unless he is of the opinion that such sale will not work a fraud upon the purchaser, his refusal in this instance was in strict accordance with the terms of the statute. Hence, if the review under section 15 of the statute could be broadened to a trial de novo of the proceedings before the commissioner, the record here shows no abuse of discretion in his denial of the

permit. Since the brokers are not authorized to sell in the absence of a permit, that order was also proper.

The decree is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



8 Cal.App.2d 404

PEOPLE v. VON BADENTHAL

Cr. 2733.

District Court of Appeal, Second District,
Division 2, California.

July 17, 1935.

Hearing Denied by Supreme Court
Aug. 15, 1935.

1. Larceny $\S$ 65

Evidence that accused misrepresented his name, falsely claimed to be a baron and to have sold a scenario, and thereby obtained loan to finance trip which he never intended to take and used money for other purposes in accordance with intent when he received money, *held* sufficient to sustain conviction for grand theft on theory that money was obtained by false pretense, or on theory of larceny by trick and device.

2. Criminal law $\S$ 865(1)

Court's request to jury to further discuss evidence in endeavor to arrive at verdict after jury reported disagreement and foreman expressed opinion that agreement was practically impossible *held* proper, as against contention that court erred in failing to discharge jury and declare mistrial.

3. Criminal law $\S$ 865(1)

Court's inquiry as to how jurors were numerically divided *held* proper as means of determining whether there was reasonable probability of jury agreeing and whether it was advisable to send jury out for further deliberation.

4. Jury $\S$ 149

Error could not be predicated upon court's failure to rule on counsel's statement that he would like to have another physician called on theory that it constituted denial of "motion" to have another physician brought in to examine juror before she was discharged, since "motion" is application made to court for order, and language used did not indicate that order was desired (Code Civ. Proc.

§ 1003; Pen. Code, § 1089, as amended by St. 1933, p. 1342).

[Ed. Note.—For other definitions of "Motion," see Words & Phrases.]

5. Jury ⇨149

In hearing on question whether juror should be discharged because of illness, error *held* not shown by fact that when juror interrupted examination of physician with remark, "May I ask a question?" court replied, "No" (Pen. Code, § 1089, as amended by St. 1933, p. 1342).

6. Criminal law ⇨1030(1)

Reviewing court will not consider suggested error unless it appears that counsel exercised due diligence to avoid and correct error in trial court.

7. Jury ⇨149

Discharge of juror and substitution of alternate *held* proper, in view of evidence as to juror's illness (Pen. Code, § 1089, as amended by St. 1933, p. 1342).

8. Jury ⇨149

Refusal to vacate order discharging, because of illness, juror replaced by alternate, and refusal to reinstate juror *held* not error, in view of failure to offer evidence that juror was able to resume duties, fact that then existing jury, including alternate, was lawful jury deliberating on verdict, and fact that discharged juror had left courtroom and conversed with other persons (Pen. Code, § 1089, as amended by St. 1933, p. 1342).

9. Criminal law ⇨959

On motion for new trial on ground of substitution of alternate for juror discharged for illness, propriety of court's action in discharging juror *held* determinable in light of evidence as to illness before court at time juror was discharged, without regard to evidence produced on motion (Pen. Code, § 1089, as amended by St. 1933, p. 1342).

10. Criminal law ⇨1158(3)

On motion for new trial on ground that juror discharged for illness was then capable of continuing, decision of trial court on conflicting evidence was final (Pen. Code, § 1089, as amended by St. 1933, p. 1342).

11. Criminal law ⇨172

Substitution of alternate for juror discharged for illness after jury had case under submission and had balloted *held* not to place accused twice in jeopardy (Pen. Code, § 1089, as amended by St. 1933, p. 1342).

STEPHENS, P. J., dissenting.

Carl Von Badenthal was convicted of grand theft, and he appeals.

Affirmed.

Gold & Needleman, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jere J. Sullivan and S. Ernest Roll, Deputy Dist. Attys., all of Los Angeles, for the People.

FRICKE, Justice pro tem.

[1] Appellant was convicted of obtaining the sum of \$1,200 by grand theft from John H. Schleifer. In April, 1934, the complainant was introduced by a mutual acquaintance to appellant as "Baron Von Badenthal" of Austria, the fatherland of complainant. Appellant stated to Schleifer that his family owned a large estate in Austria; that his mother had died leaving 15,000,000 crowns in which he had a one-third interest; that he owned a 107-carat diamond which was in a bank vault in Paris and also owned a valuable oil painting in Syria; that he was in this country on business and was attempting to sell a scenario, which he had written, to a motion picture studio in Los Angeles; that his allowance from the estate was \$300 a month, but that he had overdrawn to the extent of a thousand dollars and would not get any further allowance until August; and that his then present finances consisted of only twenty cents. Similar representations were made in subsequent conversations, in which, also, appellant displayed or claimed an acquaintanceship with various persons in Austria known to Schleifer. Sympathizing with the "Baron," the complainant took him to live with him in his home, where for a number of months appellant enjoyed the hospitality of complainant even to the extent of using his automobile and borrowing over \$600 from his host.

About the middle of May appellant informed complainant that he had sold his motion picture scenario and that the contract had been signed, but that before he could receive the \$15,000 purchase price it was necessary for him to secure a verification from the Vienna Playhouse that he had not sold them the screen rights to the picture. Later appellant stated to Schleifer that the best thing would be for him to go in person to Vienna, and requested complainant to advance him the necessary fin-

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

ances for the trip. In compliance with the request, complainant, relying upon his representations and statements, loaned appellant \$1,200 for that purpose. On July 4th the "Baron" left Los Angeles on the ostensible trip to Europe. After arriving in New York he requested and received further financial advances from the complainant. While in New York appellant wrote a letter, dating it as having been written in Vienna, sent it to a friend in that city and had her mail it to complainant, and also, using the stationery of a transatlantic steamship, wrote a letter to Schleifer saying that he was on the boat. In fact, the "Baron" never left the United States, and when, some time later, complainant discovered this he had appellant arrested and returned to this jurisdiction.

After his arrival in Los Angeles appellant, in the city jail, admitted to complainant that he had lied to him, that his true name was Karl Wellinger and that he was not a baron, and that he had not sold his scenario. On the witness stand, also, appellant admitted that he was not a baron, that he had not sold the scenario and had not gone to Europe. Witnesses from the motion picture studio established that appellant had not sold the scenario, and complainant's testimony as to the representations of appellant concerning his wealth, nobility, and the selling of the scenario was corroborated by the testimony of Mrs. Schleifer. Other witnesses testified that appellant had stated to them that he had sold the scenario.

While denied in many respects by appellant, there is ample evidence of the facts herein recited. The evidence is sufficient to sustain the conviction. The money was obtained by the false pretense that the scenario had been sold, and the judgment could also be sustained on the theory of larceny by trick and device, the money having been advanced to be used for the particular purpose of the European trip which appellant never intended to take, and the money was used by appellant, in accordance with his intent at the time he received it, for other purposes. Appellant himself admitted that he never intended to use the money to go to Europe. The fact that the money was turned over as a loan does not affect this rule. *People v. Rae*, 66 Cal. 423, 6 P. 1, 56 Am. Rep. 102; *In re Clark*, 34 Cal. App. 440, 167 P. 1143.

[2] Appellant claims error because the trial court failed to discharge the jury

and declare a mistrial when the jury declared its inability to agree, and because an alternate juror was substituted for one of the original twelve jurors after the jury had been deliberating for some time without arriving at a verdict.

After being instructed the jury, having heard some seven or eight days of testimony, retired to deliberate at 2:40 p. m. on March 19, 1935. At 3:50 p. m. on March 20th the jury was brought into court and, being asked by the judge, the foreman stated that the jury had not agreed upon a verdict, that numerically they stood 10 to 2 and that up to 15 minutes prior thereto the votes, since their first ballot, had been 9 to 3. On further inquiry the foreman expressed the opinion that an agreement was practically impossible. Further questioned, the foreman said that the jury was disagreed as to both the law and the facts, and that it would help the jury if they were given a further interpretation of the subject of intent, and one of the jurors expressed a belief that "by clarifying the intent a little more" the jury might be able to agree. The record shows that when the court asked the jury whether further deliberation would be productive of an agreement, "voices in unison," the number not being disclosed, answered, "I don't think so." The trial judge then commented upon the fact that the jury had not requested to be discharged and stated that he would discuss the question of intent and the law applicable, to which the foreman responded that the question was "responsibility instead of intent." Counsel for both sides stipulated that the court might instruct the jury orally. The court then properly instructed the jury on the law applicable to the subject of intent and also commented on the doctrine of reasonable doubt and the presumption of innocence.

At 4:52 p. m. of the same day the jury again returned into court, apparently to have some testimony read, and were informed by the judge that the shorthand reporter was not then available, that the jurors would have to rely upon their memory of the testimony concerning which they had made inquiry and requested that they deliberate further. The foreman then volunteered the information that the jury still stood 10 to 2, that two of the jurors' minds were closed and that one of them had authorized him to state that her mind was made up and

closed to further discussion but that she did not refuse to further discuss the evidence or the law. The court then directly inquired of the jurors whether any one of them was unwilling or refused further to discuss the evidence. To this there was no response. The court again requested that if any juror would not further discuss the evidence or would not change his opinion regardless of what argument might ensue, such juror should advise the court, and if any juror had that idea the court would not want to impose further confinement upon the other jurors. No juror responded to this. The foreman, however, made a statement that one of the jurors had said her mind was made up, and the subject was closed. The judge then stated he would ask the jury to retire for a short while at least, and directed the bailiff to take the jury to supper and that they resume their deliberations the following day.

We find nothing in the matters related above which warrants any conclusion other than that the court, not satisfied that a verdict could not be agreed upon, requested the jury to further discuss the evidence and endeavor to arrive at a verdict. In this there was no impropriety. See *People v. Baker*, 94 Cal. App. 687, 690, 271 P. 777, and cases cited.

[3] There was no error in the fact that the court by inquiry ascertained how the jurors were numerically divided. See discussion in *People v. Talkington* (Cal. App.) 47 P.(2d) 368. Such information by itself is proper as a means of assisting the court in its determination as to whether there is a reasonable probability of the jury agreeing upon a verdict and the advisability of sending them out for further deliberation. An examination of the California cases seeming to hold otherwise (see *People v. Talkington*, *supra*, and cases there considered) discloses that the errors there involved lay in the fact that the inquiry as to how the jury stood was coupled with statements by the trial court which were themselves prejudicial error.

While appellant had been on the witness stand one of the jurors, Rhoda Gould, obtained permission to ask him a question, and, that being answered, obtained permission to ask another; but, instead of asking the question, put her hands to her face and burst into hysterical crying, whereupon the court took a recess and the juror was attended by one of the other lady jurors. On the evening of March 20th the juror,

Rhoda Gould, became ill at the dinner table and it required two persons to assist her to the elevator at which point she was obliged to sit down and then fainted. The hotel house physician was called and attended her. After the jury had returned to the juryroom the following morning the judge caused them to be brought into court, and in the presence of appellant and counsel stated that the illness of one of the jurors had been reported to him and that the doctor who had attended her was present. Placed upon the witness stand, the physician testified that he had found the juror suffering from a heart attack induced by acute indigestion, and very highly nervous and hysterical. The physician further testified that in his opinion it would be in the best interests of the juror not to continue on the jury; that undue excitement and discussion might prove injurious to her; that her illness was such that she ought not to and was unable to perform the duty of a juror and that the condition of her heart was serious and might prove fatal. The court thereupon declared its finding that the juror was unable to perform her duty by reason of illness, ordered that she be discharged and that the alternate juror duly chosen and sworn at the beginning of the trial should take her place as a member of the jury. The jury then retired for further deliberation. This procedure was authorized by section 1089 of the Penal Code (as amended by St. 1933, p. 1342) which provides that: "If at any time, whether before or after the final submission of the case to the jury, a juror die or become ill, so as to be unable to perform his duty * * * the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors."

[4] Appellant claims it was error for the court to deny defendant's counsel's motion to have another doctor brought in to examine the juror before she was discharged. No such motion was made. Counsel did, during the course of the medical testimony, state, "I would like to have another doctor called in this case," but that statement was not a motion. A motion is an application made to the court for an order (*People v. Ah Sam*, 41 Cal. 645; Code Civ. Proc., § 1003); and the language used, especially when read with the context, was

not such as would indicate that an order was desired, and hence no ruling was made. There was no error here.

[5, 6] Appellant also asserts that "Miss Gould then desired to make a statement and also ask a question in open court and was refused to do this by the court." Counsel has ignored the record, which shows merely that during the course of the examination of the physician the juror interrupted with the single remark, "May I ask a question?" to which the court replied, "No I think not, Miss Gould." Nothing further on this subject appears in the record. We have no means of knowing what the question was, and no further effort was made by the juror or counsel to pursue the matter further. The trial judge was most courteous during the entire proceeding and no reason appears why the juror could not have made a statement prior to her discharge had she so desired. Appellant was then as familiar with the incident as now, and had he desired he could have called the juror and another physician as witnesses, and, we assume, would have done so had the circumstance then indicated that there was any occasion for such testimony. Before an appellate court will consider suggested error it must appear that counsel exercised due diligence to avoid and correct error in the trial court. Appellant suggests that the juror during the proceedings last above referred to was "evidently in good health and able to continue," but quite significantly omits in this connection any reference to the record, because, perhaps, the record fails to support such statement.

[7] The evidence of the bailiff and other jurors as to the seizure by the juror with illness and her condition at the hotel, and the testimony of the hotel house physician, presented to the trial court a condition clearly calling for the discharge of the juror and the substitution of the alternate, and the court's action was eminently proper.

[8] On the afternoon of the same day appellant's counsel requested the court to vacate its order discharging the juror who had been ill and to reinstate her as a member of the jury. While the denial of this motion is assigned as error, appellant offers no authority which would warrant the court in granting such a motion. The motion seems to have been based on the theory that the juror was able to re-

sume her duties, but no proof of that fact was offered. Furthermore, the then existing jury, with the alternate included, was the lawful jury deliberating upon the verdict, and the discharged juror had, since her discharge, left the courtroom and had undoubtedly come in contact and, as shown by the record, had conversations with other persons in which the cause on trial was mentioned if not discussed. The court properly denied the motion.

[9, 10] The matter of the substitution of an alternate juror was again raised on the motion for new trial, supported by affidavits of the juror and a physician who had examined her shortly after her discharge, to the effect that the juror at the time of her discharge was capable of continuing her duties as a juror. Even if we assume that these affidavits established that the discharged juror was physically and mentally capable of continuing as a member of the jury this would not show that the court erred in its decision at the time the juror was discharged. The action of the court must be tested in the light of the evidence before it at the time of the decision. At that time the court was warranted in concluding that the juror was too ill to proceed. The fact, if true, that after the substitution of the alternate juror had been ordered evidence was discovered contrary to that upon which the decision was based does not render the ruling erroneous. The affidavits on motion for a new trial were, however, contradicted by the evidence of the bailiff in charge of the jury and one of the jurors, and in this conflict of evidence the decision of the trial court on motion for a new trial was final, especially since in certain respects the affidavits submitted by appellant contained statements which it would appear from the record were, to the knowledge of the trial judge, contrary to the facts. The motion for a new trial was properly denied.

[11] Appellant's contention that the substitution of the alternate juror placed him twice in jeopardy is without merit.

The judgment and order are affirmed.

I concur: CRAIL, J.

STEPHENS, Presiding Justice.

I dissent. I am not convinced that the substitution of an alternate juror for a regular juror after the jury has had the

case under submission and has considered it sufficiently to have submitted the individual opinions of its members to a vote upon the question of guilt is a trial by one jury within the meaning of the term, historically speaking, or as it is used in our Constitution.



8 Cal.App.2d 331

**CITY OF LOS ANGELES et al. v.
WATTERSON et al.
Civ. 1376.**

District Court of Appeal, Fourth District,
California.

July 8, 1935.

1. Waters and water courses ⇨230(8)

Action for legal and equitable relief consequent upon void sale of valid irrigation district bonds, in respect to place of trial and time within which trial must have been commenced, was governed by general provisions of Code of Civil Procedure, and not by provision of Irrigation District Act (Gen. Laws 1931, Act 3854, §§ 58, 68, 69, 72).

2. Appeal and error ⇨1010(1)

Findings of court which are amply supported by evidence cannot be disturbed on appeal.

3. Equity ⇨65(2)

Inequitable conduct which will deny litigant his day in court must have infected cause of action, and must relate to transaction about which complaint is made.

4. Waters and water courses ⇨230(8)

In action to recover irrigation district bonds on ground that sale was void because of interest of district officers in district's contract accepting bid for bonds, evidence held to support finding that one of parties to agreement for submission of bid had knowledge that another party to agreement was district officer (Gen. Laws 1931, Act 3854, § 58).

5. Corporations ⇨428(7)

In action to recover irrigation district bonds on ground that sale was void because of interest of district officers in district's contract accepting bid for bonds, knowledge of vice president of corporation which was party to agreement for submission of bid that another party to agreement cast deciding vote as district director to accept bid was notice

to corporation that such other party was officer of district (Gen. Laws 1931, Act 3854, § 58).

6. Waters and water courses ⇨230(4)

In action to recover irrigation district bonds on ground that sale was void because of interest of district officers in district's contract accepting bid for bonds, parties to agreement for submission of bid held to have notice of all facts disclosed on face of bonds, including signature of one of parties to agreement as president of district (Gen. Laws 1931, Act 3854, §§ 31, 58).

7. Evidence ⇨318(2)

Copy of letter by state engineer to Governor concerning district irrigation controversy held not admissible in action involving controversy where letter contained hearsay based on hearsay, and was not such a report as was made legal evidence by any statute, was not shown to be an original, and was not certified as copy by any legal custodian.

8. Pleading ⇨290(3)

Plaintiffs who were not parties to or privy to contract pleaded by defendants were not precluded from impeaching genuineness of contract because of plaintiffs' failure to file affidavits denying genuineness of contract within ten days after receiving answer, as required by statute (Code Civ. Proc. § 448).

9. Waters and water courses ⇨230(4)

Irrigation district's contract for sale of bonds was void where district officers had interest in contract, whether or not officers derived any benefit from sale (Gen. Laws 1931, Act 3854, § 58).

10. Waters and water courses ⇨230(4)

Irrigation district officers who agreed with parties submitting bids that officers should have portion of bonds at price paid by bidders, and who actually acquired some of bonds, had interest in district's contract awarding sale of bonds to bidders, so that sale was void (Gen. Laws 1931, Act 3854, § 58).

11. Waters and water courses ⇨230(8)

District irrigation officers possessing interest in district's contract for sale of bonds invalidated entire sale of bonds under contract, and did not merely invalidate sale of bonds which district officers acquired (Gen. Laws 1931, Act 3854, § 58).

12. Contracts ⇨107

Where statute provides penalty for act, contract founded on such act is void, although statute does not pronounce contract void nor expressly prohibit it.

13. Waters and water courses ⇨230(4)

Statutes legalizing, ratifying, confirming, and validating proceedings leading up to

sale of irrigation district bonds and making bonds binding obligations of district *held not* to validate district's sale of bonds under contract in which district officers had interest and which was void under statute providing penalty in case district officers were interested in contracts awarded by board (Gen. Laws 1931, Act 3854, § 58; St. 1925, p. 373; St. 1931, p. 376; St. 1933, p. 572).

14. Constitutional law ⇨193

Rule that Legislature can ratify act which it could have authorized cannot be applied where result would be to ratify a fraud and to ignore applicable penal statute.

15. Waters and water courses ⇨230(4)

Competent majority of board of directors of irrigation district did not accept bid for purchase of district bonds, where director who cast deciding affirmative vote had interest in bid (Gen. Laws 1931, Act 3854, § 58).

16. Waters and water courses ⇨230(4)

Where sale of irrigation bonds was void because district officers were parties to agreement for submission of bid for bonds and so had an interest in district's contract accepting bid, and money paid on purchase was never received by district, but was misappropriated by officers, maxim that he who seeks equity must do equity did not require district to return money paid on purchase price as condition to recovery on bonds (Gen. Laws 1931, Act 3854, § 58).

17. Waters and water courses ⇨230(8)

In action to recover irrigation district bonds on ground that sale was void because district officers were parties to agreement for submission of bid and so had an interest in district's contract accepting bid, court could find that money paid on purchase price was never received by district, but was misappropriated by officers, notwithstanding provision of irrigation district act that in action to contest validity of district bonds, all findings of fact or conclusions of board of directors should be conclusive, and resolution adopted by board of directors of district that money paid on purchase price of bonds had never been received by district (Gen. Laws 1931, Act 3854, §§ 58, 72).

18. Waters and water courses ⇨230(8)

In action to recover irrigation district bonds on ground that sale thereof was void, in which interlocutory judgment was entered ordering delivery of bonds and coupons to clerk of court within 90 days, and upon default thereof plaintiff to have judgment for amount of bonds and coupons, court had jurisdiction to enter second judgment for amount of coupons which defendants failed to turn over to plaintiffs.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by the City of Los Angeles, a municipal corporation, and another, against W. W. Watterson and others. From the judgment, defendants Robert D. Crowell and others appeal.

Affirmed.

Lucius K. Chase and Chase, Barnes & Chase, all of Los Angeles, for appellants Robert D. Crowell and Security-First Nat. Bank of Los Angeles.

E. R. Young and Young, Lillick, Olson, Graham & Kelly, all of Los Angeles, for appellant Longyear.

Lawler & Degnan, of Los Angeles, for appellants M. H. Lewis & Co., M. H. Lewis, and C. A. Sheedy.

Ray L. Chesebro, City Atty., James M. Stevens, Asst. City Atty., F. M. Bottorff, Deputy City Atty., and T. B. Cosgrove, Sp. Counsel, all of Los Angeles, for respondents.

HARDEN, Justice pro tem.

On August 7, 1923, the electors of Owens Valley Irrigation District voted to issue bonds of said district in the amount of \$1,650,000. On January 23, 1924, the board of directors thereof adopted a resolution authorizing the sale of bonds of said issue amounting to \$736,000. On the date fixed for the reception of bids, February 14, 1924, a bid for bonds of the par value of \$471,500 was presented in the name of M. H. Lewis & Co. by C. A. Sheedy, vice president, under circumstances hereinafter stated. Accompanying the bid was a cashier's check of \$8,400 to apply as part payment. The bid was accepted, and on or about February 15, 1924, the sum of \$411,999.78 was paid by checks of M. H. Lewis & Co. to apply on the purchase and payment of said bonds in accordance with the terms of the bid.

At the time of the transactions herein mentioned, prior to March 3, 1925, defendant W. W. Watterson was chairman and a member of the board of directors of said district. M. Q. Watterson, a brother of defendant W. W. Watterson, was at all of said times treasurer of said district. The other members of said board were D. M. Longyear, J. L. Gish, also defendants herein, George B. Warren, and Lawrence J. Bodle. Director D. M. Longyear was a

son of defendant W. D. Longyear. At all said times defendant W. W. Watterson was president and a member of the board of directors of Watterson Brothers, Inc., a corporation, and defendant M. Q. Watterson was secretary-treasurer and a member of the board of directors thereof; and said persons constituted a majority of the members of said board, and controlled its business affairs and management. M. H. Lewis was president and C. A. Sheedy was vice president of M. H. Lewis & Co.; and said officers owned the majority of the stock of said company, were directors thereof, and controlled its business affairs. Defendants Kaleb T. Crowell and W. D. Longyear were owners of lands within said irrigation district.

The action of the board of directors of said district in accepting the bid of M. H. Lewis & Co. for said bonds was accomplished by the affirmative votes of directors W. W. Watterson, D. M. Longyear, and J. L. Gish, against the negative votes of directors Warren and Bodle. Director W. W. Watterson cast the deciding affirmative vote.

This action was instituted November 17, 1927, by the city of Los Angeles and the department of water and power of said city, municipal corporations, taxpayers, and owners of lands within said district, in behalf of themselves and of the other land-owners and interested parties in the district, to compel the purchasers of said bonds in the amount of \$471,500 to deliver the same to said district or, in default thereof, to pay to it the value of said bonds and attached coupons not delivered, and for injunctive relief.

The plaintiffs alleged, and the court found, in part as follows: That said sale of bonds was invalid by reason of the direct interest therein of W. W. Watterson as director of said district and of M. Q. Watterson as treasurer thereof; that prior to February 14, 1924, W. W. Watterson and M. Q. Watterson conspired and agreed with W. D. Longyear, Caleb T. Crowell, M. H. Lewis & Co., M. H. Lewis, and C. A. Sheedy for the submission of a bid for a portion of said bonds in the amount of \$471,500 in the name of M. H. Lewis & Co., without disclosing the interest of the other parties therein; that it was agreed between the parties to said conspiracy that W. W. Watterson, M. Q. Watterson, W. D. Longyear and Caleb T. Crowell would arrange for, provide, and advance the

funds necessary to consummate the purchase of said bonds in accordance with the terms of said bid, and that upon the purchase thereof said Wattersons, Crowell, and W. D. Longyear would make and maintain satisfactory banking arrangements for carrying said bonds on loans or otherwise for defendant M. H. Lewis & Co., would furnish any margin required for carrying said bonds, and would fully protect, indemnify, and reimburse M. H. Lewis & Co. for any losses, costs, liabilities, and expenses which that company should suffer or incur by reason of the purchase or sale of the whole or any part of said bonds; that said Wattersons, Crowell, and W. D. Longyear would be entitled to acquire and receive one-half of the bonds so purchased at the price for which said bonds were purchased; that, pursuant to said plans, the Wattersons, W. D. Longyear, Crowell, M. H. Lewis & Co., M. H. Lewis, and C. A. Sheedy did make and maintain banking arrangements for carrying said bonds and did provide, arrange for, and advance the money to be used in the purchase and acquisition of said bonds; that, pursuant thereto, the Wattersons, Longyear, and Crowell did acquire possession of one-half of said bonds; that all of said acts and agreements of the Wattersons were done and made in the name of Watterson Brothers, Inc., but were on behalf of W. W. Watterson and M. Q. Watterson individually; that at all times the parties to said conspiracy and agreement knew that W. W. Watterson was president and a member of the board of directors of Watterson Brothers, Inc., and that said M. Q. Watterson was secretary and director thereof, and that they controlled the majority of the stock thereof and its financial and business policies, and also knew that W. W. Watterson was chairman and a member of the board of directors of said irrigation district and that M. Q. Watterson was treasurer thereof; that the payment of \$411,999.78 was made by eight checks of \$50,000 each and one of \$11,999.78, made payable to the order of M. Q. Watterson, treasurer of said district; that said checks were delivered to W. W. Watterson in Los Angeles on or about February 15, 1924, and that on that day he took the same to Keeler, Inyo county, and procured the indorsement thereof by M. Q. Watterson, treasurer of said district, either to Inyo County Bank, or order, or to First National Bank of Bishop, or order (banks in which the Wattersons

were officers and which were managed and controlled by them); that said checks were then returned to W. W. Watterson; that thereafter practically all of the proceeds thereof were converted to the personal use of W. W. Watterson and M. Q. Watterson, which conversion they confessed on or about September 15, 1927; that all of the bonds were delivered to Lewis & Co. on or about February 15, 1924; that said delivery was procured through the conspiracy and agreement aforesaid; that the irrigation district did not receive any money or benefit therefor; that at the time of the judgment hereinafter mentioned M. H. Lewis & Co., Lewis, and Sheedy held 65 of said bonds of the par value of \$500 each, the legal representatives of defendant Crowell held 760 thereof, and W. D. Longyear held 118 thereof; that defendants D. M. Longyear and J. L. Gish had no guilty knowledge of the matters complained of prior to the commencement of the action; that plaintiffs did not discover, and had no means of discovering, the fraud complained of until about September 15, 1927.

Caleb T. Crowell died after trial and before judgment and the defendants Robert D. Crowell and Security-First National Bank of Los Angeles were appointed executors of his will and were substituted as defendants herein.

The findings were in favor of the plaintiffs and against the defendants W. W. Watterson, M. Q. Watterson, said executors of the will of Caleb T. Crowell, W. D. Longyear, M. H. Lewis & Co., M. H. Lewis, and C. A. Sheedy on practically all issues. Judgment was entered accordingly on December 15, 1932, and ordered that said defendants delivered to the clerk of the court within 90 days all of the bonds and their coupons so purchased; that upon default thereof plaintiffs have judgment against said defendants jointly and severally in the sum of \$1,038,220. Thereafter, under protest and upon stipulation that the same would be without prejudice to the appeal, all of the bonds and coupons were delivered to the clerk with the exception of coupons amounting to \$81,303.75. On March 24, 1933, a second judgment was entered against said defendants jointly and severally for said sum of \$81,303.75. As to the defendants Watterson, the judgments have become final. The executors of the estate of Crowell, W. D. Longyear, M. H. Lewis & Co., M. H. Lewis, and C. A.

Sheedy have appealed from both judgments upon one record.

The case is founded upon the provisions of section 58 of the Irrigation District Act (Act 3854, Deering's Gen. Laws 1931), which provides that no director or officers shall be interested, directly or indirectly, in any contract to be awarded by the board, and further provides that for a violation of such provision the officer shall be guilty of a misdemeanor and shall be punished by fine or imprisonment, or both.

[1] This is not an action to have the issues of bonds declared invalid. Sections 68, 69, and 72 of the Irrigation District Act have to do with actions to contest the validity of bonds and to the time within which and the forum where such actions may be brought. It is provided thereby that such contest shall be in the nature of a proceeding in rem; that jurisdiction over the defendants may be acquired by special proceedings for publication of summons; provision is made for speedy trial, and for an appeal within 30 days. Section 72 provides that no contest of any of the matters in said sections provided for shall be made other than within the time and in the manner specified. Such sections have no application whatever to the present action, which is for legal and equitable relief consequent upon a void sale of valid bonds. This action is controlled, in respect to the place of trial and the time within which it must have been commenced, by the general provisions of the Code of Civil Procedure.

[2] A considerable part of appellants' brief is devoted to argument of the proposition that the city has not come into the case with clean hands; that all relief ought to be denied it because of alleged unconscionable conduct in its dealings with the residents and landowners of Owens Valley. The findings of the court are to the contrary. Such findings find ample support in the evidence, and upon well-recognized principles cannot be disturbed upon appeal.

[3] Furthermore, to deny a litigant his day in court because of inequitable conduct, such conduct must have infected the cause of action and must relate to the transaction concerning which complaint is made. 21 C. J., § 173, p. 187; Pomeroy's Eq. Jur. (4th Ed.) vol. 1, § 399, p. 741; *Germo Mfg. Co. v. McClellan*, 107 Cal. App. 532, 290 P. 534. There was an entire lack of evidence connecting plaintiffs with the sale of the bonds.

[4] One of the principal points relied upon to overturn the judgments is the alleged fact that Crowell had no knowledge at the time of the transactions that the defendants Watterson were officers of the district. (It is admitted that all of the other defendants had such knowledge.) The evidence would support the following evidentiary findings: That Crowell had known both Wattersons for a good many years; that he often visited them in Owens Valley; that he knew they were prominent men there; that he had purchased mortgages from them, through their banks; that he had petitioned for the formation of the irrigation district; that W. W. Watterson told him the district had been formed and that there was to be a sale of the bonds in question and had tried to persuade him to buy the whole issue, which Crowell declined to do; that Wattersons, Longyear, and Crowell persuaded M. H. Lewis & Co. to make the bid; that Crowell finally agreed with W. W. Watterson to buy bonds to the amount of \$118,000. Crowell further testified that W. W. Watterson said to him in that connection: "Well, now, if we don't buy an interest in those ditches there, so that we can consolidate everything, * * * I think that *we* will disorganize this irrigation system, and *we* don't want these bonds sold out over the country, but *we* want them where *we* can call them in, place *our* hands on them and call them in, and *disorganize and pay off*." "Well," I says, "that's all right." "Now," he says, "I've got Lewis over here to carry those bonds, what *you and me and Longyear hadn't taken*—I've got Lewis to carry them, and he will put them in a bank and carry them." I says, "I ain't going in any bank. I never borrowed any money from any bank on bonds or anything of the kind, and I'm not going to." "Well," he says, "I can arrange with Lewis to carry them and put them in the bank," and I says, "Well, all right." I think about that time he came to me with an agreement that I would guarantee Lewis against any loss on those or something of the kind, and I signed the agreement; *thought nothing of it*." We have cited enough evidence to show that the finding of the court that Crowell had knowledge that W. W. Watterson was a director of the district is a justifiable inference, and is therefore warranted. We need not pursue the matter further to establish knowledge that M. Q. Watterson was an officer of the district.

[5] C. A. Sheedy, vice president of the M. H. Lewis & Co., was present at the time of the opening of bids for the bonds, overheard the calling of the roll of directors on the question of accepting the bid of his company, and then learned that the deciding affirmative vote was cast by W. W. Watterson. This was notice to his company. In view of the knowledge of all appellants, including Crowell, of W. W. Watterson's connection with the district, it is not necessary to consider whether, in the making of the bid, M. H. Lewis & Company acted as the agent of the Wattersons, Longyear, and Crowell, and thereby to charge the principals with the knowledge of the agreement, nor as to whether plaintiffs, by invoking the rules applicable to conspiracy, could charge Crowell with the knowledge of Sheedy.

[6] Pursuant to the requirements of section 31 of the Irrigation District Act, the bonds bore the signature of W. W. Watterson, as president of the district. The parties to the contract of February 14, 1924, were chargeable with notice of all the facts disclosed upon the face of the bonds. *McClure v. Township of Oxford*, 94 U. S. 429, 433, 24 L. Ed. 129; *Crow v. Oxford*, 119 U. S. 215, 222, 224, 7 S. Ct. 180, 30 L. Ed. 388; *Barnett v. Denison*, 145 U. S. 135, 139, 12 S. Ct. 819, 36 L. Ed. 652.

The findings of the court as to defendants' knowledge of the whole transaction, including the Wattersons' official connections with the district, put at rest the whole of appellants' contentions arising from the claim that Crowell was a bona fide purchaser.

[7] Appellants offered in evidence a letter dated December 26, 1924, purporting to have been signed by W. F. McClure, state engineer, addressed to the Governor of California, upon the subject of the controversy between the residents and landowners in Owens Valley and the department of water and power of the city of Los Angeles. It was based in part upon hearsay statements made to him. Upon objection that the letter was incompetent, being hearsay, and that no foundation was laid for its reception, it was excluded by the court. Reliance is placed upon the case of *Vallejo, etc., R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 P. 238, wherein it was held that a report made pursuant to statute by the state agricultural society was admissible in evidence and contained legal

evidence as to the facts therein stated regarding the products of the state. The offered letter was not shown to be an original; nor was it certified as a copy by any legal custodian thereof. There was no foundation for its reception in evidence. Aside from lack of foundation, it was not admissible. It was hearsay based upon hearsay, and not such a report as is made legal evidence by any statute.

[8] An important and surprising item of the evidence, around which much of the controversy turns, is a written contract bearing date February 14, 1924. The contract is between M. H. Lewis & Co., first party, and Watterson Brothers, Inc., W. D. Longyear, and C. T. Crowell, second parties. The court found that the second page of the contract as produced by defendants was a true expression of the agreement of the parties, but that the first page thereof was not true or correct. The writing recited on the first page thereof that the first party "*has purchased*" the bonds in question (amounting to \$471,500) at the instance and request of the second parties; that the first party would sell to the second parties, at the price paid therefor, one-half thereof; that neither Watterson Brothers, Inc., nor Longyear should profit by the transaction. On the second page it provides that the second parties agreed to save the first party harmless from any loss by reason of the purchase and sale of said bonds; that "said second parties agree that at the time of the purchase of said bonds above described, and during the term of this agreement, they *will* make and maintain satisfactory banking agreements for carrying said bonds on loans, or otherwise, for said first party during the period of this agreement, and incidental to said loans, will agree to furnish any necessary margin required in carrying said bonds." All of said terms were proved by satisfactory evidence aside from the contents of the instrument itself and are admitted, except the provision that neither Watterson Brothers, Inc., nor Longyear should profit. This latter provision, contained on the first page of the contract, is relied upon by appellants to clear the transaction of its fraudulent aspects. Throughout the argument of the sufficiency of the evidence to justify the findings of the court, appellants repeatedly resort to said passage to exonerate the appellants of wrongdoing. The complete answer is that the findings are to the effect that said provision was not part of

the contract actually made. Italics have been employed to show that the first page of the agreement was rewritten, apparently, after the purchase, because it recites that the first party *has purchased*; whereas, the second page contains an agreement to the effect that the second parties *will* make the banking agreements referred to. It is evident from an inspection of the photostatic copy of the agreement that the two pages were written on different typewriters; and perforations disclose that the pages had previously been fastened together in some instrument and thereafter torn apart. An original draft of the agreement prepared by Lewis was not produced; nor was the first typed draft thereof, though Lewis testified it was prepared by an attorney then representing Mr. Longyear. Said contract was attached as an exhibit to the answer of the defendant M. H. Lewis & Co., filed March 3, 1926. Appellants contend that plaintiffs were not in a position to deny its genuineness and due execution owing to their failure to follow the requirements of section 448, Code of Civil Procedure.

Heath v. Lent, 1 Cal. 410, was a suit against an administrator of an estate upon a bond executed by the deceased as surety. While the statute then in effect was somewhat different from section 448 of the Code of Civil Procedure, the statements of the court are helpful as indicating the reason for the rule found in such statutes. There the court said: "The statute provides, that when a complaint or answer is founded on an instrument in writing, which is alleged to have been signed by the party, the signature shall be considered as admitted, unless denied by such party on oath. The party to be charged was the representative of the estate of the person whose signature appears on the bond. He had not signed the instrument, and could not deny upon oath its execution by the deceased. It is clear that the statute does not extend to any other parties than those who are alleged to have signed the instrument. Such parties are supposed to know the genuineness of their own signatures, but it would be unreasonable to suppose that the representatives of a deceased party possess the same knowledge."

In Marx v. Raley & Co., 6 Cal. App. 479, 92 P. 519, 520, the action was for the value of personal property sold. Defendant set up a letter written by it to plaintiff's assignor, claiming that the con-

tract was embodied therein. After citing with approval *Heath v. Lent*, supra, the court said: "In this case, as in that, it would be unreasonable to say that the plaintiff was bound to know the genuineness of the signature of the defendant."

Miller v. Price, 103 Cal. App. 650, 284 P. 1035, 1036, was an action for damages for wrongful levy of an execution. The defendant set up in his answer a copy of his instructions given to the sheriff in the prior suit and the sheriff's return. Plaintiff did not deny the genuineness nor due execution of such documents by affidavit. Defendants relied upon the code section in question. The court said: "Such papers are binding only upon the parties who have signed the same."

On the other side of the question, we have *Krug v. Warden*, 57 Cal. App. 563, 207 P. 696, 697. That was an action to quiet title. An intervener set up a tax deed to Warden and a quitclaim deed from Warden to intervener. There it was contended that plaintiff's failure to comply with section 448 of the Code of Civil Procedure prevented his attack upon the tax deed upon the ground it was void. The court said: "Plaintiff could not deny that the deeds had been assigned [signed?] by the purported parties or delivered. It was admissible, however, for him to prove that the conveyance to Warden was void. This he did by showing the insufficiency of the notices. * * *" Inasmuch as the case turned upon a holding that the deed was void, it is not directly in point on the question here involved. A similar situation is disclosed in the case of *Interstate Realty, etc., Co. v. Clark*, 77 Cal. App. 558, 247 P. 244.

Without attempting to formulate from said decisions a rule of general application, we hold that section 448 of the Code of Civil Procedure cannot be applied in this case to prevent the plaintiff from impeaching the genuineness of the pleaded contract. Plaintiffs were not parties to the contract, nor in any way privy thereto. As we see it, the reason behind the rule is not present here; and, the reason failing, the rule fails of application. The first page of the contract being impeached, and the finding of the court being that said page was not true or correct, said recital that the Wattersons and Longyear should not profit, added strength to the claim of illegality made by plaintiffs in their pleadings. The contract was merely an item of

evidence, all of the terms of which, with the exception of the one now under consideration, supported plaintiff's position.

[9] In any event, the only material effect of an admission of the terms of the contract would be to entitle defendants to avail themselves of the contention that Wattersons and Longyear did not profit from the sale of the bonds. In other respects the findings of the court as to the terms of the actual agreement between the parties to the purchase of said bonds are not challenged. If defendants had established the contract to be that the Wattersons did not profit by the sale, that fact would not necessarily establish a lack of interest on their part in the contract. Under such circumstances, the validity of the contract does not hinge upon whether the fiduciary did or did not profit. *Henninger v. Heald*, 52 N. J. Eq. 431, 29 A. 190; *Menefee v. Oxnam*, 42 Cal. App. 81, 88, 183 P. 379; *Western States L. Ins. Co. v. Lockwood*, 166 Cal. 185, 135 P. 496.

Whether defendants Watterson profited or not, it is an undoubted fact that in contemplation of law they suffered a detriment by the assumption of the obligations of said contract.

[10] On the question of whether the Wattersons were interested in the sale in contravention of section 58 of the Irrigation Act, it should be stated here that the evidence disclosed that the Wattersons actually acquired one-eighth of the bonds purchased in the name of *Lewis & Co.*, for a sum in excess of \$52,000, and that said bonds so acquired were subsequently sold by them to the defendant *Crowell*. The evidence was abundant to support the finding of a direct interest of the defendants Watterson in the sale. The indemnifying agreement made by them, Longyear and *Crowell*, as second parties, with *M. H. Lewis & Co.*, as first parties, under which the second parties had the right to acquire one-half of the bonds at the price paid, the actual acquisition of one-half thereof by said second parties and the procuring by the Wattersons of one-eighth thereof pursuant thereto, put the matter beyond controversy. The interest was such as is denounced by section 58 of the Irrigation Act.

[11, 12] It is not true, as is contended, that even if it be held that Wattersons were interested in the purchase, such interest would operate to invalidate only the sale of the bonds which they acquired. "It

is established by an unbroken line of authorities that 'where a statute provides a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void, nor expressly prohibit it.'" *Stockton P. & S. Co. v. Wheeler*, 68 Cal. App. 592, 601, 229 P. 1020, 1024; *Berka v. Woodward*, 125 Cal. 119, 127, 57 P. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31; *County of Shasta v. Moody*, 90 Cal. App. 519, 523, 265 P. 1032; *Moody v. Shufleton*, 203 Cal. 100, 262 P. 1095.

[13, 14] Appellants contend that certain curative statutes passed by the Legislature operate to validate the sale. Such acts of the Legislature are found in Statutes of 1925, p. 373; Statutes of 1931, p. 376; Statutes of 1933, p. 572. In almost identical language such statutes provide that all proceedings leading up to the sale of bonds of irrigation districts theretofore sold are legalized, ratified, confirmed, and validated; the bonds are declared to be binding obligations of the district issuing them; and the faith and credit of the district are pledged for their payment.

It seems that the instances in which such statutes are most frequently applied are where there has been an entire failure to follow the procedure specified in a statute, where there has been an irregular or defective compliance with such procedure, and where proceedings have been taken in the absence of any legislative authority. All such instances of the application of such statutes may be passed over without further notice for the reason that, though enlightening on the general subject, our problem is not to be determined thereby. The question here is whether the comprehensive language employed in the validating acts is properly applicable to cure a fraud such as was found to have been committed.

The cases where the courts have passed upon the question are few. One of them is *Thompson v. Thompson*, 52 Cal. 154. There certain land was conveyed to the city of Santa Barbara and was later transferred to Espinosa, who took the conveyance for De la Guerra, the president of the board of trustees of the city. The action was ejectment by a grantee of De la Guerra against defendant who claimed title by a prior grant from the municipal authorities. Defendant proved only, however, that he had inclosed the land in 1859, and had subsequently occupied the same. The case turned in part upon a holding that if

the defendant "had no privity with the title of the town, he was not in a position to institute an inquiry whether the grant to Espinosa was for his own benefit, or that of De la Guerra." The decision contains the following language applicable here: "If there was any infirmity in the deed from the town authorities to Espinosa, for want of authority or legal capacity to make it, the defect was cured by the third section of the Act of February 4th, 1872 (Stats. 1871-2, p. 78), which enacts that 'all acts and proceedings of the Board of Trustees of the said town * * * are hereby approved and confirmed.' * * * A subsequent approval by the Legislature of a prior disposition of the land by the town authorities, was equivalent, in law, to a previous authority so to dispose of them." The *Thompson* Case was considered in *City of Oakland v. Oakland Water Front Co.*, 118 Cal. 160, at page 194, 50 P. 277, 290, in which it was stated, concerning it, that the act there in question confirmed "all the acts and proceedings' of the trustees,—a confirmation as comprehensive and universal as it could possibly be made. No construction of the language of that act could have excluded the transfer which it was held to have validated. * * * " Thus, it is said by appellants that it is shown that the curative statute was given effect notwithstanding the showing of fraud on the part of De la Guerra. It must be acknowledged that said case of *Thompson v. Thompson*, supra, turns in part upon the curative effect of the statute and to that extent supports appellants' position. We may here quote other language of Chief Justice Beatty in the case of *City of Oakland v. Oakland Water Front Co.*, supra, which is appropriate: "It is to be regretted * * * that a court should ever feel itself bound by rules of construction to give effect to statutes which ratify and confirm by wholesale the acts of municipal or other political agencies of the state. There is no more reckless or dangerous species of legislation. It is really legislating with the eyes shut. * * * " On a similar subject, the Supreme Court of the United States stated: "If the legislature intended to do what is claimed, 'it was bound to do it openly, intelligibly, and in language not to be misunderstood,' and, 'as a doubtful or obscure declaration would not be justifiable, so it is not to be imputed.'" *Hayes v. Holly Springs*, 114 U. S. 120, at page 126, 5 S. Ct. 785, 788, 29 L. Ed. 81.

The action of *Spear v. City of Bremerton* was before the Supreme Court of Washington on three occasions and is reported in 90 Wash. 507, 156 P. 825; 93 Wash. 699, 160 P. 946; and 95 Wash. 264, 163 P. 741, 742. The city of Bremerton, without authority, undertook to purchase and operate a water system lying partly within the territorial limits of another municipality. Municipal bonds were issued to provide funds to purchase the system from a private water company. An attack upon the validity of the bonds because of the lack of authority to make the purchase was sustained in the trial court, but, pending appeal, a validating act conferred authority upon the municipality to make the purchase, and, accordingly, such act was held to have cured the lack of legislative authority. There was a second ground of attack upon the bonds to the effect that their sale was fraudulent in that the city officials disposing of them connived with bond brokers to sell the bonds at a discount, and that this was accomplished by the pretense of paying certain commissions, attorney's fees, etc. This attack was sustained by the Supreme Court in the final decision, the court holding in this particular: "It is not to be understood that we approve the original judgment in so far as it sanctioned the attempt of the city of Bremerton to pay John E. Price & Co. or any purchaser a sum in lieu of interest under the guise or subterfuge of a commission, attorneys' fees, or other pretense. In that respect the judgment from which this appeal is taken will be *affirmed*."

The case of *Mayor of City of New York v. Tenth National Bank*, 111 N. Y. 446, 18 N. E. 618, involved fraud on the part of commissioners of the city, who appropriated a part of the funds advanced by the bank for the construction of a courthouse. Such commissioners were also directors of the bank making the advances, but did not represent it in the transaction, their only activity therein being in behalf of the city. The curative act ratified the advances made and bonds issued to raise money for their repayment. While there was fraud in the case, it was not on the side of the bank. The bank acted only through its president, who acted in good faith and in entire ignorance of any fraud. The case, therefore, is not in point.

In *White Mountains R. R. v. White Mountains (N. H.) R. R.*, 50 N. H. 50, the properties of the railroad were being sold under the terms of a mortgage given to se-

cure outstanding bonds. A group of bondholders agreed among themselves to bid in the property at the trustee's sale and connived with the trustee, offering and delivering to such trustee stock in a corporation (thereafter formed to operate the railroad) as consideration for such trustee's efforts in securing a disposition of the property at a low figure. The sale was consummated according to the agreement and thereafter the trustee received a certificate of stock in the new company. The action was to set aside the sale on the ground of fraud. One of the defenses was that the sale had been validated by legislative act. In disposing of the matter the court said: "It would not be unreasonable to presume that the legislature were ignorant of the fraudulent character of the sale, and, by confirming the sale, intended only to relieve the purchasers from the consequences of mistakes or formal defects. But whatever knowledge or intention they may have had, the statute cannot operate to prevent the plaintiffs from invalidating the sale by proof of fraud. Such a result is beyond the power of the legislature. It does not come within the principle of that class of cases (decided in other States) in which a legislature has been held to have the power to confirm by retroactive laws, the acts of public officers who have exceeded or imperfectly executed their authority; or to cure defects in conveyances. Statutes of this kind 'are of a purely remedial nature;' their purpose being to correct mistakes in order that the intention of the parties may be carried out. The legal rights affected by such statutes are 'deemed to have been vested subject to the equity existing against them;' and the statutes accomplish only what, upon principles of natural justice, a court of equity ought to have power to decree. Such legislation has been held valid 'when clearly just and reasonable, and conducive to the general welfare;' 'but the cases,' says Chancellor Kent, 'cannot be extended beyond the circumstances on which they repose without putting in jeopardy the energy and safety of the general principles.' 1 Kent's Com. 456. In this instance the statute of 1859, if it cures the fraud in the sale, goes far beyond the correction of mistakes, or the remedying of formal defects; and is not only open to objection as a retrospective law, but also as an act of a judicial nature. Could the legislature before the sale have passed an act authorizing one of the trustees to receive a bribe from the purchas-

ers? If not, how can their subsequent confirmation have greater efficacy than their previous authorization? 'The healing statute must in all cases be confined to validating acts which the legislature might previously have authorized. It cannot make good retrospectively, acts which it had previously no power to permit.'"

The recent decision of Meyerfeld, Jr., et al. v. South San Joaquin Irr. Dist. (Cal. Sup.) 45 P.(2d) 321, 325, involves a consideration of the curative act of 1931 already referred to. While the question of fraud was not involved, it is there stated: "The answer of the intervener urges with much merit that it is obvious from a reading of the ratifying statute that it was the purpose of the Legislature thereby to cure the irregular exercise of power and not to validate an antecedent act attempted in the total absence of power."

Appellants' strongest statement of their position is that it would have been lawful for the Legislature to have provided that an officer of an irrigation district might become a bidder at such a bond sale and that, if his bid were the best, he might become a purchaser; that, the Legislature having had the authority so to enact, a sale in which a director was interested can be ratified by subsequent legislative act. The question raises the concept of a retrospective, implied repeal of the penal statute. A ratification by curative act in this case would operate to validate an act utterly void when done because prohibited by law and made a crime. If we grant that it is the general rule that the Legislature may ratify an act which it could have authorized, such rule will not be applied where to do so is not only to ratify a fraud, but to ignore an applicable penal statute. So far as we know, no case has ever gone so far. There is no clear showing that the Legislature intended such a result; and, since the Legislature has not gone to that length, the court is not permitted to do so.

[15,16] It is contended by appellants that, upon an application of the maxim "he who seeks equity must do equity," the court should have ordered as a condition to the delivery of the bonds that the district pay to M. H. Lewis & Co. the money paid upon the purchase. It is admitted that under the authority of Sechrist v. Rialto Irrigation District, 129 Cal. 640, 62 P. 261, plaintiffs could not be held to the necessity of making the payment.

The check for \$8,400, constituting the original payment, accompanied the bid and was delivered to the secretary of the district. Upon acceptance of the bid it was turned over by the assistant secretary to the treasurer. The checks aggregating \$411,999.78 never did reach the hands of any officer of the district except the Wattersons, as already indicated. However, a receipt was given the assistant secretary by the treasurer for \$420,399.78. Entries were made in his books by the treasurer, and a resolution was adopted by the board of directors, wherein it was recited that the money had been received by the district. The whole of the payment of \$411,999.78 was deposited in Los Angeles and San Francisco banks to the credit of Wattersons' banks, either the Inyo County Bank or the First National Bank of Bishop, on or about February 15, 1924. No part of the money was deposited to the district's credit in any bank. The finding that the district did not receive any part of the \$420,399.78 is supported by the evidence; and it is established that the misappropriation was on or about February 15, 1924. The only indefiniteness about the findings is that "practically all" of the money was converted by the Wattersons to their own use. This did not imply that the district got any part thereof.

It is conceded by the respondents that payments made by checks payable to the treasurer, and delivered in the ordinary course of business, would constitute payment to the district. We think the form of the payments is not of much importance as against the agreement and conditions under which they were made. A competent majority of the board of directors did not accept the bid; therefore there was no acceptance. Curtin v. Salmon, River, etc., Co., 130 Cal. 345, 62 P. 552, 80 Am. St. Rep. 132; North Confidence M. & D. Co. v. Fitch, 58 Cal. App. 329, 208 P. 328. The action was no more effectual to bind the district than as if the board had voted to reject the bid. If the board had voted to reject, there would have been no change in title to the money; so here, the district did not become entitled to the money nor to any part of it. Of course, if the district had taken the money notwithstanding there was no contract, it would be required to deliver it up. When the money was misappropriated, it still belonged to the bidders and those whom the bidders represented. But, however that may be, we may war-rantly hold the district not liable to pay

appellants anything. Equity will not permit its rules to be made instruments of injustice. If natural justice makes no demands upon the district, the rules of the court of equity make none. The maxim that "he who seeks equity must come with clean hands" sometimes outweighs the other maxim that "he who seeks equity must do equity." *Goble v. O'Connor*, 43 Neb. 49, 61 N. W. 131. As between the appellants and the innocent district, under the facts disclosed by the record in this case we think justice requires that the loss should fall upon the appellants. In truth, as we see it, equity has no claim whatever on the district. It was not required to pay to the purchasers any money as a condition to the successful maintenance of the action.

[17] Section 72 of the Irrigation Act provides merely that in any *such* action (namely, an action to contest the validity of the bonds), all findings of fact or conclusions of the board of directors shall be conclusive. Such provision has no application here to bind the court to the effect that the district got the money.

[18] We see no merit in the point that the court had no jurisdiction to enter the second judgment, or that it was in any way erroneous. The first judgment was interlocutory in form and is such a judgment as is well recognized in suits in equity. It was well adapted in its provisions to meet the necessities of the case. The final judgment was strictly pursuant to the first judgment.

The judgments are affirmed.

We concur: BARNARD, P. J.; MARKS, J.



3 Cal.App.2d 492

LOS ANGELES COUNTY v. INDUSTRIAL
ACCIDENT COMMISSION et al.

Civ. 10202.

District Court of Appeal, Second District,
Division 1, California.

July 24, 1935.

Master and servant ☞385(16)

Injured employee cared for at home by
son for three months held not entitled to com-

pensation for son's services where employee did not request employer to provide nursing care and it did not appear that services were not rendered gratuitously (*Gen. Laws 1931, Act 4749, § 9*).

Proceeding under the Workmen's Compensation Act by Mary M. Valley, opposed by Los Angeles County, employer. To review an award of the Industrial Accident Commission in favor of claimant, employer brings writ of review.

Award annulled.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco (Arthur I. Townsend, of San Francisco, of counsel), for respondents.

CONREY, Presiding Justice.

Olive View Sanatorium is a hospital institution maintained by the county of Los Angeles. On the 18th day of August, 1930, Mary M. Valley received accidental injuries arising out of and in the course of her employment as a waitress in that place. Thereafter she was furnished hospital and medical treatment by her employer, the county of Los Angeles, and was paid full compensation on the basis of an informal rating of 42 per cent. permanent disability. On December 20, 1930, she was discharged from the hospital, but she remained under the care of the county's physician and received treatments from him at his office until the following September.

No application for adjustment of claim was filed with the Industrial Accident Commission by Mrs. Valley until June 14, 1934, and this claim is only for a "wage adjustment" for services rendered to the applicant at home by her son for about three months after her discharge from the hospital. The sum awarded is \$135. From the applicant's testimony, it appears that at the time of her discharge from the hospital she was wearing a brace for her back, said brace having been prescribed as a part of her treatment for the injury; that she was unable to put on or remove this brace without assistance. In other words, although as the physician said, this was now an ambulatory case, the patient's testimony indicates that she still required some assistance such as a nurse would give. On the other hand, it is admitted that after her discharge from the hospital she made no

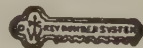
request to the county or its representatives for the services of a nurse. Substantially the only support for the claim in this respect is that she went to the physician's office regularly once a week and that he must have known that she needed nursing services, but made no arrangement for her to obtain such services. The Workmen's Compensation Act of 1917 (Act 4749, Deering's Gen. Laws, 1931 Ed.), section 9, provides that "where liability for compensation under this act exists, such compensation shall be furnished or paid by the employer and be as provided in the following schedule: (a) Medical and hospital treatment. Such medical, surgical and hospital treatment, including nursing, * * * as may reasonably be required to cure and relieve from the effects of the injury, the same to be provided by the employer, and in case of his neglect or refusal seasonably to do so, the employer to be liable for the reasonable expense incurred by or on behalf of the employee in providing the same. * * *

The evidence produced before the commission is set forth in the return to the writ of review. In our opinion it fails to show either neglect or refusal of the county, or those representing the county, as employer of the claimant, to provide the applicant with such nursing care as she reasonably required, or at all. We think that the evidence before the commission was not sufficient to give it authority to make the award here in question. So far as appears from the evidence, the services rendered to the employee by her son were rendered by him gratuitously, as by a son to his mother, and without any contract or claim for compensation. We find no authority for the proposition that under these circumstances there was any legal foundation for a subsequent claim such as was allowed by the award in this case. In *Galway v. Doody Steel Erecting Company*, 103 Conn. 431, 130 A. 705, 706, 44 A. L. R. 693, the Supreme Court of Connecticut had under consideration the validity of an award in favor of the claimant's wife for services rendered in nursing him during convalescence, in a proceeding brought under the Workmen's Compensation Act of that state. The injured employee had been transferred from the hospital to his home because the surgeon in charge advised that his recovery would be hastened thereby, and with the knowledge that the claimant would need a very considerable amount of nursing from

his wife. In holding against the claim for compensation on account of services thus rendered by the wife, the court said: "His helpless condition doubtless required that Mrs. Galway should be in attendance or within call, but there is nothing in the finding to show that the services rendered were other than those which might reasonably be expected from any affectionate wife who was physically able to give them, or that they were not voluntarily and gratuitously rendered." This same observation may appropriately be made in the case at bar, with respect to the services rendered to Mrs. Valley by her son.

The award is annulled.

We concur: **HOUSER, J.; YORK, J.**



DAM et al. v. LAKE ALISO RIDING

SCHOOL et al. *

Civ. 9441.

**District Court of Appeal, First District,
Division 1, California.**

Aug. 2, 1935.

**Hearing Granted by Supreme Court
Sept. 30, 1935.**

1. Animals ☞27

Owner's knowledge of viciousness of animal is essential to recover for injuries received from animal, except when animal is hired, in which event plaintiff's case is complete if injuries are shown and it is proved that owner did not use ordinary care in furnishing animal for purpose for which it was hired.

2. Animals ☞27

Res ipsa loquitur doctrine is inapplicable in actions for injuries received from animal furnished for hire.

3. Animals ☞27

Bailor, furnishing riding horse for hire, must give due regard to selection of horse, purpose of its use and ability of bailee to control horses generally, if such fact is ascertainable, although bailor is not required to exercise more than that degree of care which under similar circumstances a prudent person would exercise.

4. Animals ☞27

Warranty implied in furnishing horse for hire does not extend to some action on part of

animal or rider that careful and normal person could not foresee.

5. Animals ⇨27

That riding horse gave sudden leap held insufficient to show that horse was dangerous or vicious, or that owner was not warranted in furnishing horse for hire, as regards owner's liability for injuries sustained by rider.

6. Animals ⇨27

Bailor furnishing animal for hire is not liable for injuries sustained by bailee if animal's conduct was result of happening of event occasioned by bailee which would cause otherwise gentle animal suddenly to become vicious.

7. Bailment ⇨9

Bailor is not responsible for injury which results, not from bailor's negligence, but from some agency over which bailor has no control.

8. Negligence ⇨59

One is not responsible for result of unavoidable accident which could not reasonably have been anticipated.

9. Negligence ⇨136(25)

Whether accident could have been anticipated is question of fact for jury to determine.

10. Animals ⇨27

Owner, furnishing horse for hire, was not required to inform rider that horse was jumper unless there was reason to believe that horse would jump when not facing a hurdle, as regards owner's liability for injuries sustained by rider when horse made sudden leap.

11. Trial ⇨29(1)

Admonishment of plaintiff's attorney by court after attorney attempted to present question which, if answered, would have been error, and which he had previously withdrawn and had asked court to admonish jury to disregard asking of question, held justified.

12. Costs ⇨264

Where motion to strike appearing in bill of exceptions contained body of cost bill, but did not set forth title of court and cause, and bill of exceptions contained number of action and names of parties plaintiff and defendant, court of appeals would assume, in absence of evidence to contrary, that cost bill contained same title of court and cause.

13. Costs ⇨264

Plaintiff's motion to strike cost bill from files was properly denied, where plaintiff was sufficiently informed as to claim of costs and party defendant presenting it.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Evelyn Dam, a minor, by F. H. Dam, her guardian ad litem, and another, against the Lake Aliso Riding School, a copartnership, Cornelia Van Ness Cress and others, which was dismissed at time of trial against all the defendants except as to Cornelia Van Ness Cress. From the judgments and orders, the plaintiffs appeal.

Judgments and orders affirmed.

F. H. Dam, of San Francisco, for appellants.

Kirke La Shelle, Jr., of San Francisco, for respondent.

WARD, Justice pro tem.

This is an action on behalf of a minor by her guardian ad litem for damages for personal injuries. The father of the minor joins as plaintiff to recover special damages. Unless otherwise indicated, the word "plaintiff" herein will refer to the minor. The complaint alleged that the defendant conducted and maintained a riding school for ladies and girls; that on the date mentioned in the complaint defendants, for a valuable consideration, furnished and hired to the plaintiff a certain horse referred to as "Koko" for the purpose of horseback riding; that the defendants knew or should have known that the horse was not a gentle saddle horse and was not safe or suitable or fit for the plaintiff to ride; that the horse was unruly, vicious, and dangerous, and would suddenly plunge and jump and bolt and become uncontrollable; that these characteristics were unknown to plaintiff; that when plaintiff rode the horse she was thrown violently from the saddle, resulting in the injuries set forth in the complaint.

The complaint was so worded that the contract for hiring, from which an implied warranty of suitability may be inferred, is pleaded. In the same cause of action the complaint contains allegations of negligence. A general demurrer to the complaint was overruled. The case could have been tried upon the theory that it might have been a tort or a breach of a contract upon an implied warranty. Seemingly the latter theory was adopted by consent of counsel and will be therefore so

considered on appeal. A general verdict and four special interrogatories reading as follows were submitted to the jury: "For your guidance and by request of counsel, the court will submit to you certain forms of general verdicts and also certain interrogatories to be answered by you. The interrogatories read as follows after the title of the court and cause: 1. At the time of the accident was the horse ridden by the plaintiff Evelyn Dam a vicious, dangerous and unsuitable horse for the purpose of riding by plaintiff? Your answer is yes or no and signed by your foreman. 2. If the answer to question No. 1 is in the affirmative, did the defendant, Miss Cress, have actual knowledge of such vicious and dangerous propensities of the horse in question prior to the accident in question? Your answer should be yes or no and signed by your foreman. 3. If the answer to question No. 1 is in the affirmative, did the plaintiff, Miss Evelyn Dam, have knowledge of the vicious and dangerous propensities of the horse in question prior to the accident? Your answer should be yes or no and signed by your foreman. 4. If the answer to question No. 2 is in the negative, should the defendant Miss Cress have known of the vicious and dangerous propensities of the horse in question prior to the time of the accident? Your answer should be yes or no and signed by your foreman." The second and third proposed special findings were dependent upon an affirmative answer to the first interrogatory. The fourth question could not be answered unless the first should be answered in the affirmative, and the second in the negative. The jury found on the first special finding for the respondent and returned a general verdict accordingly. From a factual standpoint, this would seem to be a complete answer to the issues involved.

[1-3] The stronger weight of authority in California is that scienter on the part of a defendant is necessary, but considering the character of this case and the theory upon which it was tried, the law as approved in eastern and southern states will be adopted as applicable to the issues herein. Knowledge of the viciousness of an animal is essential except when the animal is hired, and in such an instance when the bailee seeks to recover for injuries the plaintiff's case is complete if injuries are shown and it is proved that defendant did not use ordinary care in furnishing an animal for the purpose for which it was

hired. The maxim of *res ipsa loquitur* does not apply in cases of this character. The respondent was not a common carrier. She furnished horses to certain people for certain purposes. Ordinary care is the test to be used. Due regard should be given to the selection of the horse, the purpose of its use, and the ability of the bailee to control horses generally if this fact is ascertainable. However, the bailor is not required to exercise more than that degree of care which, under similar circumstances, a prudent person would exercise. Once a horse passes from the bailor to the bailee, then the bailee controls its movements. Plaintiff had attended the riding school for thirteen months. At a period prior thereto, for some six or seven years, she had the experience of riding horses on a ranch. Plaintiff was classified as not an advanced, but a good rider. Respondent assured plaintiff that the horse Koko was a perfectly gentle horse and safe for plaintiff to ride.

[4-9] The jury determined that at the time of the accident the horse ridden by plaintiff was not a vicious, dangerous, and unsuitable horse for the purpose of riding. Plaintiff had been riding the animal for approximately an hour. The horse acted in a perfectly normal manner. Traversing an almost level trail, the horse gave a leap. Witnesses testified the first unusual thing that occurred was plaintiff's loud scream. Whether this scream was prior, simultaneous, or subsequent to the leap of the horse was a circumstance for the jury to take into consideration. A careful reading of the entire transcript fails to disclose the definite cause of the horse's sudden action. Eliminating the one leap, the horse had shown no signs of unsuitability. Based only upon the circumstances surrounding the accident, the jury would not have been justified in determining that this animal was a vicious, dangerous, or unsuitable horse for the purpose of riding by plaintiff. The warranty implied in furnishing a horse for hire does not extend to some action on the part of the animal or the rider that a careful and normal person could not foresee. There is no evidence that the respondent knew the horse would give a sudden leap. The fact that on this particular occasion a horse misbehaved would not be sufficient to prove that the horse was dangerous or vicious or that respondent was not warranted in furnishing the horse to plaintiff. *Cooper v. Layson Bros.*, 14 Ga. App. 134, 80 S. E. 666,

The bailor is not liable for injuries sustained by the bailee if the animal's conduct was the result of the happening of an event, occasioned by the bailee, which would cause an otherwise gentle animal suddenly to become vicious. *Conn v. Hunsberger*, 224 Pa. 154, 73 A. 324, 25 L. R. A. (N. S.) 372, 132 Am. St. Rep. 770, 16 Ann. Cas. 504. A bailor would not be responsible for an injury which results not from the bailor's negligence but from some agency over which the bailor had no control. No one is responsible for the result of an unavoidable accident which was not and could not reasonably have been anticipated. *Finney v. Curtis*, 78 Cal. 498, 21 P. 120; *Clowdis v. Fresno Flume, etc., Co.*, 118 Cal. 315, 320, 50 P. 373, 62 Am. St. Rep. 238. Whether an accident could have been anticipated is a question of fact for the jury to determine.

[10] One way to maintain plaintiff's case was to prove that on previous occasions this horse had demonstrated characteristics indicating it would be dangerous for a student of the experience of plaintiff to ride on the day in question, and that respondent was lacking in the use of ordinary care and did not act as a reasonable and prudent person would act under all of the circumstances in permitting plaintiff to use this horse. In other words, that the respondent was negligent in not ascertaining whether the horse was a dangerous, vicious, or unsuitable horse for plaintiff to ride. The evidence fails to show prior vicious or dangerous conduct on the part of the horse in question. Koko had been purchased by the respondent approximately two months before the accident. She was "told the horse was an excellent saddle horse but had been used as a stock horse and had some ability as a jumper." Prior to the date of the accident respondent had given to other students, with this horse, ordinary riding lessons and also some lessons in hurdling. If the respondent used this horse for hurdling and permitted students to ride the horse for that purpose, she could not have been impressed with the fact that the animal in an ordinary lesson would be of a vicious nature, otherwise she would not have permitted students to ride the horse over the trails. It cannot be said that it was incumbent upon respondent to inform plaintiff that the horse was a jumper, unless there was reason to believe that the horse would jump when not facing a hurdle.

Fifty acts, statements, rulings, or decisions are assigned as either misconduct on the part of the court or counsel, or as prejudicial error. The enumerated cumulative alleged assignments of misconduct on the part of court and counsel seem to be frivolous. The trial judge made unnecessary statements at times, but there was no apparent prejudice against either plaintiff or respondent in the entire record. The court's remarks include matters favorable to plaintiff, such as complimenting a plaintiff witness upon leaving the stand for her ready and responsive answers. Six instructions are attacked, and special emphasis is placed upon the claim that the special finding is against the evidence. Unless the claimed errors are pertinent to the special finding or general verdict, they will be disregarded herein. It is unnecessary, for example, under the answer given to the first interrogatory, to consider the evidence or instructions relative to findings two, three, or four unless the rulings or conduct of the court or counsel on this subject prejudiced the jury in the determination of the question involved in the first special finding.

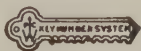
[11] Many of the assignments of alleged misconduct on the part of the court or counsel for respondent arose from the persistency of plaintiff's attorney in repeating questions to which objections had been sustained. The following is a fair sample: "The Court: The Court makes the same ruling, which is the third ruling on that particular question, which will be enough." Another instance was an attempt on the part of the attorney for plaintiff to show respondent's acknowledgment of responsibility for the accident. This appears in the transcript as follows: "Q. Before you left her home that day you told her mother, did you not, that you were insured, and that you would see that the accident was settled for?" If the court had permitted this question, it would have been error against the respondent. *Squires v. Riffe*, 211 Cal. 370, 295 P. 517. The attorney for plaintiff withdrew the question and requested the court to admonish the jury to disregard the asking of it, and subsequently attempted to present questions tending to show acknowledgment of responsibility on behalf of respondent, which brought forth an admonition from the court directed to plaintiff's attorney. Taking all of the circumstances into consideration, the admonishment was

justified. Some forty odd other rulings are called to this court's attention, but after careful consideration, we find little or no merit in them, and it does not appear that contrary rulings would have resulted in a different verdict.

[12, 13] Appellant also appeals from an order refusing to strike the memorandum of costs from the files. The cost bill is not included in the clerk's transcript on appeal. The motion to strike appears in a bill of exceptions, contains the body of the cost bill and the affidavit thereto, but does not set forth the title of court and cause. The bill of exceptions contains the number of the action and the names of the parties plaintiff and defendant. We must assume, in the absence of evidence to the contrary, that the cost bill contained the same title of court and cause. The affidavit attached to the cost bill recites in part that the "costs and disbursements are true and correct and have been necessarily incurred in this cause." The affidavit is silent as to the names of the defendants or the plaintiffs, but "this cause" can refer only to the case designated by the title of court and cause. At the time of trial the case against all defendants, except as to defendant Cornelia Van Ness Cress, was dismissed. Plaintiff was sufficiently informed as to the claim of costs, and the party defendant presenting the same. The motion to strike the cost bill from the files was properly denied.

Judgments and orders appealed from are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.



8 Cal.App.2d 603

SMITH et ux. v. THOMSEN et al.

Civ. 5350.

District Court of Appeal, Third District,
California.

Aug. 3, 1935.

1. Principal and surety ⇨15

Seller of furniture to lessee of hotel who vested title to furniture in lessee and took as security for payment thereof an assignment

of lease on the hotel *held* not a surety so as to be discharged by change in amount due under lease on ground that such alteration was without seller's knowledge and consent.

2. Attorney and client ⇨104

Notice to an attorney of any matters relating to the business in which he is engaged in business for his client is presumed to be notice to the client.

3. Principal and surety ⇨128(1)

Seller of furniture to lessee of hotel who vested title thereto in lessee and took as security for payment thereof an assignment of the lease *held* not entitled to complain of modification of lease on ground that such alteration operated as a release of seller as surety where evidence showed that such modification was made with the knowledge and consent of seller.

Appeal from Superior Court, Los Angeles County; Henry B. Neville, Judge.

Action by Walter D. Smith and wife against Max Thomsen and others and A. R. Pratt. Judgment for plaintiffs, and last-named defendant appeals.

Affirmed.

Samuel J. Crawford, of Santa Monica, for appellant.

Fogel & Beman and Richard K. Gandy, all of Santa Monica, and David H. Cannon, of Los Angeles, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Respondents herein were the owners of an unimproved parcel of land in Santa Monica upon which they desired to erect a hotel with stores on the ground floor. In furtherance of this project, respondents obtained a building loan from the Beneficial Life Insurance Company. They also entered into a long-term lease for the hotel with Max Thomsen and Eleanor Thomsen at a total rental of \$335,700. In accordance with the agreement, the Thomsens furnished the hotel, entering into a contract therefor with A. R. Pratt, appellant herein, who installed the furniture and fittings to an amount in excess of \$40,000. As security for the faithful performance of the lease, it was agreed that the lessees would give to the lessors a chattel mortgage on the furniture. To do this it was necessary for appellant to release his lien on the furniture and vest title in the lessees, which he did, accepting in lieu

thereof as security for the unpaid balance on the furniture an assignment from the lessees of their lease. The lessors in turn assigned the chattel mortgage on the furniture to the insurance company as additional security for its loan.

After the execution of these various instruments, the original loan from the insurance company was increased some \$15,000 and the same evidenced by a supplementary agreement dated July 20, 1928, increasing the total rentals on the hotel for the entire term to \$350,685. It is the fact of this increase in rental contained in this agreement of which appellant claims he had no notice. This supplementary agreement was executed by lessors and lessees and acknowledged by Bernard J. Walsh, a notary public. The lessees failing to pay the required monthly rentals defaulted and two actions were brought, one to foreclose the chattel mortgage and for the appointment of a receiver, and another action in unlawful detainer. With this latter action we have nothing to do, this appeal being from a judgment for a specified sum found due from the lessees to the lessors for rent and directing the foreclosure of the chattel mortgage to satisfy the amount due. The appellant is A. R. Pratt who originally sold to lessees the furniture covered by the chattel mortgage.

Appellant raises two questions in his opening brief: First, that Pratt was a surety and the change in the amount due under the lease was an alteration without his knowledge and consent in the terms of the contract between the principal and the insured and therefore acted as a discharge of the suretyship, and, second, as to the right of a landlord to collect rentals during the period of time a receiver was in charge of the premises.

[1] The first question to be determined, however, was whether Pratt was in fact a surety. The finding of the trial court was that "it is not true that the defendant A. R. Pratt ever became surety for Max Thomsen and Eleanor Thomsen." In the agreement entered into between Mr. and Mrs. Smith, the owners and lessors of the hotel, and A. R. Pratt, wherein the lessors agreed to the assignment of the lease from the lessees to Pratt as security for the payments due on the furniture sold by Pratt to Thomsen, it is provided:

"It is expressly understood and agreed between the parties hereto that second

party (Pratt) is not, and shall not be considered as a guarantor of said Lessee, nor shall second party, be responsible for the performance of any of the provisions of said lease unless second party accepts said assignment of said lease and duly notifies first parties of such acceptance."

It is not contended that Pratt ever accepted an assignment of the lease nor performed any of the conditions precedent specified in the agreement. Appellant attempts to support his contention of suretyship by differentiating between a personal and real suretyship and by claiming that this was a real suretyship as the obligation rested upon specific property as the security for the debt. It must be remembered, however, that Pratt had sold to Thomsen the furniture in question, vesting title thereto in him, and had taken as security for the payment thereof not a claim in the furniture itself, but an assignment of a certain lease. This transfer of title in the furniture was full and complete and the purchasers thereof executed a chattel mortgage on the furniture to another who brought the present action. We do not believe, therefore, Pratt was acting as a surety, either personal or real, in the transaction.

[2,3] However, as respondents point out, if such suretyship did in fact exist, the modification of the original terms was made with the knowledge and consent of Pratt and he cannot now complain. The trial court so found, and in support of that finding the evidence discloses that the original lease wherein the total rentals were fixed at \$335,700 bears date of February 17, 1928, and was acknowledged on March 14, 1928, before Samuel J. Crawford, a notary public and the attorney of record for appellant herein. This lease was placed in escrow, together with various documents involved in the deal, which escrow was closed August 1, 1928. Under date of July 20, 1928, a chattel mortgage was executed between Max Thomsen and Eleanor Thomsen and Walter D. and Eleanor S. Smith to secure all of the obligations of that certain lease hereinabove referred to and the amendments thereto. It will be recalled that this document was acknowledged before Samuel J. Crawford, attorney for appellant. It appears from the testimony of Mr. Pratt that his attorney in the transactions between himself and the Thomsens, including negotiations as to the chattel mortgage and the agreement as to

the sale of the furniture and also the subrogation agreement wherein Pratt accepted the assignment of the lease as security for the purchase price of the furniture, was also Samuel J. Crawford. As to the supplemental agreement, wherein the amount of the mortgage was increased from \$335,000 to \$350,000, it appears this instrument was acknowledged before Mr. Bernard J. Walsh, an attorney and a notary public, with whom Mr. Pratt also discussed the terms thereof. It also appears that Mr. Walsh was an attorney in the office of Mr. Crawford and was taking care of Mr. Crawford's legal business while he was on his vacation. It would be noted also that this instrument, being a supplemental agreement, was dated and acknowledged on July 20, 1928, which is also the date of the chattel mortgage. It would also appear that Mr. Crawford represented Mr. Smith in the handling of the various instruments placed in escrow, pending the completion of the entire transaction. As to whether or not Mr. Crawford actually drew the supplementary agreement between the lessors and the lessees wherein the increased amount was agreed upon and certain rentals changed, he himself was uncertain, although he admitted discussing with Mr. Smith the amounts involved. It is apparent, however, that he was familiar with that portion of the transaction and acted as attorney for both Mr. Pratt and Mr. Smith and that Mr. Walsh was acting for Mr. Crawford in the handling of the supplementary agreement during the absence of Mr. Crawford.

That notice to an attorney of any matters relating to the business in which he is engaged in business for his client is presumed to be notice to the client is established by the following cases: *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160; *Rauer v. Hertweck*, 175 Cal. 278, 165 P. 946; *Bogart v. George K. Porter Co.*, 193 Cal. 197, 223 P. 959, 31 A. L. R. 1045; *Atkinson v. Foote*, 44 Cal. App. 149, 186 P. 831; *Gaver v. Early*, 58 Cal. App. 725, 209 P. 390.

As to the second point urged by appellant, that is, the right of a landlord in an unlawful detainer action to collect rentals during the period of time a receiver is in charge of the premises, we are of the opinion that the appeal before us being on foreclosure of a chattel mortgage and not as to the unlawful detainer, that ques-

tion is not properly before us. This point applies to the discussion of rulings and evidence in the unlawful detainer action, the record of which, however, is not before the court. There is nothing before us upon which we could base an opinion.

For the reasons heretofore given, therefore, the judgment herein should be affirmed and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.



8 Cal.App.2d 634

KOEBERLE v. HOTCHKISS et al.

Civ. 10126.

District Court of Appeal, Second District,
Division 2, California.

Aug. 5, 1935.

1. Appeal and error ⇐930(1)

Where it is contended that evidence is insufficient to support verdict, District Court of Appeal has duty to consider evidence in light most favorable to respondent.

2. Appeal and error ⇐1012(1)

Finding and weighing evidence is primarily for trial court.

3. Courts ⇐107

District Court of Appeal purposely refrains from setting out facts and circumstances in evidence on which it bases its statement that there is substantial evidence to support implied findings of jury.

4. Trial ⇐252(3)

Instructions which failed to fully set out party's theory as to effect of alleged oral agreements on written agreement held not erroneous since such oral agreements were inadmissible to change written agreement.

5. Tenancy in common ⇐39

Cotenant, by acts and conduct indicating that other cotenant was her agent, may bind herself so that notice to cotenant was notice to her.

6. Brokers ⇐1

Primary purpose of Real Estate Brokers' Act which was designed to protect public was to require real estate brokers and salesmen to be honest, truthful, and of good reputation (St. 1919, pp. 1252, 1259, §§ 2, 20).

7. Brokers ⇐42

Where broker was duly licensed for year in which services were fully performed, broker's action eleven years later for balance due for such services *held* not barred because of broker's failure to plead and prove that he was duly licensed broker in year in which action was brought, since action arose out of breach of written promise to pay, which is not within purview of act (St. 1919, pp. 1252, 1259, §§ 2, 20).

8. Brokers ⇐74

Where lessor canceled lease to avoid payment of oil royalties to broker procuring lease, and lessee continued operation of lease and deposited royalties to lessor's credit, broker *held* entitled to funds so deposited as against contention that funds were not royalties but were deposits in bank obtained by lessor from compromise of lawsuit with lessee (Civ. Code, § 1500; St. 1919, pp. 1252, 1259, §§ 2, 20).

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by J. E. Koeberle against Minna K. Hotchkiss and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

See, also, 40 P.(2d) 911.

Frank P. Doherty, William R. Gallagher, and Harold Hotchkiss, all of Los Angeles, for appellants.

Stewart, Shaw & Murphey and Arvin B. Shaw, Jr., all of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal from a judgment for \$28,808.20 in favor of the plaintiff based on the written agreement of the defendants to pay the plaintiff 10 per cent. of any and all royalties when and as received by the defendants from an oil lease covering a tract of 10 acres on Signal Hill, which the plaintiff in the year 1921 was instrumental in procuring for the defendants with the General Petroleum Corporation, as lessee.

[1] Taking the evidence in the light most favorable to the respondent, which it is our duty to do where the contention is made that the evidence is insufficient, it appears that the defendants entered into the contract in 1921 and thereafter paid 10 per cent. of their royalties to the plaintiff for several years; that the royalties amounted to very large sums so that even

the 10 per cent. of the royalties was large. The defendants finally gave notice to the lessee, a third party not involved in this litigation, that the lease was canceled. The lease was not thus canceled because the lessee was not in default and the lessee persisted in continuing under the lease. Thereupon the defendants refused to receive the royalties and the lessee deposited the royalties from month to month in a bank in the name of the defendants under section 1500 of the Civil Code and continued to occupy the land and to produce oil under the lease. This went on for a considerable period of time while the defendants were litigating with the oil company for a cancellation of the lease. This money on deposit in the name of the defendants was increased by the accretion of interest at the small current rate on such deposits in an additional sum of \$14,274.28. During all the time that this money was being deposited in the bank as a tender of the royalties due under the lease, the defendants were free to withdraw it at their option. But they did not withdraw it and they did not pay the plaintiff his 10 per cent. thereof.

The litigation with the oil company dragged along for several years until August 23, 1932, when the parties thereto compromised the same. Under the terms of the compromise, the defendants acknowledged full performance upon the part of the oil company of all the terms and conditions of the lease. It was also stipulated that the money in the bank might be withdrawn by the defendants at any time they might elect to do so. The character of the deposits in the bank was not altered in any manner by the compromise agreement. That instrument merely reaffirmed the right, which defendants already had, to draw the money at any time they might elect to do so. But after drawing out the said royalties, the defendants refused to pay the plaintiff his 10 per cent. thereof upon the alleged ground that said moneys were not royalties but were deposits in a bank which were obtained by way of compromise of the lawsuit rather than as royalties. Hence this litigation.

The defendants' opening brief covers 188 pages. In addition, it has a supplement, setting forth certain exhibits. The reporter's transcript is in four volumes. We have read the briefs carefully from cover to cover and parts of them several times, as is our custom in all cases, and

we have given a fair and reasonable study to the transcripts where necessary, and we have come to the conclusion that there is nothing unusual in this case which distinguishes it from the ordinary action upon a written contract for the payment of money except the extraordinary zeal and eloquence of the defendants both at the trial and upon appeal.

The defendants first contend that the evidence is insufficient to warrant or sustain the verdict with regard to certain findings of fact implied by the verdict of the jury. And so far as this contention is concerned, the appellants attempt on appeal to try the case *de novo*. Much of the evidence which the defendants set out in their briefs and upon which they rely to sustain their contentions is flatly contradicted by the testimony of the plaintiff's witnesses, and no credit is given or reference made to the plaintiff's testimony in this regard. The defendants' evidence, where it conflicted with the plaintiff's evidence, did not convince the jury. No effort is made by the defendants to show all the evidence relative to their contentions. We shall not be drawn into a discussion of the weight of the evidence. We shall content ourselves with saying that there is substantial evidence to sustain the implied findings of the jury.

[2, 3] We purposely refrain in this case as in other cases from setting forth the facts and circumstances upon which we rely for our decision that there is substantial evidence to sustain the findings of the trial court. Such a recital is not required by the constitutional mandate which directs that all decisions of this court shall be given in writing and the grounds of the decision shall be stated. To thresh through a reporter's transcript, and to then determine whether or not there is any substantial evidence, requires no more skill than to thresh through a transcript and determine on which side lies the greater weight of evidence. The threshing of evidence for either of these purposes is essentially the same task of finding and weighing evidence, requiring skill of the same kind and degree, and is primarily a task for the trial court. It required a somewhat lively imagination the first time an appellate court declared that the search for and the determination whether there was any evidence to support a finding was the determination of a question of law. Thereafter the doctrine of *scintilla* of evidence was rejected in California for the

doctrine of substantial evidence. *Estate of Baldwin*, 162 Cal. 471, 123 P. 267, and cases cited. For a time there was a tendency to overlook the fiction that it was a question of law and not of fact. Thus in the *Estate of Wikman*, 148 Cal. 642, 84 P. 212, 214, we find the following language used: "This is a finding of fact and must be sustained if there is any reasonable amount of evidence supporting it." To the same effect see *McCarthy v. McColgan*, 99 Cal. App. 492, 278 P. 918. We are not approving this quotation. The word "reasonable" ordinarily involves a question for a fact finder. We are attempting to point out how nearly this so-called "question of law" approaches to being a question of fact. All of this is in line with the thesis of this paragraph that this court purposely refrains from setting out the facts and circumstances in evidence upon which it bases its statement that there is substantial evidence to support the implied findings of the jury. The defendants are entitled to this explanation because of the length and eloquence of their briefs.

It is sometimes said by litigants that such recitals of facts and circumstances should be set out for the convenience of the Supreme Court in the event a hearing is granted in that court. But hearings in the Supreme Court are granted in only a small fraction of the cases which have been decided by the District Court of Appeal. Such a recitation of the evidence makes the same a part of the case law, much to the confusion of professors in law schools, their pupils, and others. Such practice takes time and makes for long opinions when brevity in opinions is demanded as a cardinal virtue second only to clearness. When reviewing a decision of the District Court of Appeal, the Supreme Court will ordinarily take as true the facts as set forth in the opinion. With equal propriety, we believe, the Supreme Court, after the trial court has first decided this question and after this court has reviewed the evidence and again decided it, will ordinarily take as true our statement that we do or do not find substantial evidence in the record. We are satisfied that in the rare instances in which it would not so take our statement, the high court would eventually go, in any event, to the record itself.

The defendants next contend that "the court committed prejudicial error in giving its instructions and in refusing to give certain instructions requested by appellants

and in modifying and in giving as modified certain instructions requested by appellants." We have carefully studied the instructions given by the court. Taking the instructions as a whole, the jury was fairly and fully instructed upon the issues of the case. And also the instructions fairly covered the defendants' theories of the case where such theories found support in the evidence. Where the court instructed the jury on matters of fact, the facts therein assumed were undisputed in the evidence and uncontested. Among the instructions which were refused, those which were not erroneous were fully covered elsewhere. Several of the instructions were "formula" instructions, which a trial court should always hesitate to give. One of these instructions covers six pages of the printed supplement. In addition to being incomplete as a formula instruction, it is argumentative throughout, and is an excellent model of what an instruction should not be. Instead of being unfairly treated in the instructions, the defendants received the benefits of instructions as to alleged oral promises of the plaintiff and as to defendants' theory of the Real Estate Brokers' Act (St. 1919, p. 1252, as amended), to neither of which they were entitled.

[4] There is much evidence in the record about alleged oral agreements made by the plaintiff to the defendants to continue during the life of the lease to look after the defendants' interests in the lease, and the defendants complain of certain instructions because they do not fully set out the defendants' theory in this regard. The evidence as to these alleged oral promises by which it was attempted to change the written agreement was not admissible under the parol evidence rule. See the case of *Koeberle v. Hotchkiss* (Cal. App.) 40 P.(2d) 911, which is a suit between the same parties, where the same contract was involved, and where the same question was raised.

[5] Defendants next contend that "one co-tenant, merely by acts and conduct, cannot bind the other co-tenant in the absence of express authority," and complain of one instruction because they say it permitted the jury so to do. That was not the import of the instruction, however. The import of the instruction was that one co-tenant could by her acts and conduct indicating that her other cotenant was her agent, bind herself so that notice to her cotenant was notice to her.

[6, 7] The defendants' final contention is that the plaintiff was barred from maintaining this action by his failure to plead and prove that he was a duly licensed real estate broker in the year 1932. Real Estate Brokers' Act, Stats. 1919, p. 1252. Section 20 of said act provides in effect that no person acting in the capacity of a real estate broker shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any of the acts mentioned in section 2 of the act without alleging and proving that such person was a duly licensed real estate broker at the time the alleged cause of action arose. The primary purpose of the Real Estate Brokers' Act was to require real estate brokers and salesmen to be "honest, truthful and of good reputation." *Riley v. Chambers*, 181 Cal. 589, 185 P. 855, 856, 8 A. L. R. 418. The act was designed to protect the public. Where, as in this case, there is a written agreement to pay sums of money to the plaintiff, his heirs, assigns, executors, etc., and the services as real estate broker were fully performed and completed in the year 1921 during all of which year the plaintiff was duly licensed, and no other services as real estate broker were or are to be performed, it cannot be held that the payee of the contract cannot recover and his assigns and executors, if any, cannot recover because he or they have failed to obtain licenses each year through the succeeding years. Suppose a promissory note payable in 1932 had been given in 1921 in payment for the services, could defendants' contention be successfully maintained as a defense to an action brought by the plaintiff upon said note? Likewise the cause of action herein which arose eleven years after all the services were completed must be held to have arisen out of the breach of the written promise to pay. As such, it is not within the purview of said act. See *Koeberle v. Hotchkiss et al.*, supra, in which the identical question between the same parties was decided adversely to the defendants.

[8] Unfortunately for appellants, but fortunately for the true and successful administration of justice, the jury was able to see through the shallow claim that the identical money on deposit in the bank was by the magic of the compromise agreement transformed into something other than royalties and did not permit the defendants to evade payment under the terms of their written agreement.

For the reasons above stated, there is also no merit in the defendants' motion for a new trial.

Judgment affirmed.

I concur: FRICKE, Justice pro tem.

STEPHENS, Presiding Justice.

I concur. In concurring I deem it proper to say that credit for those parts of the opinion that treat of our duty in the matter of statement of fact belongs wholly to Mr. Justice CRAIL.

Comment upon the subject is justified by the constant assumption in petitions for rehearing that it is our duty to include detailed recitation of facts in our opinions. A short, concise opinion upon the law points presented by the facts, it seems, is very popular except, in some instances, with the lawyer whose case has thus been handled. If lawyers would carefully read the opinion in *People v. Davis*, 147 Cal. 346, 81 P. 718, and the Supreme Court's comment upon denying a hearing in *Burke v. Maze*, 10 Cal. App. 206, at page 211, 101 P. 438, 440, many pages in appellate briefs and petitions for rehearings and hearings before the Supreme Court would be saved, for the uselessness of pages of facts in opinions is therein plainly indicated. In offering such free advice to attorneys, I must confess that I harbor the thought that the authorities herein mentioned could as well be perused with profit, every now and then, by justices of reviewing courts.



8 Cal.App.2d 290

WALTON v. SOUTHERN PAC. CO.

Civ. 9257.

District Court of Appeal, First District,
Division 1, California.

July 3, 1935.

Rehearing Denied Aug. 2, 1935.

Hearing Denied by Supreme Court
Aug. 29, 1935.

1. Judgment ⚡585(3)

Judgment of nonsuit in action for injuries by employee against railroad under Fed-

eral Employers' Liability Act and Federal Boiler Inspection Act *held* not to bar subsequent action for wrongful death of employee by administratrix against railroad under same acts; causes not being identical as to measure of damage (Federal Employers' Liability Act, 45 USCA §§ 51-59; Federal Boiler Inspection Act, 45 USCA § 22 et seq.).

2. Trial ⚡349(2)

Submission of special issues is within trial court's discretion.

3. Action ⚡48(2)

Commerce ⚡8(4, 6)

Causes of actions may be brought jointly under Federal Employers' Liability Act and Federal Boiler Inspection Act, and such actions are governed by federal laws (Federal Employers' Liability Act, 45 USCA §§ 51-59; Federal Boiler Inspection Act, 45 USCA § 22 et seq.).

4. Master and servant ⚡276(1)

Evidence *held* not to show that hostler's assistant was engaged in interstate commerce when injured while fueling engine preparatory to its use for switching purposes of interstate and intrastate character, precluding recovery for his wrongful death under Federal Employers' Liability Act (Federal Employers' Liability Act, 45 USCA §§ 51-59).

5. Death ⚡38

Action under Federal Boiler Inspection Act commenced February 16, 1932, for death on January 5, 1932, of hostler's assistant who received injury on March 25, 1930, *held* not barred by limitation, since Boiler Inspection Act contains no period of limitation, and state statute of limitations provides that action may be brought within one year after death (Federal Boiler Inspection Act, 45 USCA § 22 et seq.; Code Civ. Proc. § 340, subd. 3, and § 377).

6. Commerce ⚡8(6)

State statute of limitations, and not period of limitation in Federal Employers' Liability Act, *held* applicable to action for wrongful death under Federal Boiler Inspection Act which contains no period of limitation, where violation of Federal Employers' Liability Act was not shown because employee was not engaged in interstate commerce (Federal Employers' Liability Act, 45 USCA §§ 51-59; Federal Boiler Inspection Act, 45 USCA § 22 et seq.; Code Civ. Proc. § 340, subd. 3, and § 377).

7. Trial ⚡330(5)

Where suit is brought upon two different theories, if there is evidence sufficient to sustain either of them and verdict of jury is general, verdict will stand.

2. Trial ⇐330(5)

In action for wrongful death against railroad under Federal Employers' Liability Act and Federal Boiler Inspection Act, jury's general verdict would stand, notwithstanding recovery under Federal Employers' Liability Act was precluded because deceased was not engaged in interstate commerce, since general verdict imported implied finding that Boiler Inspection Act was violated in that engine had leaky throttle, which defect caused engine to move backward and cause injury (Federal Employers' Liability Act, 45 USCA §§ 51-59; Federal Boiler Inspection Act, 45 USCA § 22 et seq.).

9. Commerce ⇐8(4)

Action against railroad for wrongful death of employee held maintainable under Federal Boiler Inspection Act, as against contention that sole remedy of employee of common carrier, engaged in interstate transportation, where at time of injury employee is not engaged in interstate transportation, but under circumstances where there has been violation of duty imposed by Boiler Inspection Act, is under State Workmen's Compensation Act, where evidence showed that accident happened on highway of interstate commerce (Federal Boiler Inspection Act, 45 USCA § 22 et seq.; St. 1917, p. 831, as amended).

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Leila Mae Walton, administratrix of the estate of James C. Walton, deceased, against the Southern Pacific Company. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

For prior opinion, see 43 P.(2d) 361.

Dunne & Dunne and Arthur B. Dunne, all of San Francisco, for appellant.

Clifton Hildebrand and Thos. F. McCue, both of San Francisco, for respondent.

McNUTT, Justice pro tem.

Plaintiff, the administratrix of Walton, deceased, sued in her own behalf and in that of her two minor children, for the wrongful death of the husband and father, resulting from injuries sustained by him as an employee of defendant, a common carrier in interstate transportation. Defendant has appealed from the judgment of \$12,500 entered upon the verdict in her favor.

[1] Intermediate the institution of the instant action and the occurrence of the

accident Walton had sued in the federal court for damages for the injuries sustained by him in the accident of March 25, 1930. This case was tried with a jury, the Hon. Frank H. Kerrigan, judge of said court, presiding. His complaint was in two counts: (1) Under the Federal Employers' Liability Act (45 USCA §§ 51-59); (2) under Federal Boiler Inspection Act (45 USCA § 22 et seq.). The defendant, by answer, made certain denials and pleaded affirmative defenses.

At the conclusion of plaintiff's presentation, defendant offering no evidence, it moved for a directed verdict.

Appellant herein contends that the record shows said motion to have been granted by the trial court and sustained by affirmance of the judgment, October 14, 1931, in Walton v. Southern Pacific Co., 53 F.(2d) 63 (C. C. A. 9). Respondent urges, however, that the record reveals no more than the granting of a nonsuit, and hence, that there would appear to have been no meritorious adjudication.

At 599a, reporter's transcript, as a part of the judgment in the Circuit Court of Appeals, we find: "At the close of the appellant's case, the appellee moved for a directed verdict. The motion was granted by the trial court, and 'a judgment of nonsuit' was rendered accordingly on February 25, 1931. On that day the plaintiff-appellant was allowed 30 days in which 'to settle and allow a bill of exceptions.'" 53 F.(2d) 63, 64. It appears that in the trial of the instant case, appellant herein offered to put in evidence the record of the trial in the federal case. However, the record herein does not disclose what it may have contained other than the quoted excerpt from the appellate court opinion, which cannot be read as more than a judgment of nonsuit which is no bar to a subsequent action on the same case. Mohn v. Tingley, 191 Cal. 470-478, 217 P. 733.

Furthermore, the causes are not identical as to measure of damage; the instant differing from the original case. Michigan Central R. Co. v. Vreeland, 227 U. S. 59, 33 S. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; Louisville & N. Ry. Co. v. Holloway, 246 U. S. 525, 38 S. Ct. 379, 62 L. Ed. 867.

The complaint in the suit at bar was in three counts, in each of which plaintiff sues as administratrix of the estate of Walton, deceased, and the parties for whose bene-

fit she sues and the defendant, respectively, are identical. Count No. 1 proceeds upon the Federal Employers' Liability Act and alleges that decedent and defendant were both engaged in interstate commerce at the time of the accident in question, and then sets forth with particularity the negligence of the defendant due to which the decedent was injured. Count No. 2, grounded upon a violation of the Federal Boiler Inspection Act, alleges with particularity the violations of such act it is alleged as occasioned the injury. Count No. 3, as amended, purports to charge violation of the Federal Employers' Liability Act, alleging negligence in more general terms, with a view to invoking the doctrine of *res ipsa loquitur*.

The answer admits the death as alleged, admits that as to some of its activities defendant was a common carrier by railroad engaged in interstate commerce, but denies that it was so engaged in respect to the matters referred to in the complaint; denies that the decedent was at any time or place as pleaded engaged in interstate commerce; admits the matter of his death; admits the control of the engine through its agents alleging decedent to have been one of them. Other material allegations as to the effects or causality between them and the accident and the death are denied.

Motions for nonsuit and for directed verdict were severally made as to each count, and as to the theory upon which such count proceeded. These motions were severally denied.

[2] Appellant assigns error in the court's refusal to submit certain special issues; this lay within the trial court's discretion and no abuse appears.

The Federal Employers' Liability Act is a negligence statute and fastens upon a railroad engaged in interstate commerce liability in damages to a person injured while employed by a railroad in such commerce, and gives, in the event of his death, an action for the benefit of the surviving husband or wife and children of such employee, where such injury or death results in whole or in part, from the negligence of the carrier, or its agents, or by reason of any defect or insufficiency due to its negligence in, among other things, its engine, appliances and machinery. It deals as well with the effect of contributory negligence, assumption of risk and limitation of action.

The Federal Boiler Inspection Act (like the Federal Safety Appliance Act, 45 USCA § 1 et seq.) contains no provision dealing

with actions for death, contributory negligence, or limitation of actions, nor does it require, in order that its violation may be invoked, that the employee be engaged in interstate commerce.

[3] Causes of actions may be brought jointly under the Employers' Liability Act and the Boiler Inspection Act, and it has been held that such actions are governed by federal laws. *Kidd v. Chicago, etc., R. Co.*, 310 Mo. 1, 274 S. W. 1079, certiorari denied 269 U. S. 582, 46 S. Ct. 119, 70 L. Ed. 424; *Gerow v. Seaboard Air Line Ry.*, 189 N. C. 813, 128 S. E. 345, certiorari denied 269 U. S. 584, 46 S. Ct. 121, 70 L. Ed. 425.

[4] At 4 o'clock in the afternoon, March 25, 1930, the decedent James C. Walton received injuries which resulted in his death when an engine which he as an employee of appellant was supplying with fuel at its roundhouse, at its yard in Colton, Cal., unexpectedly backed, throwing him from his position on the tender and against the cab. Walton was a hostler's assistant. The engine 2604 had been spotted by Lord, the hostler, at the oil column to take in fuel. Lord left the cab to supply the engine with water. At that time Walton saw one Roxie climb into the cab and take the fireman's seat. Roxie was an engine watchman. Walton, as his duty required, watched the oil flowing into the tender so as to prevent it running over. While so engaged the engine suddenly ran backwards as Walton testified on his first trial, 14 feet, and as Lord admitted, 10 feet. Walton was thrown against the oil column, back against the engine of the cab and injured. After a brief period of unconsciousness he was taken to the hospital, and died as a result of the injuries.

The witness German, for plaintiff, testified: That at the time of the accident he was employed in said yard, was one of the crew that took 2604 out at 11 o'clock p. m. of the day of the accident; that the first work the engine did that night was to switch a train known as 98, the Phoenix Manifest, which was bound for Tucson, El Paso, and Phoenix, Ariz; that he switched cars that were marked to go through to Phoenix; that the next switching job performed by the engine was to break up and switch a train known as the "Pick-up," bound for Yuma, Ariz., and points east; that about 3 o'clock in the afternoon of the day of the injury a witness, on coming by the roundhouse, had happened to notice on the bulletin board that 2604 was assigned for 11 p. m.; that the

purpose of the switching crew is making up and breaking trains.

Counsel stipulated that Colton is a station on appellant's line and also a part of the main line running out of Los Angeles and across the Arizona borders; that it is a switch yard wholly within this state; that in the normal course of business switching movements are made of both interstate and intrastate character; that 2604 was assigned to such yard to be used indiscriminately in interstate and intrastate commerce; that on the day of the accident on the morning shift which had begun at 7 a. m. and was to finish at 3 o'clock but, due to a little overtime, finished a few minutes later, 2604 had handled indiscriminately interstate and intrastate switching operations, and, further, subject to appellant's objection that it was irrelevant, incompetent, and immaterial, that from 11 p. m. on March 25, 1930, until the end of that shift which would be 7 a. m. March 26th, 2604 was again engaged in similar, that is to say, in switching operations, indiscriminately interstate and intrastate.

Witness Schwartz testified that 2604 was used indiscriminately to switch cars coming into the state and cars going to points beyond the state and as well cars coming from points beyond the state. "It was used for general yard work."

"Q. Then that would include switching cars both interstate and intrastate in character? A. It would."

On the following morning, 25th to 26th, it switched a car east bound as far as Chicago; that engines of either trains are spotted for oil and water at the column in question and are inspected and refilled on track No. 2. It was further stipulated that at times the track in question is used as a highway for interstate commerce.

Lord, the hostler, testified that he was a Southern Pacific fireman; that Walton had several jobs, part of his duty being to assist the witness; that the witness was in charge of 2604 when Walton was hurt; that the witness, among others, excluding Walton, had authority to move engines, but before he spotted the engine and left the cab he shut off the throttle; that when the engine backed eight to ten feet no bell or whistle was sounded, and that he left the engine in charge of no one authorized to move it; that when the engine was so left the throttle was left so completely closed that no steam could get from the boiler to the cylinders and no steam was coming from the boilers into the cylinders. This testimony of Lord, plaintiff's witness, is the

only direct testimony in the case bearing upon the question as to whether steam could get from the boiler into the cylinders.

The testimony which Walton had given in the district court case was read over objections of appellant. He was first employed by the Southern Pacific Company August 15, 1929, as an extra about the Colton roundhouse doing whatever the foreman directed. About January 1st he was informed that he would be hostler's helper, in which capacity he worked until injured between 3:45 and 4 p. m. March 25, 1930. His duties were to take engines around the wye, fuel and water them, and fill lubricators. On March 25th he was preparing 2604 for the next shift it went out on. Lord was hostler in charge. Switching crew had used 2604 in switching operations that day. Walton got on front of engine, gave Lord signal to back, he spotted it at the sand dome, witness put in sand, then walked back across top of engine and cab to the oil tank, gave him signal to back and spot for oil and water. When Lord spotted the engine he was in engineer's seat pulling throttle. When spotted, witness pulled oil beam over, opened manhole, put telescope into manhole, and turned on the oil. Lord left nobody in charge of engine. Witness turned around and saw that Roxie climbed into cab and sat in fireman's seat. While oil was being taken the engine moved back cutting off the oil supply, oil beam struck witness in the chest and knocked him across the cab. He was unconscious for about a minute, and on coming to looked about, Lord was gone, he remembered no more. And that on March 22, 1930, and while the boiler was closed tight, 2604 moved backwards; that if throttle had been shut off, and the same and other parts were in proper condition and working order, the reverser on center engine would not have moved.

Respondent (brief, p. 7) asserts that the record shows 2604 was actually assigned to this interstate switching purpose at 3 o'clock p. m. of the day Walton was injured, and that this engine did interstate switching on that next assignment. This statement is not justified. The testimony of the witness German goes no further than does the stipulation of the parties, namely, that the engine was to go out at 11 p. m. in connection with switching operations.

One Loftus, a discharged fireman, testified that in March, 1930, and for nearly

twelve years, he had been an S. P. fireman, a hostler, and had worked in the roundhouse before becoming fireman. He knew engine 2604. In the early part of 1930, including March, he had worked on the extra board, did not witness the accident; had worked on 2604 the last time two or three days before Walton was hurt, and before that in March as fireman and hostler. Within a few days before March 25th the engine had a leaky throttle; that it had a leaky throttle after the accident; had a tendency to walk away of its own accord, to move, cylinders filled up with steam which leaked down into the pistons, causing them to work the driver; the steam having been exhausted through leakage, the engine would stop; imagines it walked twelve to fifteen feet; had seen it move of its own accord several times; moved because cylinder filled up with steam due to leaky throttle; condition of engine not different after the accident; if brakes were set they would hold it.

On cross-examination witness said he could not possibly be mistaken about these events; that the only times when he saw 2604 move of its own accord was when he was in the yard and as a fireman was working on it; that he worked two or three days before March 25th; that he does not believe that the last time he worked was March 7th. He said he was familiar with the main line register which (starting March 9th) was shown him. On that day he worked on 2616. It shows 2604 worked next day, and that he had signed the register which does not show that he worked on 2604. On March 9th he signed up on 2616, again on March 11th, again on March 16th. On March 9th, fireman on 2604 was Ward, the same on 10th. The book received in evidence shows no work for Loftus on 2604 from March 7th until late in April. Witness examines the book, does not find therein that he worked on 2604. He says at times he saw it move; contends that he was a fireman when he saw it move. His signature shows that he worked as fireman on 2681 on March 26th, 27th, 28th, 29th, and on 30th without engine number, and says that from the 26th to the 30th he was working on 2681 and did not work on 2604 after the accident within two or three days.

A statement that had been signed by him September 27, 1930, was exhibited to him. (Exhibit 5.) It shows, among other things: "I do not recall any defects on this engine. I do not remember any time

that this engine moved off of its own accord. I never heard of this engine running away. I never had any trouble with this engine as to a defective throttle. I never heard of this engine or any other engine moving off of its own accord, * * * have no recollection that this engine had a leaky throttle while I was working on it."

Many witnesses, testified for defendant as to condition of the engine in question, the result of which shows that it had always been inspected before the accident, that its throttle had never leaked, that the inspection was made after the accident and no leaky throttle existed.

Was the deceased employee when injured engaged in interstate transportation or in work so closely related to such transportation as to be practically a part of it? He was not on the engine when it did any switching work on its night shift, because of his injuries. 2604 was not a regularly assigned interstate road engine. It was used indiscriminately for switching purposes of either character, and it was to be used that night in shifting cars in intrastate and interstate movements. It was being fueled preparatory to such general use when he was injured. Does the fact that the first car that it switched that night was one in an interstate movement give color to the purpose for which the engine was being prepared for use as one looking to interstate transportation; or, since it is a stipulated fact that the engine was being prepared for general use, either interstate, intrastate, or both, is its first actual later movement wholly adventitious? So far as this record is concerned it is circumstantial and accidental that the first car that it moved in switching operations that night was an interstate car.

If 2604 was not by predesignation an interstate engine it would not become such from the mere fact that the first car it switched that night was an interstate car; hence fueling engine was not employment in interstate transportation.

It follows that if the engine was not to go into interstate transportation because it was being prepared for general use, the inquiry is ended and there was no room for the operation of the Employers' Liability Act.

Minneapolis & St. Louis Railroad Co. v. Winters, 242 U. S. 353, 37 S. Ct. 170, 171, 61 L. Ed. 358, Ann. Cas. 1918B, 54, pre-

sented a case in which plaintiff was injured while making repairs to an engine. The engine "had been used in the hauling of freight trains over the defendant's line * * * which freight trains hauled both intrastate and interstate commerce, and it was so used after the plaintiff's injury." It had pulled a freight train into the town where plaintiff was injured three days before the accident, and pulled one out of the same place on the day of the accident. The court said: "That is all that we have, and is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine, as such, is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

In *Onley v. Lehigh V. R. Co.*, 36 F. (2d) 705 (C. C. A. 2), certiorari denied 281 U. S. 743, 50 S. Ct. 349, 74 L. Ed. 1156, a brakeman working on a switching crew was injured after having oiled an engine, while testing a fire hose. The defense was that plaintiff was not engaged in interstate commerce. It was conceded that plaintiff and the engine had been engaged during the morning in interstate switching part of the time and intrastate switching part of the time, and that but for the accident he would have been working in the afternoon doing such switching as might have been required. "The future is barren of assistance, for he was not employed in preparing for some definite movement, so that his work was a necessary incident of it, and became of like character with it; and nothing is known but that the plaintiff, and we may assume the engine, would have, in the ordinary course of events, done such switching as would have been required. We do not know what would have been required, except that it might have been

wholly interstate switching, wholly intrastate, or partly both."

The cases cited in the briefs are myriad, so that an extensive analysis of them would be impossible. However, the Supreme Court of this state, in the case of *Mappin v. Atchison, Topeka, etc., Railway Co.*, 198 Cal. 733, 247 P. 911, 914, 49 A. L. R. 1330 (not cited in any briefs), lays down the principles by which the character of commerce in which the employee was engaged is to be ascertained. The United States Supreme Court denied certiorari. 273 U. S. 729, 47 S. Ct. 239, 71 L. Ed. 862. The facts of the *Mappin Case* differ in essential particulars from those in the instant case. In the former, a member of the switching crew was injured during the switching operation; while here no switching operation was in progress. In the *Mappin Case* the switching crew was in the act of making and breaking up trains in the company's yard at San Francisco. The immediate train comprised of thirteen cars, three of which not only originated as to transportation outside of California, but one of them, though empty, had actually begun its homeward movement in conformity with the rules and customs of carriers, while others were in the course of movement to designated places to receive freight for points outside the state when the injuries occurred. Speaking of one of the cars, the court said: "It had been selected by the yard master for such loading, and had been designated for that purpose. Its designation was to 'Block 6' in the freight house of the defendant, which was the place from which freight destined to Arizona points was to be loaded upon cars. * * * It was in course of movement to its thus designated place for its thus predesignated purpose when the injuries to *Mappin* occurred."

The court then distinguishes *Chicago Junction R. Co. v. Industrial Board*, 277 Ill. 512, 115 N. E. 647, 648, relied upon by appellant railroad as indicating that the employment of *Mappin* was not in interstate transportation. In said case deceased employee was one of the switching crew moving some fifteen empties from the shops to the storage tracks in the carrier's freight yards when he was injured in the course of such removal. Eleven of these cars after the accident were taken to the storage tracks, re-iced, and on the same day moved by another crew to loading tracks and were filled with interstate

freight. The opinion of the court expressly recites (says our Supreme Court): That up to the time of the accident there had been no specific designation given as to where any particular car would ultimately go, and the court for that reason held that the cars were not, at the time of decedent's injury, engaged in interstate commerce, and the court in that case says: "It has been held that, if the object of a switching movement is the placing of an empty car in a position to receive a load to be carried out of the state, the car is engaged in moving interstate commerce from the moment the switching movement begins." (Citing cases.)

The record here shows merely that the night shift involved the same character of work as the finished day shift; namely, whatever switching work presented itself, intra or interstate, and for aught that appears, the fact that the first car that it switched that night was interstate in character, is purely a circumstance and it was not work predesignated or predetermined while the fueling operation was in progress.

There are many cases cited in the briefs which deal with injuries received while the employees were working upon property dedicated to interstate commerce such as roadbeds and bridges, which, of course, have no application here as the yard switch engine is not, in and of itself, dedicated to any kind of commerce until specific assignment occurs.

It is therefore concluded that at the time of the injuries to the decedent he was not employed in interstate transportation or work so closely connected therewith as to become a part thereof.

Notwithstanding *Van Buskirk v. Erie Railroad Co.* (1922, C. C. A. 3d) 279 F. 622, relied upon by respondent in petition for rehearing to establish that Walton, when injured, was engaged in interstate transportation, we believe that the following cases support the contrary view: *Chicago & E. I. R. Co. v. Industrial Commission of Illinois*, 284 U. S. 296, 52 S. Ct. 151, 76 L. Ed. 304, 77 A. L. R. 1367; *Shanks v. Delaware, etc., R. Co.*, 239 U. S. 556, 36 S. Ct. 188, 60 L. Ed. 436. L. R. A. 1916C, 797; *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 36 S. Ct. 517, 60 L. Ed. 941; *Chicago & N. W. Ry. Co. v. Bolle*, 284 U. S. 74, 52 S. Ct. 59, 76 L. Ed. 173.

[5] The contention of appellant that the second cause of action is barred by the statute of limitations is untenable. Walton received his injury on March 25, 1930; he died January 5, 1932. The present action was commenced February 16, 1932, within 45 days after his death. The Boiler Inspection Act is silent as to the time within which an action may be brought, and therefore, under the authorities, about to be referred to, the state law, section 340, subd. 3, of the Code of Civil Procedure, applies, which provides that the action be brought within one year after the death. *Moore v. Chesapeake & O. R. Co.*, 291 U. S. 205, 54 S. Ct. 402, 405, 78 L. Ed. 755 (Feb. 5, 1934). In this case action was brought in two counts: (1) Under Federal Employers' Liability Act; and (2) on the theory that plaintiff was not engaged in interstate commerce under Safety Appliance Acts and a Kentucky statute. In discussing this subject, the court said:

"In relation to injuries received in that state in intrastate commerce, aside from the particular bearing of the Federal Safety Appliance Acts, the liability of respondent was determined by the laws of Kentucky. * * * Questions arising in actions in state courts to recover for injuries sustained by employees in intrastate commerce and relating to the scope or construction of the Federal Safety Appliance Acts are, of course, federal questions which may appropriately be reviewed in this court. * * * The Federal Safety Appliance Acts, while prescribing absolute duties, and thus creating correlative rights in favor of injured employees, did not attempt to lay down rules governing actions for enforcing these rights. * * * But the act made no provision as to the place of suit or the time within which it should be brought, or as to the right to recover, or as to those who should be beneficiaries of recovery, in case of the death of the employee. While dealing with assumption of risk, the statute did not affect the defense of contributory negligence, and hence that defense was still available according to the applicable state law. (Citing the *Schlemmer* [220 U. S. 590, 31 S. Ct. 561, 55 L. Ed. 596] and *Poplar* [237 U. S. 369, 35 S. Ct. 609, 59 L. Ed. 1000] Cases.) In these respects the amended act of 1903 made no change. * * *

"The Safety Appliance Acts having prescribed the duty in this fashion, the right

to recover damages sustained by the injured employee through the breach of duty sprang from the principle of the common law * * * and was left to be enforced accordingly, or, in case of the death of the injured employee, according to the applicable statute. * * * 'The Federal statute, in the present case, touched the duty of the master at a single point, and, save as provided in the statute, the right of the plaintiff to recover was left to be determined by the law of the state.'

In *Gilvary v. Cuyahoga Valley R. Co.*, 292 U. S. 57, 54 S. Ct. 573, 575, 78 L. Ed. 1123, we find the following: "Petitioner cites language in *Texas & Pacific Ry. Co. v. Rigsby*, 241 U. S. 33, 41, 36 S. Ct. 482, 60 L. Ed. 874. But that case is not in point on the question under consideration in this case. There we were called upon to decide whether a railroad employee engaged in intrastate commerce upon the line of an interstate carrier was within the protection of the Safety Appliance Acts. We held that he was. The opinion supports our recent construction of these acts that, while they prescribe the duty, the right to recover damages sustained by the injured employee, through the breach 'sprang from the principle of the common law' and was left to be enforced accordingly, or in case of death 'according to the applicable statute'—citing *Moore v. Chesapeake & O. R. Co.*, supra; *Minneapolis, St. Paul, etc., Ry. Co. v. Popplar*, 237 U. S. 369, 35 S. Ct. 609, 59 L. Ed. 1000. "These acts do not create, prescribe the measure, or govern the enforcement of, the liability arising from the breach."

As is said in the *Gilvary Case*, supra, with respect to the Safety Acts: "They do not extend to the field occupied by the State Compensation Act."

While these decisions dealt with the Safety Appliance Act, it has been held in a case under the Boiler Inspection Act, where similar questions were raised, that the fact it arose under the latter act is "a distinction involving no different question." *Rice v. Baltimore & O. R. Co. (C. C. A.)* 42 F.(2d) 387, 392.

[6] It thus appears that the Boiler Inspection Act does not purport to provide remedial procedure where it is to be invoked as a ground of recovery for death independently of its application with the Liability Act in an interstate case; hence, in an intrastate case such as this, the state law applies.

A cause of action for wrongful death of another is, in California, brought under the provisions of section 377, Code of Civil Procedure, and the period of limitations (one year) runs from the date of the death and not from the date of the accident (*Marks v. Reissinger*, 35 Cal. App. 44, 169 P. 243), and our former holding that it ran from the date of the accident was erroneous. 8 Cal. Jur. 1039; *Tann v. W. P. R. Co.*, 39 Cal. App. 377, 178 P. 971.

[7,8] It is settled that where suit is brought upon two different theories, if there is evidence sufficient to sustain either of them and the verdict of the jury be a general one, the general verdict will stand, as it imports an implied finding (in a case such as this), that the Boiler Inspection Act was violated in that the engine had a leaky throttle. *Sessions v. Pacific Improvement Co.*, 57 Cal. App. 1, 206 P. 653; *Merrill v. Kohlberg*, 29 Cal. App. 382, 155 P. 824; 24 Cal. Jur. 885, 6. The evidence in this case supports the view that the engine moved backward as the result of a leaky throttle. Where, as here, there is testimony that the throttle was closed, and evidence that the throttle leaked, simple principles of physics would indicate that, when it suddenly walked, jumped, or moved backwards, steam must have gotten from the steam chest into the cylinders in sufficient quantity to move the pistons. The jury was not bound by defendant's attempted explanation of the backward movement of the engine.

[9] The appellant's contentions that the sole remedy of an employee of a common carrier, engaged in interstate transportation, or, in this case, of his personal representative, where, at the time of the injury, the employee was not engaged in interstate transportation, but under circumstances where there has been a violation of duty imposed by the Boiler Inspection Act, is under the State Workmen's Compensation Act are untenable (*St. 1917*, p. 831, as amended). The evidence here shows that the accident happened on a highway of interstate commerce. Reporter's transcript, p. 201, line 18; p. 312, lines 12-19; p. 312, lines 22-26; p. 313, lines 1-5.

Under the authority of *Ballard v. Sacramento Northern Railway Co.*, 126 Cal. App. 486, 14 P.(2d) 1045, 15 P.(2d) 793, the instant suit is maintainable.

The instructions given below are, upon the whole, fair, and error, if any, in the

admission of the testimony given by Walton in the federal case, is not of sufficient consequence to justify a reversal of the judgment.

For the foregoing reasons, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.



8 Cal.App.2d 517

PEOPLE v. TIRACORDA.

Cr. 2718.

District Court of Appeal, Second District,
Division 1, California.

July 26, 1935.

1. Criminal law ☞511(1)

Slight corroboration of testimony of accomplice in criminal prosecution is sufficient (Pen. Code, § 1111).

2. Criminal law ☞511(1)

Evidence held to corroborate testimony of accomplice and to sustain conviction for robbery (Pen. Code, § 1111).

3. Criminal law ☞543(2)

In prosecution for robbery, permitting testimony of witness at preliminary hearing to be read in evidence at trial in absence of witness held not error, where witness could not be located and showing was made that witness could not with due diligence be found within state (Pen. Code, § 686, subd. 3).

4. Criminal law ☞1186(4)

In prosecution for robbery, possible error arising from reading into evidence of statements of accomplices after defendant had said that he remembered none of things set out in either statement and had nothing to add when statements were read to him held harmless where evidence to support conviction was sufficient without statements (Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Ray B. Tiracorda was convicted of robbery, and he appeals.

Affirmed.

Ralph D. Paonessa, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

ROTH, Justice pro tem.

Before midnight on the 10th day of November, 1934, one Franklin, a cook, was seeking diversion by drinking himself into a state of intoxication in a refreshment establishment on East Fifth street in the city of Los Angeles. On two occasions during the purchase of drinks he paid for the same in bills of \$5 denomination. During this time he was being watched by three men named Green, Alberti, and Tiracorda (the last named the defendant herein). At midnight he requested the bartender to call a taxi, and thereafter went outside to the curb to enter the cab, which had been either standing outside of the place of business, or which had arrived there in response to a call. The driver of the cab in the meantime entered the place of business to go to the lavatory. As Franklin was in the act of entering the cab, he was set upon by Green and Alberti and soundly thrashed and relieved of cash to the extent of \$22. Green and Alberti immediately jumped into an automobile which was parked at the curb, or in the street near the curb, which automobile was owned by Tiracorda, and in which car Tiracorda was sitting at the wheel with one Brady by his side. Tiracorda, as Green and Alberti jumped in, immediately drove away. He was subsequently apprehended and charged with robbery, to which he pleaded not guilty, and also with a prior conviction of robbery in the city of New York on March 25, 1928, which latter offense he admitted.

The cause was tried without a jury. All of the foregoing facts were testified to by Brady, who is admitted to be an accomplice of the crime of robbery charged in the present information. All of the foregoing facts, however, were corroborated by other witnesses unconnected with the crime in any way, and statements and admissions of defendant, and the record leaves no doubt that the foregoing résumé of events comprise the facts, and such conclusion can be reached without the aid of Brady's testimony.

Brady testified further that some minutes prior to the actual robbery, defendant, together with Alberti and Green, in his presence discussed their inability to

pay their room rent and fixed upon Franklin as the source of the necessary revenue. Further that, subsequent to the robbery, the money taken from Franklin was divided between all of them, although it does not appear to have been an equal division. These latter facts testified to by Brady are uncorroborated, but they are the only facts which are. Defendant was convicted and appeals from the judgment of conviction and from the order denying his motion for a new trial.

[1,2] Defendant urges on appeal that the evidence is insufficient to sustain a conviction, which point is based primarily upon the legal proposition that the testimony of an accomplice must be corroborated. Pen. Code, § 1111. The legal requirement is conceded, but the concession is not pregnant with the suggestion that such corroboration must be overwhelming. It has been held consistently that even slight corroboration is sufficient. *People v. Follette*, 74 Cal. App. 178, 204, 240 P. 502; *People v. Tinnin*, 136 Cal. App. 301, 304, 28 P.(2d) 951. No evidence on this point has been excerpted for our perusal, but nevertheless we have read the entire record, and find that the corroboration is not slight but is ample and convincing.

[3] Defendant also urges that the court erred in permitting the testimony of Franklin given at the preliminary examination to be read in evidence at the trial. It was established at the trial that Franklin could not be located, and we believe without recounting all of the incidents of diligence established by the state, that a showing was made satisfying the requirements of section 686, subd. 3, of the Penal Code, that the witness "cannot with due diligence be found within the state," as said phrase has been construed by such cases as *People v. Land*, 137 Cal. App. 196, 197, 30 P.(2d) 433; *People v. James*, 133 Cal. App. 751, 752, 24 P.(2d) 859. The showing which was found sufficient and recounted in detail in the report of the last-named case was not any more conclusive than the showing made in the instant case.

[4] The final point asserted by defendant is that statements made by Green and Alberti were improperly read in evidence. The officers who took these statements testified that they were read to defendant, who replied that he did not remember any of the things set forth in either one

or both of them, and had nothing to add. He admitted that he drove the car, but stated he had no knowledge of any robbery committed. Whether these statements of defendant constitute such an unequivocal denial as to preclude the admission in evidence of the statements of Green and Alberti for any purpose, we do not decide, since we are satisfied that the evidence is sufficient without them, and that even if erroneously admitted, such error was harmless. Section 41½, art. 6, Const. of Cal.

The judgment and order denying motion for new trial are affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.



8 Cal.App.2d 541

SETCHELL v. PROCHASKA et al.

Clv. 1169.

District Court of Appeal, Fourth District,
California.

July 30, 1935.

Hearing Denied by Supreme Court
Sept. 26, 1935.

1. Mortgages ⇨38(1)

In action to foreclose mortgage, evidence held to sustain judgment foreclosing mortgage based on findings that mortgage was not executed as part of single void transaction whereby property was illegally acquired by mortgagor in exchange for certificates of investment in violation of permit which prohibited issuance of investment certificates in exchange for real property, and that mortgagor had acquired title to mortgaged property through such exchange, which title was good as between mortgagee and grantor of property to whom it had been reconveyed.

2. Exchange of property ⇨5

Agreement under which land was to be exchanged for investment certificates in corporation became voidable when certificates were issued contrary to terms of permit which was issued by corporation commissioner and which prohibited issuance of investment certificates by corporation in exchange for real property.

3. Licenses ⇨39

Deed executed and delivered to corporation in exchange for investment certificates in violation of permit issued to corporation which prohibited issuance of investment cer-

tificates in exchange for real property held valid before grantor exercised right to have deed set aside for failure of consideration, as between grantor and bona fide mortgagee who had made loan to corporation on strength of delivery of deed, with no knowledge of manner in which deed had been acquired.

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by Helen Setchell, also known as Helen Setchel, against Anna Prochaska, Mary Srp, and others who filed a cross-complaint. Judgment for plaintiff, and defendants appeal.

Affirmed.

W. S. Staley, of San Diego, for appellants.

Wright, Monroe, Thomas & Glenn, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action to foreclose a mortgage for \$5,000 held by the plaintiff and originally executed and delivered to her and her husband by the California Land Buyers Syndicate, a corporation. The real property covered by the mortgage was conveyed by the defendants to this corporation by deed dated July 23, 1929. It was stipulated that the only consideration given by the corporation in exchange for the real property was 380 units of the investment certificates of said syndicate and that, at the time of the transaction, the permit issued by the commissioner of corporations to said corporation allowed it to issue said units for cash only and prohibited the issuance thereof in exchange for real property. The deed referred to was placed in escrow with a title company, the corporation placed in escrow the investment certificates, and the plaintiff and her husband placed in escrow the amount of the loan represented by the mortgage. The escrow was closed and the respective papers delivered. Some months later, on January 8, 1930, the corporation conveyed the property by deed to the defendants, the deed reciting that the conveyance was made "subject to the mortgage indebtedness in the sum of \$5,000."

In their answer, the defendants alleged that the deed of January 8, 1930, to the defendants was made by the corporation by way of admitting its fault and as a partial restitution for its act in the matter of se-

curing the deed from these defendants on or about July 23, 1929. In a cross-complaint they alleged that on July 19, 1929, they were approached by agents and employees of the corporation named and urged to exchange the real property for the investment shares; that they relied upon certain representations made by the agents and employees of the corporation and agreed to transfer the property to the corporation in exchange for the investment shares; that they did not then know that it was unlawful for the corporation to dispose of its capital stock other than by actual sale for cash; that they did not know this when the reconveyance of January 8, 1930, was delivered to them; that they learned that the transaction was illegal shortly before this suit was filed; that the purported consideration received in exchange for the real property has utterly failed; that the transaction was void from the beginning on account of its illegality; and that the misrepresentations made by the agents of the corporation were false, were known by them to be false, were made with the intent to deceive the defendants, and were believed and relied upon by them.

While the court found that the only consideration received by the defendants for said property was 380 units of the investment shares of this syndicate, and that its permit allowed said corporation to issue said units for cash only and prohibited the issuance thereof in exchange for real estate, it also found that the plaintiff was not a party to and had no knowledge or notice, either actual or constructive, of the transaction between the defendants and the corporation; that the plaintiff had had no dealings or conversations with the defendants and had made no representations to them; that the exchange of the property and the making of the loan and taking of the mortgage were not a single transaction; that the person who procured the loan from the plaintiff was not her agent; that the plaintiff is an innocent holder for value and had no notice or knowledge of the breach of the permit referred to; and that the note and mortgage were not invalid in their inception but were and are a valid obligation and encumbrance. A judgment was entered in favor of the plaintiff and against the cross-complainants, and this appeal followed.

[1] The appellants contend that the exchange of this property for the investment

certificates and the making of the loan was a single transaction taking the form of a "three-cornered" deal; that the issuance of the certificates being illegal the entire transaction was void from the beginning; that title to the property never passed to the corporation; and that the mortgage is, therefore, necessarily void. The trial court has found against these contentions and the evidence amply sustains these findings. It fully appears that the respondent was asked to make the loan by an agent of the corporation who was paid for his services by the corporation; that she looked at the property and agreed to make the loan; that she gave the money to this agent who placed it in escrow; that she knew nothing of the other transaction or as to how the corporation had acquired title to the property, and that the amount of the loan was placed in escrow to be delivered in exchange for a first mortgage upon the property. It also appears that the appellants paid the interest on the mortgage from the time the property was reconveyed to them on January 8, 1930, until some time in 1933 and that the respondent never saw the appellants and had no knowledge that anything was wrong with the transaction until shortly before the suit was filed.

[2,3] It is appellants' contention that this case comes within the rule laid down in such cases as *Trout v. Taylor*, 220 Cal. 652, 32 P.(2d) 968, where it has been held that an instrument wholly void, such as an undelivered deed, a forged instrument, or a deed in blank, cannot be made the foundation of a good title even under the equitable doctrine of bona fide purchaser.

We think these cases have no application here. The original agreement to exchange this land for investment certificates was not, in itself, void. The corporation could have complied with the agreement by delivering certificates which had been already sold for cash in accordance with the terms of the permit. When certificates were issued contrary to the terms of the permit, the exchange agreement became voidable, and while the appellants would undoubtedly have had the right to have the deed set aside for a failure of consideration, the deed itself was valid until this was done. The appellants recognize the situation by alleging false representations in their cross-complaint and that a re-

conveyance of the property was made by the corporation by way of a partial restitution for its acts. In *Fish v. Benson*, 71 Cal. 428, 12 P. 454, 460, the rule is quoted from *Pomeroy's Equity Jurisprudence* as follows:

"Where a conveyance has been obtained by the grantee's fraud, so that it would be set aside at the suit of the defrauded grantor, but the fraudulent grantee has in turn conveyed to a bona fide purchaser for value and without notice, the latter will take and hold the property free from all these equities, protected against the equitable remedies of the original defrauded owner."

The property in question was conveyed to the corporation by a deed which was not void but voidable, and while it was still in force, the loan was made. The deed enabled the corporation to borrow the money from the respondent, who was an innocent party with no knowledge of the manner in which the deed had been acquired. Under these circumstances, it would be highly inequitable to hold that the deed was invalid from the beginning when this could not be done without injury to a third party whose rights had intervened and whose making of the loan had been made possible by the delivery of the deed. *Michell v. Grass Valley Gold Mines Co.*, 206 Cal. 609, 275 P. 418; *Kehrlein v. Builders' Mortgage Co.*, 131 Cal. App. 714, 22 P.(2d) 242.

While the precise point here raised seems not to have been decided in California, the Supreme Court of Kansas has twice held that the rights of an innocent third party should be protected under circumstances which are quite similar. *Moos v. Land Owners Oil Ass'n*, 136 Kan. 424 15 P.(2d) 1073; *Beltz v. Griggs*, 137 Kan. 429, 20 P.(2d) 510.

We therefore hold that while there was a failure of consideration for the deed to the corporation, that deed was not such a nullity that it could not be made the foundation of a good title, in so far as a bona fide mortgagee is concerned.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

8 Cal.App.2d 423

In re FULTON'S ESTATE.

FULTON v. FULTON.

Civ. 5392.

District Court of Appeal, Third District,
California.

July 22, 1935.

Rehearing Denied Aug. 21, 1935.

Hearing Denied by Supreme Court
Sept. 19, 1935.**1. Executors and administrators** ⇨194(3)

Where petition for allowance of support of widow during administration of her deceased husband's estate alleged that an appeal had been taken from interlocutory decree of divorce which had been granted husband, fact of appeal could not be considered where it was not made a record in the case.

2. Evidence ⇨43(1, 3)

Courts take judicial notice of their own records, but such rule does not apply to records made in other cases in the same court.

3. Appeal and error ⇨907(4)

Where bill of exceptions shows nothing to contrary and does not specifically show no other testimony was introduced, presumption is that there was sufficient testimony introduced to support court's order.

4. Appeal and error ⇨907(4)

Where court found that petitioner was widow of deceased and entitled to allowance during administration of estate and bill of exceptions which was settled by stipulation of counsel did not specifically set forth that it included all the testimony, findings of court were, on appeal, presumed to be supported by testimony.

5. Executors and administrators ⇨188

That interlocutory decree of divorce had been entered against widow of deceased did not show that she was not a member of his family on date of his death, so as to preclude her from receiving allowance for support during administration.

6. Executors and administrators ⇨188

An interlocutory decree of divorce which allotted husband certain property "free from any claim of any nature whatsoever" of the wife held not to defeat her statutory claims to family allowance and reasonable allowance during settlement of estate (Probate Code, § 680).

7. Divorce ⇨156

Interlocutory decree of divorce does not dissolve the marriage relation, and parties remain in legal relation of husband and wife until marriage is dissolved by final judgment.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Proceedings for allowance of claim of Louisa J. Fulton against the estate of William Forest Fulton, deceased. From an order allowing the claim, S. G. Fulton, executor, appeals.

Affirmed.

See, also, 220 Cal. 726, 32 P.(2d) 634.

W. Coburn Cook, of Turlock, for appellant.

L. L. Dennett, of Modesto, and R. V. Wilcox, of Turlock, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon an appeal by S. G. Fulton from an order of the court allowing the petitioner, the widow of said deceased, \$50 per month for her support during the administration of the estate of said deceased. The order of the court recites the admission of evidence, both oral and documentary, taken on the hearing of the petition for the allowance filed by Louisa J. Fulton, and after said hearing the court found as follows: "That the said Louisa J. Fulton is the widow of said Forest Fulton, deceased, and that she is entitled to an allowance out of the property of said decedent for her maintenance and support; that the sum of \$50.00 per month is a reasonable amount under the circumstances of said widow, and under the conditions of the estate to be allowed her monthly for her support and maintenance."

Upon this appeal the following specifications are urged as grounds for reversal of the order: (1) The evidence shows that Louisa J. Fulton is not entitled to a family allowance, for the reason that she deserted the decedent in 1928, and never returned to him; (2) that she is bound by the contract, namely, the judgment, and that by it, it is determined that she is no longer entitled to support, nor has she any right of inheritance; (3) that according to the judgment she is not the widow of the decedent; that the executor is entitled to have the final decree entered in the divorce action.

After the introduction of testimony showing the marriage relation existing between the petitioner, Louisa J. Fulton, and William Forest Fulton at the time of his death, the appellant introduced an interlocutory judgment of divorce, which judg-

ment adjudged that William F. Fulton was entitled to a decree of divorce from Louisa J. Fulton on the grounds of desertion. This decree bears date June 7, 1932.

In the division of property set forth in the interlocutory decree we find the following: "William Fulton, (also known as William F. Fulton, also known as W. F. Fulton), is the owner in fee of the following described parcels of real property, and each of them, together with all improvements and appurtenances, free from any claim of any nature whatsoever of Louisa Fulton."

[1] There is not one word of testimony in the record showing that Louisa J. Fulton deserted the decedent in 1928, and never returned to him. The record shows no entry of a final decree of divorce, but does show the death of William Forest Fulton after the entry of the interlocutory decree. The petition for the allowance sets forth that the petitioner was the wife of the deceased at the time of his death. The respondent in her brief alleges that after the entry of the interlocutory decree, an appeal therefrom was taken to the Supreme Court. The fact of such appeal not having been made a record in this case, it could not be considered either in the trial court, or by us upon the present appeal.

[2] While it is true that courts take judicial notice of their own records, this does not apply to records made in other cases in the same court. In *Sewell v. Price*, 164 Cal. 265, 128 P. 407, 410, the ruling is as follows: After stating that courts will take judicial notice of their own records, it is said: "But the rule is limited to proceedings in the same case. It is well settled that courts cannot in one case take judicial notice of their records in another and different case. 16 Cyc. 918; *People v. De La Guerra*, 24 Cal. 73; *Lake Merced Water Co. v. Cowles*, 31 Cal. 214, 215; *Ralphs v. Hensler*, 97 Cal. 296, 32 P. 243."

[3] The bill of exceptions in this case, which was settled by stipulation of counsel, does not specifically set forth that it includes all of the testimony, which enforces the rule that where the bill of exceptions shows nothing to the contrary and does not specifically show that no other testimony was introduced, it will be presumed that there was sufficient testimony introduced to support the order of the court.

[4, 5] As we have said, the court found that Louisa J. Fulton was the widow of the deceased, and that she was entitled to an allowance. Therefore, it must be presumed that testimony to support the findings of both of such facts was introduced. The appellant bases his argument on specification No. 1 which we have set forth herein. There is nothing in the record to support such an argument. In support of his argument our attention is called to the case of the Estate of Miller, 158 Cal. 420, 111 P. 255, 257, where it was sought to introduce oral testimony to the effect that the widow was not a member of the family of the deceased at the time of his death. Such testimony was held inadmissible by the trial court. Upon appeal the Supreme Court said: "It follows, therefore, that the evidence sought to be introduced by appellant, tending to determine the status of the widow as a member of the deceased's family, was improperly rejected, and for this reason the decree appealed from is reversed and the petition for distribution to the widow remanded for a new hearing, in accordance with the views herein expressed." That such testimony, if it existed, should have been introduced in this case is supported by the holding of the court in the Miller Case. The fact that an interlocutory decree of divorce was entered on June 7, 1932, does not show that the petitioner was not a member of the family of the deceased on the 21st day of December, 1933, if such showing were necessary.

[6] The second ground for reversal urged by the appellant is based upon the language of the decree which we have quoted, awarding certain property to William Forest Fulton. The decree itself does not purport to dispose of all of the property which might have been the community property of William Forest Fulton and Louisa J. Fulton, but if it be assumed that no other property was owned by William Forest Fulton, the decree does not in terms deprive Louisa J. Fulton of her marital rights as against the estate of William Forest Fulton, deceased. The language in the instant case is no different in substance and effect from that found in the interlocutory decree mentioned in the Estate of Gould, 181 Cal. 11, 183 P. 146, to wit: "All other property of said community, real, personal, or mixed, and of every description, is hereby assigned and

allotted to the plaintiff, Frank H. Gould, free and clear of all claim of the defendant." The words "free and clear of all claim of the defendant," just quoted, are no less comprehensive than the words "free from any claim of any nature whatsoever of Louisa Fulton."

Notwithstanding this language which we have quoted from the interlocutory decree mentioned in the Estate of Gould, a family allowance was awarded to her on the theory that the language did not include the rights of a wife to a family allowance. The following quotation from the Estate of Gould we think conclusive as to appellant's second and third grounds of contest, to wit: "When a person dies leaving a widow, under section 1464 of the Code of Civil Procedure, such widow is entitled to a reasonable provision for her support to be allowed by the superior court or a judge thereof. This provision is not conditioned upon her having lived in a family relation with her husband at the time of his death. It follows, therefore, that the right of Nettie Gould to a family allowance must be determined independently of the circumstance that she had not lived with Frank H. Gould for some years prior to his decease. *Farris v. Battle*, 80 Ga. 187, 7 S. E. 262, 263; approved in *Smith v. Smith*, 112 Ga. 351, 37 S. E. 407; *King v. Executor of King*, 64 Mo. App. 301. At the time of the death of the decedent, Nettie Gould was his wife. She is now entitled to such rights as the law confers upon her, under the circumstances, as his widow, including the right to a family allowance, unless the property of the community awarded to the decedent was allotted to him free and clear of all claim by her, including the claim to a family allowance. *Estate of Dargie*, 162 Cal. 51, 53, 121 P. 320."

[7] That an interlocutory decree of divorce does not dissolve the marriage relation, we need only quote the following from 9 California Jurisprudence, page 757: "The entry of an interlocutory decree does not dissolve the marriage relation, and the parties thereto remain in the legal relation of husband and wife until the marriage has been dissolved by the final judgment."

In the Estate of Ehler, 115 Cal. App. 403, 1 P.(2d) 546, 547, the court, considering questions similar to ones here presented, quoted with approval the following language: "Even if it were to be conceded, which it is not, that the appellant

herein had established upon such hearing by practically undisputed evidence that the family status of the parties had been destroyed, it would not follow that the husband of the decedent must for that reason have been denied the rights he sought to assert under section 1465 of the Code of Civil Procedure. On the contrary, this court has held in *Estate of Gould*, 181 Cal. 11, 183 P. 146, and also in *Estate of Parkinson*, 193 Cal. 354, 224 P. 453, that the rights of the surviving spouse created under the provisions of sections 1464, 1465 and 1466 of the Code of Civil Procedure were not conditioned upon the existence of the family status at the date of the decedent's death." This quotation is taken from the Estate of Henningsen, 199 Cal. 103, 247 P. 1082.

In support of the law which we have herein set forth we may cite further the cases of *Estate of Hale*, 117 Cal. App. 545, 4 P.(2d) 263; *Leavitt v. Leavitt*, 134 Cal. App. 145, 24 P.(2d) 910. Other cases might be cited, but these we deem sufficient.

Under section 680 of the Probate Code, the widow is specifically mentioned as being entitled to a reasonable allowance during the settlement of the estate.

The order is affirmed.

I concur: PULLEN, P. J.



8 Cal.App.2d 420
**BROWN v. SUPERIOR COURT IN AND
 FOR HUMBOLDT COUNTY et al.**
 Civ. 5408.

District Court of Appeal, Third District,
 California.
 July 22, 1935.

Prohibition ☞5(3)

Petitioner held not entitled to writ of prohibition to stay further proceedings in replevin on ground that undertaking had not been filed under statute, where plaintiff is a foreign corporation, where sufficient undertaking had been filed under statute dealing with claim and delivery of personalty, and where, although petitioner was sued under fictitious name, he had been duly served with summons and complaint and was fully pro-

ted by terms of undertaking (Code Civ. Proc. § 512, as amended by St. 1933, p. 1856, § 58, and § 1030, as renumbered and amended by St. 1933, p. 1900, § 189).

Petition for writ of prohibition by Barry Brown against the Superior Court of the State of California in and for the County of Humboldt and Harry W. Falk as judge thereof.

Writ discharged.

Frank Thompson, of Eureka, for petitioner.

Blaine McGowan, of Eureka, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is a proceeding to prohibit respondents from prosecuting an action for replevin until an undertaking as required by section 1030 of the Code of Civil Procedure has been filed.

From the petition for the writ of prohibition it appears that an action was commenced in the superior court of the state of California, in and for the county of Humboldt, entitled "McMillan Process Company, a Corporation, Plaintiff, v. C. H. Brown, John Doe and John Doe Co., Defendants." In the complaint plaintiff sought to recover from defendants two wood deburring machines, of which defendants had obtained possession by virtue of a conditional sales agreement, and alleged that defendants having failed to make the payments provided in the agreement, demanded the return of the machines or their value. Petitioner, sued as John Doe, was served with complaint and appeared in the action and demanded that an undertaking as provided in section 1030 of the Code of Civil Procedure be posted by plaintiff, a Nevada corporation, as security for all costs and charges which might be awarded against plaintiff. It appeared, however, that plaintiff, some time after the filing of its complaint, but prior to the demand for the security for costs, had caused to be levied a writ of replevin and had filed an undertaking in the sum of \$3,000 conditioned "for the return of said property to the defendants if return thereof be adjudged and for the payment to defendants of such sum as may from any cause be recovered against plaintiff." No question

is raised as to the sufficiency of said undertaking as a replevin bond, the only question presented being whether an undertaking given pursuant to section 512 of the Code of Civil Procedure (as amended by St. 1933, p. 1856, § 58) fulfilled the requirements of the undertaking as provided for in section 1030 of the Code of Civil Procedure (as renumbered and amended by St. 1933, p. 1900, § 189). Section 512 of the Code of Civil Procedure, dealing with claim and delivery of personal property, reads in part as follows: "Upon a receipt of the affidavit and notice, with a written undertaking, executed by two or more sufficient sureties, approved by the sheriff, * * * to the effect that they are bound to the defendant in double the value of the property as stated in the affidavit for the prosecution of the action, for the return of the property to the defendants, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff, such officer must forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. * * *"

Section 1030 of the Code of Civil Procedure provides: "When the plaintiff in an action or special proceeding resides out of the State, or is a foreign corporation, security for the costs and charges, which may be awarded against such plaintiff, may be required by the defendant. When required, all proceedings in the action or special proceeding must be stayed until an undertaking, executed by two or more persons, is filed with the clerk, or with the justice if there be no clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action or special proceeding, not exceeding the sum of three hundred dollars. * * *"

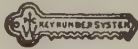
From a comparison of the two sections it is apparent defendant is as fully protected under the undertaking given under section 512 of the Code of Civil Procedure as he would be under an undertaking given pursuant to section 1030 of the Code of Civil Procedure.

In a somewhat similar situation in *Comstock v. Clemens*, 19 Cal. 77, 78, the defendant demanded security for costs, but the court held an undertaking on appeal was a sufficient bond to protect a defendant in an action brought by a nonresident.

Petitioner points out that he has been sued under a fictitious name, but it appears he has been duly served with a copy of the summons and complaint and therefore is as fully protected by the terms of the undertaking as if personally named in the action. It does not appear either in the petition or answer thereto whether petitioner has been served with a copy of the undertaking as required by section 512 of the Code of Civil Procedure, but if not, petitioner has his remedy therefor. It appearing, therefore, that now and prior to the filing of the demand for security for costs there was on file a sufficient undertaking to protect petitioner for the repayment to him of such sums as he may from any cause recover against plaintiff, he is fully protected as contemplated by section 1030 of the Code of Civil Procedure.

The writ of prohibition is therefore discharged.

I concur: PLUMMER, J.



8 Cal.App.2d 368

**NORTON et al. v. MUNICIPAL COURT OF
LOS ANGELES et al.**
Civ. 10485.

District Court of Appeal, Second District,
Division 1, California.
July 11, 1935.

1. Courts ☞207(1)

Petitioner *held* not entitled to writ of supersedeas from appellate court directed to proceedings in action not pending on appeal to appellate court, since court had no jurisdiction to grant writ except in aid of its appellate jurisdiction.

2. Courts ☞207(1)

Where petition to appellate court for writ of supersedeas was in relation to proceeding wherein self-executing judgment had been appealed to appellate court, petitioner *held* not entitled to writ, since there was no process to restrain.

Petition for writ of supersedeas by Hattie F. Norton and another against the Municip-

pal Court, City of Los Angeles, County of Los Angeles, State of California.

Petition denied.

Aaron F. Norton and Hattie F. Norton,
in pro. per.

PER CURIAM.

[1] This petition (see par. XXXVI) asks for a writ of supersedeas directed to proceedings in an action not pending on any appeal to this court. An appellate court has no jurisdiction to grant a writ of supersedeas except in aid of its appellate jurisdiction. *Rosenfeld v. Miller*, 216 Cal. 560, 15 P.(2d) 161.

[2] In so far as the prayer of the petition asks for supersedeas in relation to the proceeding in the superior court entitled *Norton v. Municipal Court*, wherein that court has denied the petitioners' application for a writ of prohibition, and in which (par. XXXIX herein) it appears that petitioners have appealed to this court, the petition is also without merit. The judgment or order appealed from is self-executing, and no process is required to be issued for its enforcement. In such case no supersedeas is allowed. *Hulse v. Davis*, 200 Cal. 316, 253 P. 136.

The petition is denied.



8 Cal.App.2d 451

**GRAHAM et al. v. WOOD et al. (Street,
Intervener).**
Civ. 9233.

District Court of Appeal, First District,
Division 1, California.
July 23, 1935.

Hearing Denied by Supreme Court
Sept. 19, 1935.

1. Landlord and tenant ☞80(1)

Where receipts given by lessors to sublessees recited that sums mentioned therein were paid as special inducements to lessors to enter into subleases, but failed to state terms or conditions of subleases, receipts standing alone were without effect, and meaning thereof would be construed in connection with provisions of subleases, and testimony of parties thereto as to circumstances under which receipts were executed.

2. Landlord and tenant ⇨80(4)

Where copartners after leasing hotel sublet various concessions therein on percentage basis with minimum rentals and cash payment of \$2,600 and master lease was terminated shortly thereafter without sublessees' fault, sublessees held entitled to recover from lessors individually and as copartners amount so paid, where sublessees made cash payment as security for faithful performance of subleases and cash payment was to be applied as rent for concluding periods of subleases, as against contention that payment was made to one of lessors as bonus for execution of subleases.

3. Trusts ⇨358(1)

Where one partner, after copartnership had leased hotel and sublet various concessions therein for which sublessees paid advance rent to such partner, formed holding company to which copartnership transferred master lease which was revoked shortly thereafter without sublessees' fault, and partner deposited in own name as trustee rent advanced by sublessees to await outcome of action by sublessees to recover such fund, sublessees and not trustee in bankruptcy of holding company held entitled to bank deposit where holding company was not identical with copartnership and deposit was not traceable to money paid by sublessees to partner.

4. Trusts ⇨358(1)

Right of pursuing trust fund fails when means of ascertainment of fund fails.

5. Landlord and tenant ⇨214

Action of lessors' successor in locking doors of hotel and serving notice on sublessees to surrender possession of their concessions therein held constructive eviction terminating subleases so as to entitle sublessees to recover payment of advance rent, notwithstanding sublessees shortly thereafter reopened concessions and continued operation thereof under new arrangement with receiver of successor.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Harold K. Graham and another against George W. Wood and Lewin A. Wood, individually and as copartners doing business under the firm name of Wood Bros., and another, wherein E. C. Street, as trustee in bankruptcy of the Wood Bros. Holding Company, intervened. From a judgment for plaintiffs, named defendants and the trustee separately appeal.

Affirmed.

Boyd Oliver, of San Francisco, for appellants.

Silverstein & Silverstein, of Oakland, for intervener and appellant.

Raymond Salisbury, of Oakland, for respondents.

PER CURIAM.

The plaintiffs Graham and Sampson, in behalf of themselves and as assignees of other claimants, namely, Sam Miller, George L. Courtney, and Charles A. Sutter, brought this action against the defendants George W. Wood and Lewin A. Wood, individually and as copartners doing business under the firm name of Wood Bros., to recover certain sums of money aggregating \$2,600 theretofore paid by said claimants to George W. Wood in connection with the execution of four subleases granting to claimants, as sublessees, the privilege of conducting certain concessions in Hotel Oakland, for the number of years stated in said subleases. The action is based upon the claim that shortly after the subleases became operative they were terminated by the acts of the lessors and their successors in interest, without fault on the part of the sublessees. Following the alleged termination thereof, the sublessees demanded repayment of said sums of money, and the defendant George W. Wood, who negotiated the subleases and executed the same on behalf of the lessors, as an evidence of good faith and in conformity with an agreement made by him with the sublessees, deposited \$2,600 in a bank in his name as trustee to await the termination of the action the sublessees contemplated bringing to recover said sums of money; and within a few days thereafter, to wit, on February 2, 1932, the complaint in the present action was filed and the money so deposited was attached. Issue being joined, the action was set for trial; and four days prior to the date of trial E. C. Street, as trustee in bankruptcy of Wood Bros. Holding Company, a corporation, claiming that the money so deposited by Wood constituted a trust fund which belonged to the bankrupt's estate, filed a complaint in intervention to recover the deposit. Plaintiffs answered the intervener's complaint, denying that the deposit constituted a trust fund or that the intervener was entitled to any part thereof; and in order to avoid delay in the trial of the action it was stipulated that the allegations of said complaint were deemed denied by the defendants Wood Bros., individually and as copartners. The trial court found that the sublessees were entitled to the return of the

sums of money so paid by them to Wood; and as to the issues raised by the intervenor's complaint, found that the money deposited in the bank by Wood did not constitute a trust fund, and that the intervenor was entitled to no part thereof. Judgment was entered accordingly, that plaintiffs do have and recover of and from the defendants, individually and as copartners, the sum of \$2,600, and "that intervenor take nothing herein." From said judgment, the defendants and the intervenor have taken separate appeals. The bank was made a party defendant also, but admittedly it has no interest in the matter, nor is it mentioned in the judgment.

The master lease was held originally by Wood Bros., as copartners. It was executed August 11, 1931, at which time the premises were encumbered by mortgage bonds, naming the Crocker First Federal Trust Company as trustee. The lease called for a twenty-five-year term, on a percentage basis rental, and permitted the lessees to incorporate and transfer the lease to the corporation. On August 18, 1931, such a corporation was organized pursuant to the laws of Nevada, under the name Wood Bros. Holding Company, and on the same day the copartners transferred the lease to the corporation. Lewin A. Wood, however, one of the partners, was not one of the incorporators of the holding company, nor did he hold any of its stock. The incorporators thereof were the defendant George W. Wood, D. E. Wood (another brother), and S. A. Wood (wife of George W. Wood), and they constituted the directorate and became the officers of the holding company, George W. Wood being elected president and general manager. The consideration for the transfer of the lease was the issuance by the holding company of 10,000 shares of common stock (the entire authorized issue) and 1,000 shares of preferred stock (one-fourth of the entire authorized issue), which was divided among the three persons above named. In payment for his interest in the lease Lewin A. Wood received from S. A. Wood stock in another corporation (Wood Leasing Co. v. San Diego) and, in addition, was employed by the holding company as manager of the hotel at a monthly salary of \$300 and given suitable living apartments therein. Plaintiffs' sublease was executed prior to the incorporation of the holding company, and the others subsequent thereto; and all of the sublessees commenced operations thereunder immediately following the execution of their subleases, which

were drawn on a percentage basis with a minimum rental, and ran from one to five years.

Early in 1932 difficulties arose between George W. Wood and the bondholders' committee, and in January, 1932, the committee's representative informed him, so he testified, that the lease under which the holding company purported to operate the hotel was canceled. Thereupon, and on January 12, 1932, the board of directors of the holding company adopted a resolution to the effect that by reason of such cancellation the holding company was operating the property without a lease, and that effort be made to negotiate a new lease, or, upon failure of the owners to grant the same, that the hotel be closed; and on January 15, 1932, a second resolution was adopted directing that the hotel be closed. Accordingly at midnight on January 18, 1932, the hotel was closed by locking the doors thereof; and they remained locked until 11 o'clock that morning, January 19, 1932, at which time the hotel was reopened by Henry Barker, who took possession as receiver, under appointment by the superior court, in an action brought on behalf of the bondholders by the Crocker First Federal Trust Company, as trustee. On January 21, 1932, Barker served written demands on each of the sublessees "to surrender possession of that certain portion of the premises and appurtenances of the Hotel Oakland now used and/or occupied by you," but soon afterwards entered into new agreements with the concessionaires whereby they resumed the operation of their concessions under a new agreement to pay to him a monthly rental. On February 18, 1932, the holding company was declared an involuntary bankrupt, and Street was appointed as trustee; but prior to such adjudication and appointment, to wit, on February 2, 1932, the present action was filed.

[1] The two appeals present different questions. The main ground urged by the appellants Wood Bros. for reversal of the money judgment entered against them is that the sums of money sued for by plaintiffs were paid to George W. Wood as bonuses for the execution of the subleases, and not as advance rent or security for the faithful performance of the subleases, and that therefore the same were not subject to repayment even though the subleases were terminated prematurely by the acts of the lessors or their successors for reasons of their own and not because of any breach on the part of the sublessees. The cases relied on by appellants in support of the above

contention are *Ramish v. Workman*, 33 Cal. App. 19, 164 P. 26; *Curtis v. Arnold*, 43 Cal. App. 97, 184 P. 510; *Anderson v. Julius Levin Co.*, 71 Cal. App. 73, 234 P. 442; *McArthur v. Kluck*, 75 Cal. App. 785, 243 P. 453; and especially *Wood v. Hipwell*, 107 Cal. App. 680, 290 P. 1040. The trial court made no specific finding as to the nature of said advance payments, other than to find on apparently conflicting evidence that said sums were paid "for the use and benefit of" the sublessees; and such finding, when considered in the light of the evidence upon which it is based, implies that said payments were made, not in the nature of bonuses, but as security for the faithful performance of the subleases to be applied as rent for the concluding periods of the subleases; and it would seem that the evidence as a whole supports such conclusion. It is true, as pointed out by said appellants, each document given by Wood in acknowledgment of the receipt of the advance payment (all of which documents were identical in form except as to dates, names, and amounts) recited that the sums mentioned therein were paid "as a special inducement to the Wood Brothers to enter into" the sublease. But no suggestion whatever was made therein of any terms or conditions of the proposed subleases and consequently standing alone said documents amount to nothing more than nude pacts, the meaning of which must be construed in connection with the provisions of the subleases themselves, which were executed simultaneously therewith, and the testimony given by the parties as to the circumstances under which such documents were executed. In this regard the testimony shows that in negotiating the subleases Wood told each of the sublessees in substance that he would require a substantial down payment as a deposit "to protect the lease"—so that the lessee, "would not walk out the next day," and that the amount of such deposit would be credited as rent for the concluding months of the subleases; and although when drafted the subleases failed so to provide, or to mention any advance payment, each of them (except the Courtney sublease) did provide for only nominal rental for the concluding months, to the extent of covering the full amount of the advance payment; and the Courtney sublease, which granted the dancing concession and called for the payment of a minimum nightly rental of \$50, provided for a payment to him by the lessors of \$1,000 (which was the amount of the advance payment made by him) "as a premium

or gift" at the expiration of the sublease, in the event he faithfully performed the conditions of the sublease.

[2] Irrespective, however, of the question of the sufficiency of the evidence to sustain said finding, and even assuming, as appellants contend, that the wording of said documents evidencing the down payments are controlling and it be held that the advance payments were made as bonuses, the rule declared and adhered to by the cases relied on by appellants has no application to the facts of the present case for the simple reason that in each of these cases the lease was terminated by reason of the default of the lessee; whereas here the subleases were prematurely terminated by the acts of the lessors and their successors, without fault of any kind on the part of the sublessees. That being so, there was a failure of consideration, which, as held by the trial court, entitled the sublessees to the return of the advance payments made by them, the same as if it had been paid as rent in advance or as security for the faithful performance of the subleases. The remaining points urged by these appellants are without merit for the reason that they are incidental to the main one above discussed.

As above mentioned, the intervener's appeal presents an issue foreign to the one involved in the appeal taken by the defendants Wood Bros. In this respect he states in his brief that he "has no interest as to any judgment in favor of the plaintiffs and against the defendants and is not concerned as to whether the plaintiffs execute upon any judgment as against the defendants, except that such judgment should not be executed as against this particular fund upon the theory that this fund is the property of the defendants and therefore subject to such execution. The issue to be considered, therefore," so far as his appeal is concerned, so he states, "is whether, as between the defendants and the intervener, the fund in the possession of the defendant bank is the property of the defendants or the defendant George W. Wood, or whether it is the property of the bankrupt corporation, to which the intervener is entitled as trustee in bankruptcy." And in furtherance of his asserted claim to said bank deposit he contends that the holding company is the alter ego of the copartnership; that the money so paid by the sublessees to George W. Wood was received by the latter as the agent of and in trust for the holding company and of which the holding company became the cestui que trust; that although afterwards said

moneys were mingled with personal funds belonging to George W. Wood and with those of his brother Lewin A. Wood, said moneys are nevertheless traceable to the \$2,600 deposited in the bank by George W. Wood; and that therefore said deposit is the property of the estate of the bankrupt holding company.

[3, 4] In holding adversely to the above contention the trial court specifically found that the holding company was not the alter ego of the copartnership and that the money so deposited in the bank by George W. Wood did not constitute a trust fund, and therefore did not belong to the bankrupt's estate; and there is ample evidence to sustain these findings. As to the first, it shows without dispute that Lewin A. Wood, one of the two members of said copartnership, was not one of the incorporators of the holding company, nor interested financially or otherwise therein; and as to the second finding, the evidence shows that immediately after the advance moneys were paid to George W. Wood by the sublessees some of it was divided between the two copartners and that the remainder thereof was retained by George W. Wood as his own personal funds pursuant to resolutions passed by the directors of the holding company; that the same was mingled by them with their other funds; and that the money used by George W. Wood to make the deposit in the bank was obtained by him from other sources. Therefore, since the bank deposit is not traceable to the money paid in advance to George W. Wood by said sublessees, its identity as a trust fund failed. In other words, the right of pursuing a trust fund fails when the means of ascertainment fails. In re Estate of Arms, 186 Cal. 554, 561, 199 P. 1053; Lathrop v. Bampton, 31 Cal. 17, 22, 89 Am. Dec. 141.

[5] Further contention is made by the intervener that the subleases were not terminated by the acts of the holding company in locking the doors of the hotel and the service upon the sublessees by the receiver of the notices to surrender possession, because soon thereafter they reopened their concessions and operated under the new arrangement with the receiver. Even though the intervener be concerned with the determination of this question, there is no merit in his contention, because clearly the acts above mentioned amounted to a constructive eviction which terminated the subleases. Blessing v. Fetters, 40 Cal. App. 471, 181 P.

108; Black v. Knight, 176 Cal. 722, 169 P. 382, L. R. A. 1918C, 319.

In view of the conclusion reached on the main issue raised by the intervener's appeal, the remaining points urged by him become immaterial.

The judgment is affirmed.



8 Cal.App.2d 520

SHAW et al. v. ROBERTSON et al.

Civ. 1171.

District Court of Appeal, Fourth District,
California.

July 26, 1935.

Hearing Denied by Supreme Court
Sept. 23, 1935.

1. Automobiles ⇨245(72)

Where pedestrian looks without seeing approaching automobile, or where he sees it but misjudges its speed or distance, or for some other reason assumes that he can avoid injury to himself, pedestrian's contributory negligence is usually for jury.

2. Automobiles ⇨245(72)

Where pedestrian, after seeing approaching automobile as she started to cross street between intersections, continued on her course until she was struck by such automobile, whether pedestrian was contributorily negligent in failing to yield right of way to motorist as required by statute held for jury (St. 1931, p. 2127, § 131½(c)).

3. Automobiles ⇨227(3)

Where pedestrian, after seeing approaching automobile as she started across street between intersections, continued on her course until she was struck by such automobile, failure to permit recovery under doctrine of last clear chance held not error where it did not appear that motorist had opportunity to avoid accident after realizing pedestrian's predicament (St. 1931, p. 2127, § 131½(c)).

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by J. H. Shaw and another against J. W. Robertson and another. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Hillyer & Boldman, of San Diego, for appellants.

Wright, Monroe, Thomas & Glenn, of San Diego, for respondents.

BARNARD, Presiding Justice.

The plaintiff Pansy M. Shaw was struck by an automobile driven by the defendant Mrs. J. W. Robertson, and this action for damages followed. The accident occurred on Boundary street near its intersection with El Cajon avenue, in the city of San Diego. El Cajon avenue runs east and west and Boundary street runs approximately north and south. Mrs. Shaw left the curb on the east side of Boundary at a point about 42 feet south of the south curb line of El Cajon avenue and walked across the street toward the front end of her husband's car, which was parked on the west side of that street about 50 feet south of the south curb line of El Cajon avenue. About the same time Mrs. Robertson, who had been driving west on El Cajon avenue and who had stopped at the beginning of the intersection, made a left turn and proceeded south on her right-hand side of Boundary. When Mrs. Shaw had arrived within a step or two of the front of her husband's car she was struck by the right front fender of the other automobile. The court found that Mrs. Robertson was negligent, but also found that Mrs. Shaw was guilty of contributory negligence which proximately contributed to the accident and entered a judgment for the defendants, from which the plaintiffs have appealed.

It is first contended that the evidence is not sufficient to support the court's finding to the effect that the injured appellant negligently and carelessly walked in front of the automobile, and that her negligence and carelessness contributed to the accident.

Mrs. Shaw testified that just as she started to walk across the street she looked toward El Cajon avenue and saw Mrs. Robertson's car just coming into Boundary street at about ten or twelve miles an hour. At another time she testified that she looked toward El Cajon avenue as she left the curb and saw the car turning at the button and that she looked again when she was half way across the street and saw that car just coming on to Boundary. She then testified that she did not have very far to go, and that "I figured I had a good deal of time to get to my husband's

car which was across the street. I was in the center of the street then and I kept on walking, then when I was almost to my husband's car I glanced out of the side of my eye and just as I started to look again the car struck me."

[1] Where a pedestrian looks but does not see an approaching automobile, or where he sees it but misjudges its speed or distance, or for some other reason assumes that he can avoid injury to himself, the question of his contributory negligence is usually one of fact and not of law. *White v. Davis*, 103 Cal. App. 531, 284 P. 1086. Section 131½, subd. (c), of the California Vehicle Act (St. 1923, p. 517, § 131½, subd. (c), as added by St. 1931, p. 2127), reads: "Every pedestrian crossing a roadway at any point other than within a marked or unmarked crosswalk shall yield the right of way to vehicles upon the roadway, provided that this provision shall not relieve the driver of a vehicle or the pedestrian from the duty to exercise due care."

[2] Mrs. Shaw was proceeding across a city street between intersections and at a place where, under the statute, the driver of an automobile had the right of way. While it is true that this statute did not give the driver of the automobile the right to proceed without regard to her safety, it is also true that a duty rested upon her to exercise reasonable care for her own safety. It cannot be held, as a matter of law, that this injured appellant was free from contributory negligence. The question was one of fact for the trial court which has resolved the question against her.

[3] It is further urged that the court erred in failing to apply the doctrine of the last clear chance. It nowhere appears that the court failed to consider this doctrine, and again we cannot say, as a matter of law, that the elements necessary to prevent a recovery under that doctrine were present, or that the driver of the respondent's car had an opportunity to avoid the accident after realizing that Mrs. Shaw was in a position of peril from which she was unable to extricate herself.

Mrs. Robertson testified that she was driving very slowly; that she saw Mrs. Shaw; that she slowed down and continued driving very slowly waiting for her to get across the street; that Mrs. Shaw passed a few feet in front of her car; that she swung her car to the left to go

around her; that as she was swinging her car to the left Mr. Shaw called "look out"; that thereupon Mrs. Shaw stepped back and her right front fender struck her; and that she stopped within two feet with Mrs. Shaw lying by her right front wheel. The appellants would take one part of the evidence only and would omit that portion which indicates that Mrs. Shaw would not have been hit had she not stepped back when her husband called out a warning. The court has impliedly found that the negligence of Mrs. Shaw continued up to the instant of the injury, and that her position of peril did not become apparent to the driver of the car in sufficient time to have avoided the injury. The evidence is sufficient to sustain these implied findings, and we cannot hold, as a matter of law, that a contrary situation prevailed.

The judgment is affirmed.

We concur: JENNINGS, J.; HARDEN, Justice pro tem.



8 Cal.App.2d 413

CUNHA v. CUNHA.

Civ. 9808.

District Court of Appeal, First District,
Division 2, California.

July 22, 1935.

Rehearing Denied Aug. 21, 1935.

Hearing Denied by Supreme Court
Sept. 19, 1935.

1. Divorce ☞253

As respects property rights in divorce action, whether husband was indebted to his mother for certain sum and whether he executed note in evidence thereof held for trial court.

2. Divorce ☞252

In settling property rights in divorce action, wife could not complain that husband's indebtedness to his mother was barred by limitation, since husband had right to waive defense of limitation.

3. Divorce ☞252

Division of community property to parties in divorce action held within trial court's discretion (Civ. Code, §§ 146-148).

4. Divorce ☞253

In divorce action wherein after interlocutory decree was entered plaintiff's motion for new trial was denied, court held without jurisdiction thereafter to entertain purported bill of review in which plaintiff claimed that interlocutory decree had been obtained by fraud.

5. Divorce ☞130

In action for divorce on ground of extreme cruelty, evidence held not insufficient to support findings that wife was entitled to divorce on any ground, where trial court found that parties could not be reconciled, and there was some evidence tending to show that husband had been guilty of extreme cruelty.

6. Divorce ☞288

In divorce action wherein wife was awarded one-half of community property, order allowing wife in addition attorney fees and costs on appeal held not erroneous, where there was no evidence that wife was possessed of separate property, or that she obtained possession of moneys and properties awarded under decree (Civ. Code, §§ 146-148).

7. Equity ☞39(1)

Equity will not adjudicate causes by piecemeal.

8. Divorce ☞253

In divorce action, trial court held without jurisdiction to impress upon community property lien in favor of creditors who were not made parties (Civ. Code, §§ 146-148).

9. Divorce ☞287

Judgment in divorce action would be reversed where trial court failed to make any finding as to assets in possession of husband at time of marriage, or as to quantity or value of crop of seed peas which were not harvestable at time of judgment (Civ. Code, §§ 146-148).

Appeal from Superior Court, San Mateo County; Franklin Swart, Judge.

Action by Mary Cunha against Manuel Enos Cunha, wherein defendant filed a cross-complaint. From an interlocutory decree, both parties appeal.

Reversed.

Carl W. Anderson, of Burlingame, and John D. Willard, of Redwood City, for plaintiff-appellant and respondent.

Norman S. Menifee, of Redwood City, for defendant-respondent and appellant.

STURTEVANT, Justice.

From an interlocutory decree in a divorce proceeding both parties have appealed. The

action was commenced by the wife. She filed a complaint alleging extreme cruelty. The husband answered and denied many of the allegations contained in the complaint and at the same time filed a cross-complaint. The plaintiff filed an answer to the cross-complaint, and on the issues so made the action went to trial. In the pleadings of both parties the property rights were put in issue.

[1,2] In ascertaining the property rights it transpired that the mother of the defendant claimed that the parties were indebted to her for \$1,500 loaned to them. The defendant admitted that he had received the loan, and he introduced in evidence a promissory note as evidence thereof. It was the theory of the defendant that the loan was made in 1924. He claimed that thereafter on September 1, 1927, a note was executed by him evidencing the loan. Further, he claimed that such note was renewed by another note dated January 2, 1932, and over the objection and exception of the plaintiff both notes were received in evidence showing the history of the transaction. The plaintiff makes two separate and different attacks. She claims that both notes were written on the same typewriter at one and the same time and that the evidence was simulated. That objection was addressed to the trial court, but the findings as made by the court we must assume it found the documents to be genuine and what they purported to be. The defendant and his mother both testified to the fact that the loan was made and that it had not been repaid. The most that can be said in behalf of the plaintiff's contention is that there was some conflict in the evidence, but of course that conflict was for the trier of the facts to determine. Again, it is asserted by the plaintiff that the loan, if made, had become barred by the statute of limitations. Conceding that the loan was barred by the statute of limitations when the last note was made, that fact did not operate to pay the debt. It rested with the husband to assert the defense against his mother or to waive the defense. The plaintiff cites us to no authority and we know of none which would authorize her to force her husband to take refuge behind a plea of the statute of limitations.

[3] It is next contended that the trial court did not make a division of the community property in accordance with the provisions of sections 146-148 of the Civil Code. In support of that contention the plaintiff claims she should have received more than one-half. As to what the divi-

sion should have been rested with the trial court and there is certainly nothing in the record showing that the trial court abused its discretion. In this same connection the plaintiff complains because the trial court did not make a provision allowing her maintenance in addition to awarding her one-half of the community property. However, she cites us to no part of the record that would show the trial court erred in not doing so.

[4] After the interlocutory decree was entered the plaintiff made a motion for a new trial. The motion was denied. Thereafter on December 29, 1933, she filed in the divorce proceeding a purported bill of review in which she claimed the interlocutory decree had been obtained by fraud. The trial court declined to consider the document on the ground that it had no jurisdiction. The ruling was clearly correct. The statute gives no authority for the practice which the plaintiff attempted to follow.

[5] The defendant claims that the evidence was not sufficient to support the findings that the plaintiff was entitled to a divorce on any ground. From expressions by the trial court during the trial it is quite clear that that court was much inclined to entertain the opinion expressed by the defendant. However, it is also clear the trial court was clearly of the opinion that the parties could not be reconciled. Furthermore, there was some evidence showing, or tending to show, that the defendant had been guilty of acts of extreme cruelty. Under these circumstances, we are not inclined to sustain the contention of the defendant.

[6] After the trial had been had the trial court made an order allowing the plaintiff \$150 for attorney fees and costs on appeal. The defendant earnestly objects to the order, claiming that as the trial court had awarded her one-half of the community property she should have paid her costs and counsel fees out of that share and the trial court therefore should not have allowed her an additional sum. The showing is incomplete. There was no evidence that the plaintiff was possessed of any separate property, nor that at the time the order was made, nor at this time, she has obtained possession of the moneys and properties awarded to her under the decree. There was therefore no error in the ruling.

The most serious questions are not discussed in the briefs, but require a reversal. In the plaintiff's complaint, alleging the assets of the parties, the plaintiff alleged that the community property consisted, among

other things, of "seed peas." The defendant denied the allegation. On the trial some evidence was introduced, but not enough to show the facts. The parties owned a 17-acre farm at Half Moon Bay on the coast of San Mateo county. They were engaged in raising seed peas. The complaint was filed January 20, 1933. At that time the plants would be very small. The case came on for trial on April 21, 1933. At that time the plants were not ready to be harvested and would not be for some time thereafter. However, there is evidence that the crop was a fairly good one and had a potential value of \$1,900, more or less. Instead of introducing evidence estimating the crop, estimating the cost of harvest, etc., and thus ascertaining the value of the growing crop, counsel entered into a stipulation that the returns from the commission house should be accounted for. Some returns were accounted for; however, there was no evidence that they were all accounted for. Furthermore, no finding was made either as to the quantity or the value of the crop of seed peas. The record contains enough to indicate that there has been a miscarriage of justice regarding that particular element.

[7-9] The record discloses clearly that at the time of the marriage the defendant was possessed of separate property in the sum of \$2,000 or thereabouts. After the parties married they were very frugal and worked very hard. At the time of the hearing they were possessed of an undivided one-fourth interest in a ranch in San Joaquin county, which interest was of the value of \$1,375. They also owned the Half Moon Bay property valued at \$1,700. There was cash on hand and accounts receivable, \$486.11. There were liabilities, including \$1,000 owing to the plaintiff's father and \$1,500 owing to the defendant's mother. There was owing to Gill Bros., \$327.60. It is needless to say that none of the creditors were parties to the action. Nevertheless, the court awarded to the plaintiff the one-fourth interest in the San Joaquin ranch and it awarded to the defendant the San Mateo ranch. Continuing, it imposed a lien as follows: "It is further ordered, adjudged and decreed and this court does hereby further order, adjudge and decree that the real property hereinabove mentioned (both ranches) and awarded respectively to the parties hereto, is, and all of it is, subject to a lien in the sum

of \$2,827.60 for the payment of the community indebtedness of the parties hereto and that said community indebtedness in the sum of \$2,827.60 is payable in equal proportions by the said parties hereto." It will be conceded at once that said purported lien was not binding on anybody excepting the parties to the litigation. As to them it was incomplete. The next day after the judgment was entered all of the creditors were at liberty to sue and attach the plaintiff or the defendant or both of them. Both parties concede that the action was in equity. *Gaston v. Gaston*, 114 Cal. 542, 46 P. 609, 55 Am. St. Rep. 86. Furthermore, it will be conceded that equity will not adjudicate causes by piecemeal. Neither party has cited to us an authority that is in point on the question. We think that by analogy *Rassaert v. Mensch*, 17 Cal. App. 637, 120 P. 1072, is helpful. In that case an accounting was held between those who had been partners. In 17 Cal. App. 637, on page 641, 120 P. 1072, 1074, speaking of the form of the decree, the court said: "The creditors are not bound by the decree in this action. The judgment would leave the partnership business unsettled and the liabilities unpaid. Before there can be a decree finally settling the partnership accounts the liabilities must be paid or adjusted to the satisfaction of the creditors. No dissolution of any kind affects the rights of third parties, who have had dealings with the partnership, without their consent. *Parsons on Partnership*, §§ 296, 297. When equity undertakes to adjust the differences between partners, it adjusts them all; the account and decree must include all these matters, and leave nothing open for future litigation or controversy." Although, as stated above, there was no conflict in the evidence regarding the possession by the defendant of assets aggregating approximately \$2,000 at the time he was married, the court made no express finding thereon. It follows that the purported lien was in excess of jurisdiction as to the creditors who were not parties to the action. It also follows that certain issues regarding property rights presented to the trial court for hearing and determination were not disposed of.

The judgment is reversed, and the plaintiff will have judgment for her costs.

We concur: NOURSE, P. J.; SPENCE, J.

8 Cal.App.2d 497

Ex parte SPAULDING.

Cr. 1855.

District Court of Appeal, First District,
Division 1, California.

July 25, 1935.

Hearing Denied by Supreme Court Aug.
22, 1935.**Habeas corpus** ⇨50

Habeas corpus was denied prisoner who contended that his sentence to imprisonment was excessive and therefore void, where the time for which the prisoner could lawfully be confined for the offense had not expired (Pen. Code, §§ 107, 1168).

Application for writ of habeas corpus brought by Ed Spaulding.

Application denied.

E. Spaulding, in pro. per.

PER CURIAM.

Application for a writ of habeas corpus. From the petition it appears that petitioner was charged by information filed in the superior court of San Bernardino county with having committed the offense declared by section 107 of the Penal Code, and with having suffered three prior convictions; that he entered a plea of guilty to said charge and admitted the prior convictions, whereupon and on October 6, 1931, he was sentenced to imprisonment for life in the state prison at Folsom, wherein he is now confined under commitment from said court pursuant to said judgment of sentence.

The petitioner contends, as grounds for issuance of the writ, that the sentence thus imposed is excessive and therefore void, and that he "has served the authorized term of imprisonment for the offense which would otherwise have been proper." As held in the cases of *In re Morck*, 180 Cal. 384, 181 P. 657, and *In re Rosencrantz*, 205 Cal. 534, 271 P. 902, it is the established practice in this state not to consider on habeas corpus any question of excess of sentence until the expiration of the time for which the prisoner may be lawfully confined. And in cases such as this, a maximum penalty of ten years is fixed by said section 107 for a violation of its provisions, which, after allowing for full credits given by section 1168 of said Code, would be reduced to six years and six months. Admittedly petitioner has not yet served that period of time,

and therefore, until he does, he is not entitled, under the rule of the case above cited, to raise the question of excessive penalty.

Upon the ground mentioned, the application is denied.



8 Cal.App.2d 277

CANFIELD v. SECURITY FIRST NAT.**BANK OF LOS ANGELES et al.**

Civ. 8970.

District Court of Appeal, First District,
Division 1, California.

July 3, 1935.

Hearing Denied by Supreme Court
Aug. 29, 1935.**1. Trusts** ⇨152

Spendthrift trust was not created to receive income from personalty and not rents and profits of realty, so as not to be within Code section making surplus of rents and profits of realty trust beyond sum necessary for beneficiary's support liable to claims of beneficiary's creditors, where trustee had full power to invest principal without qualification as to nature of property to be acquired and allegedly held securities and "property," word "property" being a generic term which includes anything subject to ownership, and included realty as well as personalty (Civ. Code, §§ 14, 654, 859, 867).

[Ed. Note.—For other definitions of "Property," see Words & Phrases.]

2. Constitutional law ⇨12**Statutes** ⇨226

Where state borrows and adopts constitutional or statutory provision from another state, which has received judicial construction in such state, it does so in view of such judicial construction and acquiesces in correctness.

3. Trusts ⇨152

Surplus income of spendthrift trust exceeding amount necessary for beneficiary's support held subject to claims of beneficiary's creditors, though trust was created to receive income from personalty alone or from part personalty and part realty, in view of Code section making surplus rents and profits of realty trust so liable, since same rule should apply to trust of personalty (Civ. Code, §§ 859, 867).

4. Trusts ⇨152

Income received by beneficiary of spendthrift trust of personalty exceeding amount necessary for his support was not immune

from claims of beneficiary's creditors because trust provided that whatever payments should be made to beneficiary above minimum annuity were subject to absolute discretion of trustee (Civ. Code, §§ 859, 867).

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Pearl S. Canfield against the Security First National Bank of Los Angeles and another. From a judgment of dismissal after an order sustaining demurrers to the complaint without leave to amend, plaintiff appeals.

Judgment vacated, and order reversed, with directions.

J. M. Danziger and Charles A. Buckley, both of Los Angeles (R. M. J. Armstrong, of San Francisco, of counsel), for appellant.

Lawler & Degnan, of Los Angeles, for respondent Security First Nat. Bank of Los Angeles.

Henry Brown, of Los Angeles, for respondent C. O. Canfield.

KNIGHT, Justice.

Plaintiff was granted a divorce from the defendant Charles O. Canfield, and a stipulated decree was entered in the action whereby the court awarded to plaintiff, and Canfield agreed to pay to her, among other sums, one-third of the net income received by him from a spendthrift trust created under the will of his father, until the full amount of \$20,000 was paid; also the sum of \$1,000 monthly for plaintiff's maintenance and support until Canfield's death or plaintiff's remarriage. Said stipulated decree further provided that upon Canfield's failure to make such payments, a receiver should be appointed to receive from the trustee the one-third of said income which otherwise would be paid to Canfield, and to apply the same in satisfaction of the payments called for by said decree. Canfield failed to make said payments as agreed by him and as directed by said decree, and thereupon plaintiff brought this action against him and the trustee, asking for the appointment of a receiver, and that the surplus income from said trust over and above the amount necessary for Canfield's maintenance and support, which otherwise the trustee would pay to Canfield, be paid to the receiver and applied by him as provided in said decree. In this connection the complaint alleged that un-

der the terms of said decree there was due plaintiff \$23,833.34, plus interest; that the trust fund "has securities and property" exceeding \$1,000,000 in value, which produces an annual income of more than \$60,000; and that although Canfield had been paid therefrom more than \$50,000 yearly, he failed and refused to pay plaintiff the sums she was entitled to under said stipulated decree. Demurrers to the complaint were interposed by Canfield and the trustee, and the same were sustained without leave to amend. Judgment of dismissal followed; and plaintiff has taken this appeal from said judgment.

The will, a copy of which was attached to the complaint and made part thereof, was executed on August 29, 1912, and the decree of distribution was entered March 30, 1914. The property disposed of by the will was valued at several million dollars. After providing numerous legacies to friends, servants, institutions, and collateral relations, and bequeathing \$1,000,000 each to his four daughters, the testator bequeathed "one million dollars (\$1,000,000.00) worth of securities or cash, less one hundred thousand dollars (\$100,000.00), in either cash or securities as above provided * * *, to the Security Trust and Savings Bank * * * for the benefit of my son Charles O. Canfield and his [two] children [by a former marriage], upon and for the trusts, intents and purposes, and with and subject to the powers and provisions hereinafter mentioned and declared of and concerning the part or share of my estate to the benefit of which my son Charles O. Canfield and his children are entitled by virtue of the provisions of this my will." The testator then proceeded by the fifteenth clause of his will to give his reasons for creating a spendthrift trust, and to define the duties and powers of the trustee. In this respect he declared that the past conduct and life of his son had been "one of waste, dissipation and extravagance; and that his present associations, conduct and mode of living indicate no existing purpose of reform on his part"; that he had squandered "in the neighborhood of more than one hundred thousand dollars (\$100,000.00) * * * through his incompetency in business matters and his dissipation"; and "that the probability of his reforming in the future * * * amounts to no more than a father's hope." Therefore, in establishing the spendthrift trust he directed that the trustee, during the lifetime of his

son, "collect, recover and receive the rents, issues, dividends, profits, and income of said share of my estate, investing and reinvesting the principal thereof, when necessary or advisable * * * in safe and secure investments, suitable for the investment of trust funds * * *" and after paying all taxes and lawful charges and expenses of the trust, (a) pay in monthly instalments \$1,200 per annum "only to and into the proper hands of my son Charles O. Canfield, and not by way of anticipation, nor to any assignees of my said son, nor to or upon any order which my said son shall give, whether such assignment or order be the voluntary contractual act of my son or be made pursuant to or by virtue of any legal process in attachment, execution, bankruptcy or otherwise"; (b) that in addition to the payment of said annual sum the trustee shall apply as said trustee deems advisable and through such agencies as it may select, whatever sums are necessary for the support, maintenance, and education of Orville and Laura Elaine Canfield, children of Charles O. Canfield, in a manner suitable to their station in life, during their respective lives. The will then provides: "(c) If, in the judgment of my said trustee * * * my said son shall hereafter prove himself worthy of being entrusted with the expenditure of a larger annual income or allowance than that above given him, my said trustee may, in such event, at any time, and in such proportions and at such time as to payments as it shall deem advisable in the discretion of its said officers, *increase the said allowance and pay over such increase to my said son up to the full limit of the net income of the said trust estate and any unexpended income which may have accumulated in the hands of the trustee, notwithstanding the provision above made as to payments out of the income for the maintenance and education of my said grandchildren, Orville and Laura Elaine.* (d) It is my purpose and will, by the foregoing provisions as to the application of the income of said trust estate, to commit to my said trustee absolute discretion as to, and full power of control over, the application of all of the net income of said trust estate beyond the said sum of twelve hundred dollars (\$1,200.00) per annum." (Italics ours.) The next paragraph of the will is composed of comprehensive provisions to the effect that the said Charles O. Canfield shall have no interest, estate, or ownership in the principal or income of said

trust, and that the same shall be immune from his debts, obligations, assignments, and from all court process, and that "the whole of the income" shall go to and be applied by said trustee solely for the benefit of said Charles O. Canfield and his said two children, free from any obligations of the said Charles O. Canfield. And finally, the will declares that upon and after the death of the said Charles O. Canfield, the trust shall continue for the benefit of said two children during their respective lives, and that upon the death of either or both said trust shall be dissolved and the principal thereof distributed in the manner and to the persons therein designated.

As pointed out in *Seymour v. McAvoy*, 121 Cal. 438, 53 P. 946, 41 L. R. A. 544, under the common-law rule followed by the courts of England and some of the American states, spendthrift trusts are held to be against conscience and sound public policy and therefore invalid as against the rights of the creditors of the beneficiary, upon the ground that a debtor should not be permitted to have the use and enjoyment of wealth to the exclusion of the rights of his creditors. *Brandon v. Robinson*, 18 Ves. 429. But in most states of the Union the right to create a spendthrift trust within certain limitations has been upheld by judicial decision or authorized by legislative enactment or both, upon the theory that a donor has the right to give his property to another upon any conditions he sees fit to impose, and that, inasmuch as such a gift takes nothing from the prior or subsequent creditors of the beneficiary to which they previously had the right to look for payment, they cannot complain that the donor has provided that the property or income shall go or be paid personally to the beneficiary and shall not be subject to the claims of creditors. *McColgan v. Walter Magee, Inc.*, 172 Cal. 182, 155 P. 995, Ann. Cas. 1917D, 1050. California is one of the majority states adhering to this latter doctrine. The validity of such trusts created prior to the adoption of the Codes in 1872 was sustained generally by judicial decision, *Cutter v. Hardy*, 48 Cal. 568; *Seymour v. McAvoy*, supra; and at the time of the adoption of the Codes, the Legislature, by the enactment of section 867 of the Civil Code, expressly authorized the creation of such trusts "for the receipt of the rents and profits of *real property*. * * *" (Italics ours.) But at the same time it also enacted section 859 of the same Code,

which the courts have held applies to trusts created under the authority of section 867 (*McColgan v. Walter Magee, Inc.*, *supra*; *Magner v. Crooks*, 139 Cal. 640, 73 P. 585); and by this section the strict rule granting absolute immunity to a beneficiary from the demands of his creditors was greatly modified and relaxed. Appellant herein bases her right to maintain this action primarily upon the provisions of that section. It reads as follows: "Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, is liable to the claims of the creditors of such person, in the same manner as personal property which cannot be reached by execution."

[1] Respondents contend, however, that it appears from the will in the present case that the trust here involved was created to receive the income from personal property and not the rents and profits of real property, and that consequently appellant's case does not fall within the purview of said Code section. We find no merit in this contention. As will be observed from the opening clause of said Code section, its application does not seem to depend entirely upon the character of the property constituting the trust fund at the time the trust was created or becomes operative, but rather upon the question of whether at the time of the creation thereof the donor intended or contemplated that some time in the future during the life of the trust the annuity to be paid pursuant thereto would consist in whole or in part of the rents and profits of real property. In the present case, it is true, the testator directed that upon his death "one million dollars worth of securities or cash" be set aside by his executors as the foundation of the trust; but by the succeeding provisions of his will he went on to vest full power in the trustee to invest and reinvest the principal of the trust, without qualification as to the nature of the property to be thus acquired, "in safe and secure investments, suitable for the investment of trust funds." It would appear, therefore, that at the time he gave such directions he contemplated the acquisition by the trustees of real as well as personal property as part of the trust fund. And turning to the complaint, we find it is alleged therein, in broad terms, that (at the time of the commencement of the action)

the trustee "has securities and *property*" valued in excess of \$1,000,000 (*italics ours*), which allegation, when read in connection with the above provisions of the will, was and is legally sufficient in our opinion to bring the case as appellant contends within the purview of the opening clause of said section 859, for the reason that the word "property" is a generic term which includes anything subject to ownership (*Los Angeles Pac. Co. v. Hubbard*, 17 Cal. App. 646, 121 P. 306, citing section 654, Civ. Code), and the provisions of section 14 of said Code expressly declare that the signification to be attached to the use thereof shall include, unless otherwise apparent from the context, "property real and personal."

[2-4] Appellant further contends that even assuming the trust herein was created to receive the income from personal property alone, or from part personal and part real property, she may nevertheless maintain the action under the doctrine established and followed by the courts of the state of New York. This contention is based largely upon the fact that at the time of the adoption of our Codes in 1872, our section 859 of the Civil Code was taken from a New York statute (1 N. Y. Rev. Stats. p. 729, § 57), enacted in 1829 (*Magner v. Crooks*, *supra*); and that prior to the time of so adopting said Code section the New York courts had held that the provisions of their statute applied to trusts of real and personal property alike (*Hallett v. Thompson* [1836] 5 Paige [N. Y.] 583; *Rider v. Mason*, 4 Sandf. Ch. [N. Y.] 351; *Sillick v. Mason* [1847] 2 Barb. Ch. [N. Y.] 79); and such doctrine has since been followed consistently in that state. *Williams v. Thorn* (1877) 70 N. Y. 270; *Cutting v. Cutting*, 86 N. Y. 522; *Wetmore v. Wetmore*, 149 N. Y. 520, 44 N. E. 169, 33 L. R. A. 708, 52 Am. St. Rep. 752; *Demuth v. Kemp* (1913) 159 App. Div. 422, 144 N. Y. S. 690, affirmed (1916) 216 N. Y. 757, 111 N. E. 1086; *Jenks v. Title Guarantee & Trust Co.* (1915) 170 App. Div. 830, 156 N. Y. S. 478. Up to the present time the question of whether the New York rule of construction should be followed in this state has not been expressly passed upon; but since the year 1854 the Supreme Court of this state has held by an unbroken line of decisions that when this state borrows and adopts a constitutional or statutory provision from another state, which has received judicial construction in that state, it does so in view of such judicial con-

struction and acquiesces in the correctness thereof. *People v. Coleman*, 4 Cal. 46, 60 Am. Dec. 581; *People v. Webb*, 38 Cal. 467; *Lux v. Haggin*, 69 Cal. 255, 4 P. 919, 10 P. 674. It would seem, therefore, that by adopting the New York statute, this state, impliedly at least, adopted also the rule of construction placed thereon by the New York courts; and this would seem to be especially true in this particular instance because the case of *Sillick v. Mason*, supra, was one of the cases cited by the Code commissioners in furtherance of the adoption of said section 859. *Baranov v. Scudder*, 177 Cal. 458, 465, 170 P. 1122.

But aside from the foregoing rule of statutory construction, we are convinced, after analyzing the New York cases above cited, that the reasoning thereof is sound and that the doctrine established thereby is just and equitable, and inasmuch as its adoption here is not a matter for legislative enactment, but one for judicial decision, it is our opinion that it should be followed in this state. In declaring such doctrine, the New York court, in *Hallett v. Thompson*, supra, said: "The provisions of the Revised Statutes on this subject, contained in the 57th and 63d sections of the article relative to uses and trusts, in the connection in which they are there found, are applicable to trusts to receive rents and profits of real estate, and to apply them to the use of the cestui que trust for life, or a shorter period. But courts of justice have always endeavored to preserve the analogy between estates or interests in land, or the income thereof, and similar interests in personal property. By analogy, therefore, to these rules as to the interest of a cestui que trust in the rents and profits of real estate, and the right of a judgment creditor to reach the surplus rents and profits of land beyond what is necessary for the support and maintenance of the debtor and his family, I feel myself bound to hold that a creditor's bill will reach a similar interest of the debtor in the surplus income of personal property held by another for his use and benefit. * * *

In reaffirming the same doctrine in *Williams v. Thorn*, supra, the court said: "This provision [section 57, 1 Rev. Stats. 729] is very plain, and there can be no question that the surplus income of the real estate, if there be any such surplus, is liable to be reached in some form by the creditors of the beneficiary. Most of the cases on the subject expressly hold this section equally applicable to a trust to receive and pay

over the income of personal property, and no point is made on this appeal based upon any distinction between the two sources of the income in question. The right of a creditor to maintain an action of this description in cases of trusts of personal, as well as real estate has been recognized since an early period after the adoption of the Revised Statutes. * * *

The right to maintain such an action as the present, was also sustained by *V. C. Sandford in Rider v. Mason* (4 Sandf. Ch. [N. Y.] 351), where § 57 of 1 R. S., 729, is applied indiscriminately to the income of real and personal property, and in *Sillick v. Mason* (2 Barb. Ch. [N. Y.] 79). * * *

And again, in *Cutting v. Cutting*, supra, in adhering to the same doctrine, the court said: "In support of this view, they say that the courts of justice have always endeavored to keep up an analogy between estates or interests in lands, and similar interests in personal property. Thus, the provision of the Revised Statutes, that where a trust is created to receive the rents and profits of lands, the surplus in a certain case is liable in equity to the claims of creditors (1 R. S. p. 729, § 57), is by analogy equally applicable to a trust to receive and pay over the income of personal property, though the statute is silent as to the latter. (See *Williams v. Thorn*, 70 N. Y. 270, and citations there made.) There is certainly much force in the position that one body of law should not declare a different rule for two kinds of property, when there is nothing in the nature of either kind of property, or in the nature and effect of the rule that calls for it. Clearly in the nature of things there is no reason why a gift or bequest of personal property, with a power of disposition, should not be measured by the same rule as a grant or devise of real estate with the same power. Nor is there cited or suggested any express provision of statute law, that stands in the way of the application of the rule of the Revised Statutes to both kinds of property." Moreover, it may be stated that the favorable view we have taken of the New York doctrine on this controversial question is in harmony with the conclusions reached by legal authors who have given much thought and study to the subject. As said by Professor Costigan in one of the notes to his treatise on spendthrift trusts (found in "Legal Essays," published by the University of California in tribute to Dean McMurray, page 110): "It is true, of course, that logically

California need not follow New York except in respect to trusts of real property * * * but naturally, like New York, it will treat alike spendthrift trusts of realty and spendthrift trusts of personal property." And as further pointed out by him, the decision of the Supreme Court of this state in *Re Estate of Edwards*, 217 Cal. 25, 17 P.(2d) 116, "seems to indicate a desire of the California courts to follow the New York rules as to spendthrift trusts."

The respondents argue that the New York doctrine is founded on another early statute of that state which provides that "limitations of future or contingent interests in personal property, are subject to the rules prescribed in relation to future estates in real property." N. Y. Personal Property Law (Consol. Laws, c. 41) § 11, 5 Birdseye Cons. Laws of N. Y. 1929. But a reading of the decisions in the cases above cited shows that they were placed on other and distinct grounds. And it appears that the case of *Clute & Mead v. Bool* (1840) 8 Paige (N. Y.) 83, which is one of the two cited by respondents in support of their contention, contains certain dictum which in some respects seems to put it out of line with the other decisions of the court. See *Williams v. Thorn*, supra.

Respondents contend also that the New York doctrine cannot be applied to a discretionary trust, such as we have here, which provides that whatever payments shall be made to Canfield over and above the annual sum of \$1,200 are subject to the absolute discretion of the trustee. Under the New York decisions, however, such factor does not deny to the creditor the right to maintain an action to collect a certain portion of whatever surplus the trustee might thereafter decide to award the beneficiary over and above the amount necessary for his maintenance (*Hamilton v. Drogo*, 241 N. Y. 401, 150 N. E. 496), which amount, in this state, is measured by the so-called "station-in-life" rule. *Magner v. Crooks*, supra. Obviously, therefore, if the trustee in the present case, in the exercise of its discretion, shall award to the beneficiary nothing more than he is entitled to under said rule, appellant will receive nothing. But in this respect it will be noted that the terms of the will indicate a belief on the part of the settlor of the trust that \$1,200 a year would be sufficient to take care of the necessities of the beneficiary; and the complaint alleges that he has been receiving \$50,000 a year from the

trustee. It would appear, therefore, that if he continues to be paid these large annuities, there will be ample surplus, over his necessitous demands, as alleged in the complaint, to apply to the payment of the amounts due under the decree to which he stipulated.

In concluding this branch of the discussion, it may be said that the adoption of the New York doctrine will in no way deny to a testator desiring to take care of a spendthrift the right to create a trust of personal property, or of real and personal property, to carry out such desire, for the reason that regardless of the character of property constituting the trust fund, under the rule of *Magner v. Crooks*, supra, the beneficiary is entitled to receive, within the limitations fixed by the trust, sufficient income to support himself and those dependent upon him, according to the mode of life to which they have been accustomed, the manner in which they have been reared, and to care for any affliction from which he or his family may be suffering. It will mean simply that the rights expressly granted by legislative enactment to the creditor of a beneficiary taking under a real property trust will be extended by judicial decision to creditors of a beneficiary taking under a personal property trust, or one created out of personal and real property; and no just reason can be assigned why such parity of rights should be denied; nor can any sound excuse be offered in support of a legal principle which would compel one beneficiary of a trust to apply a portion of the surplus of his income to the payments of his just debts, and under like conditions grant to another beneficiary absolute immunity from such payment, merely because the income of the former is derived from a trust of real property and the income of the latter is derived from a trust of personal property, or personal and real property. For the reasons stated, we are of the opinion that regardless of whether the trust herein was created to receive the income from real or personal property or both, plaintiff is entitled to maintain the action.

Appellant makes the further contention that even though the strict rule of immunity be upheld in cases of trusts of personal property as against the demands of creditors generally, the obligation of a beneficiary to pay for the support of his wife or children, or both, or a judgment rendered against him for such purpose, is not a debt as that term is understood and

applied in the law of spendthrift trusts; that the settlor of such a trust must necessarily contemplate in creating the same the taking care of, not only the beneficiary himself, but also those lawfully dependent upon him for support; and that consequently a wife and children are entitled to certain preferential rights against the annuities to be paid to the beneficiary, not available to general creditors. In support of such contention appellant cites a number of cases so holding, the leading one being *In re Estate of Mary H. Moorehead*, 289 Pa. 542, 137 A. 802, 52 A. L. R. 1251. In this connection it is to be noted that the interlocutory decree of divorce herein, embodying the stipulated alimony settlement, was entered in April, 1930; that the final decree was entered in April, 1931, and that the complaint herein was filed in September, 1931, and the judgment entered in January, 1932. And it may be reasonably inferred from these dates that at the time the stipulated decree was entered it was the belief of Canfield and appellant that the decree was enforceable under the rule of the *Moorehead Case* and the others adhering to the law therein declared. However, in March, 1932, the contention appellant here advanced under the authority of those cases was urged in the District Court of Appeal of the Fourth District in the case of *San Diego Trust & Sav. Bank v. Heustis*, 121 Cal. App. 675, 10 P.(2d) 158, wherein the entire income of the beneficiary was sought to be appropriated, and the court there refused to follow those cases and held the contention made under the authority thereof to be without merit. No application was made to the Supreme Court for a review of the decision, but its effect has been criticized by commentators in some of the law reviews (see 21 Cal. Law Review, pp. 23, 150). However, in view of the conclusion we have reached herein that appellant may maintain the present action as a general judgment creditor against the surplus of the beneficiary's income, it is unnecessary to analyze the decision in the *Heustis Case* or to inquire into the merits of the question there considered, more than to say that in the *Heustis Case* neither the questions of the construction of the provisions of section 859 nor the application of the New York doctrine to trusts of personal property were there urged, considered or passed upon. Consequently the decision in that case does not conflict in any manner with the

conclusions we have reached herein on those questions.

The remaining points urged in support of the trial court's ruling, including non-joinder of parties, are without merit. The judgment of dismissal is vacated, and the order sustaining the demurrers without leave to amend is reversed, with directions to overrule the same.

I concur: TYLER, P. J.

Justice CASHIN, deeming himself disqualified, does not participate in the opinion.



8 Cal.App.2d 369

GILL et al. v. JOHNSON, State Treasurer.
Civ. 1111.

District Court of Appeal, Fourth District,
California.

July 11, 1935.

Hearing Denied by Supreme Court
Sept. 5, 1935.

1. Trial ⌘159

Motion for nonsuit raises same questions as demurrer to evidence.

2. Records ⌘9(11)

Where action for value of land improperly registered by owner under Torrens Act was brought against state treasurer within four years but after expiration of period as against owner, action held not barred by 4-year statute of limitations, since statute limiting action against assurance fund refers only to action against state treasurer, and owner did not interpose defense of general statute of limitations (Gen. Laws 1931, Act 8589, §§ 34, 36, and § 105, subs. 2, 3; Code Civ. Proc. § 338).

3. Appeal and error ⌘854(4)

Notwithstanding trial court's decision granting motion for nonsuit turned upon erroneous holding, district court of appeal had duty to affirm judgment if it could be sustained upon any ground stated in motion.

4. Appeal and error ⌘1212(3)

Where question of landowner's negligence as respects recovery under Torrens Act was before court on former appeal and case was reversed solely for nonjoinder of party,

landowner's negligence was still open for trial court's decision.

Appeal from Superior Court, Imperial County; Vaughn N. Thompson, Judge.

Action by Thomas Edwin Gill and another against C. G. Johnson, as State Treasurer, and another. From a judgment for named defendant, plaintiffs appeal.

Reversed.

Barker & Keithly, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and L. G. Campbell, James S. Howie, and R. S. McLaughlin, Deputy Attys. Gen., for respondent.

HARDEN, Justice pro tem.

This is an action, as against the defendant C. G. Johnson, state treasurer, to recover from the Torrens title assurance fund the value of certain land, upon a claim that plaintiffs purchased it in reliance upon a certificate of title issued by the registrar of titles of Imperial county. The case has been before this court on two former appeals. The decisions will be found in 103 Cal. App. 234, 284 P. 510, and 125 Cal. App. 296, 13 P.(2d) 857, 860, 14 P.(2d) 1017. In the latter decision is a recitation of facts forming the basis of the action.

After the decision on the last appeal, the complaint was amended by making Austin a party. Upon regular proceedings, and for failure to appear, judgment was taken against Austin by default on December 9, 1932, for \$31,400. The action then proceeded to trial against the state treasurer. At the close of plaintiff's case a demurrer to the evidence was interposed and a motion for nonsuit made upon the grounds: (a) That the evidence showed that plaintiffs were negligent, and therefore not entitled to recover under the Torrens Act; and (b) that the action was barred by the statute of limitations. At the close of defendant's case the court granted said motions upon the ground, as stated in a written decision incorporated into a minute entry, that the statute of limitations operated to bar the action.

[1] The demurrer to the evidence is seldom interposed under our practice. A motion for nonsuit raises the same questions. *Ringgold v. Haven*, 1 Cal. 108, 113; *In re Daly's Estate*, 15 Cal. App. 329, 114 P. 787.

[2] Subdivision 3, § 105, of the Torrens Act (Act 8589, Deering's Gen. Laws 1931) provides in part that "Actions for compensation out of the assurance fund under the provisions of this act shall be commenced within four years from the time when the right of action accrued, or they shall be forever barred. * * *" It is admitted that the complaint was filed as against the state treasurer within said four-year period and as against defendant Austin after the expiration thereof.

The action as against Austin is not an action for compensation out of the assurance fund. Said provision of subdivision 3, § 105, has reference only to the action as against the state treasurer. It is therefore unnecessary to determine whether that statute is a true statute of limitations, or is that kind of statute which makes the institution of an action within a specified time a condition to the maintenance thereof. The Torrens Act does not create the right of action against Austin. In fact, it expressly provides that a complainant may sue for damages for tort independently of the provisions of that act. We think the statute of limitations applicable to the action as against Austin is section 338 of the Code of Civil Procedure. Austin had the right to waive the defense that the action against him was barred by the statute of limitations.

Respondent attempts to sustain the ruling upon the ground that defendant and the assurance fund occupy the position of surety toward Austin, and contends that a surety may successfully defend in a suit upon his contract of suretyship upon the ground that the cause of action has become barred by the statute of limitations, though the defense was not interposed by the principal. Such was the opinion of the trial court. Since the judgment was rendered, the law on the subject has been clarified by the decision of *Gaffigan v. Lawton*, 1 Cal.(2d) 722, 37 P. (2d) 79, wherein it was held that the obligation of a surety remained, notwithstanding the fact that the statute of limitations had run against the principal.

The action is not barred by the statute of limitations.

[3] Notwithstanding the decision of the trial court turned upon an erroneous holding that the action was barred by the statute of limitations, if the judgment can be sustained upon any ground stated in the motion it is our duty to affirm it.

This fact necessitates an examination of the decision of the federal court in the case of Gill et al. v. Frances Investment Co. (C. C. A.) 19 F.(2d) 880. In that action the Frances Investment Company sued to establish the validity of the trust deed which had been held to be invalid by the superior court of Imperial county. In said action Gill defended upon the ground that he was a bona fide purchaser for value. Both the district court and the circuit court of appeals held that he had notice of facts sufficient to put him on inquiry as to the existence of the trust deed and was therefore not a bona fide purchaser, and adjudged that said trust deed was valid. Said judgment gives rise to the defense interposed here that, by said holding that Gill was not a bona fide purchaser, the issue of his negligence in the present action, under the provisions of subdivision 2, § 105, Torrens Act, has been decided against him. It is practically conceded that said decision is not *res judicata*, the parties being different; but respondent stresses *stare decisis*. Other sections of said act are to be construed together with subdivision 2, § 105, for the purpose of ascertaining what will amount to fraud or negligence sufficient to warrant a denial of the right to resort to the assurance fund. By section 36 it is provided that "Except in case of fraud, and except as herein otherwise provided, no person taking a transfer of registered land, or any estate or interest therein, or of any charge upon the same, from the registered owner, shall be held to inquire into the circumstances under which, or the consideration for which, such owner or any previous registered owner was registered, or be affected with notice, actual or constructive, of any unregistered trust, lien, claim, demand or interest; and the knowledge that any unregistered trust, lien, claim, demand, or interest is in existence shall not of itself be imputed as fraud." Section 34 contains a provision to the effect that "The registered owner of any estate or interest in land brought under this act shall, except in case of fraud to which he is a party, or of the person through whom he claims without value [valuable] consideration paid in good faith, hold the same subject only to such estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the reg-

istrar's office, and free from all others, except:" (The exceptions are not applicable here.) While we do not question the holding of the federal court as between the parties and under the issues before it, the facts relied upon there to support the holding that Gill was not a bona fide purchaser do not suffice under our statute to justify our holding as a matter of law that he was guilty of negligence barring plaintiffs' right to prosecute this action to recover from the assurance fund. There is no claim that he was guilty of fraud.

[4] The last paragraph of this court's decision upon the last appeal was "The other points raised by appellant do not appear to us to be sustained. Owing to the decision reached, it is not necessary to consider them here in detail." Appellants contend that said quoted portion of the decision is a determination of the issue of Gill's negligence against respondent, whereas respondent asserts said language was *obiter dictum*. Said former appeal actually turned on a holding that Austin was a necessary party to the proceeding. We have already shown that the decision of the federal court is not effective to bar plaintiffs from pressing the instant case by reason of the holding of that court that Gill was not a bona fide purchaser. The only other aspect of the question presented on the former appeal to which said quoted language could apply was the sufficiency of the evidence to justify the holding of the trial court that plaintiffs did not have "knowledge of facts sufficient to require them to make any inquiry or investigation concerning the title other than such investigation as they made" (in effect that they were not negligent). A reversal of the judgment for nonjoinder of Austin as a party left the parties in the same position as they were prior to its rendition in the superior court. *Garthwaite v. Bank of Tulare*, 134 Cal. 237, 243, 66 P. 326; *In re Estate of Pusey*, 177 Cal. 367, 170 P. 846. The question of plaintiffs' negligence is still open for the decision of the trial court.

The judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.

8 Cal.App.2d 399

GURTZ et al. v. CITY OF SAN BRUNO et al.
Civ. 9818.District Court of Appeal, First District,
Division 2, California.

July 16, 1935.

Rehearing Denied Aug. 15, 1935.

Municipal corporations ⇨247

Quo warranto ⇨5

Where city council clearly had power to make contract granting exclusive franchise for garbage removal, that statutory provisions were not observed in making of grant was merely error in exercise of authority, and validity of contract could not be questioned by private persons, or in a collateral proceeding; exclusive remedy, if contract was void, being in quo warranto (Code Civ. Proc. § 803; St. 1905, p. 777, § 1).

Appeal from Superior Court, San Mateo County; Franklin Swart, Judge.

Action by William Gurtz, V. Sgarlato and P. J. Clark against the City of San Bruno and others. From a judgment in favor of plaintiffs, defendants appeal.

Reversed.

R. A. Rapsey, of San Bruno, and J. W. Coleberd and H. W. Call, both of South San Francisco, for appellants.

A. J. Scampini and J. A. Pardini, both of San Francisco (Walter E. Hettman, of San Francisco, of counsel), for respondents.

SPENCE, Justice.

Plaintiffs, as residents and taxpayers of the city of San Bruno, brought this action seeking to have declared null and void a certain contract granting to defendant Louis Tournahu an exclusive franchise for the removal of garbage in said city of San Bruno. The cause was tried by the court sitting without a jury and from a judgment in favor of plaintiffs, defendants appeal.

The city council of the city of San Bruno adopted "an ordinance defining garbage and rubbish and providing for the keeping, collection, removal and disposal thereof and for making contract granting exclusive franchise with relation thereto." Thereafter sealed proposals were invited for the awarding of an exclusive franchise. By resolution of the city council, defendant Louis Tournahu was awarded an exclusive five-year franchise in accordance with his bid or proposal theretofore submitted. Pursuant to said proceedings, the contract was

made with said defendant. Plaintiffs' attack upon said contract was based solely upon the failure of the city council to comply with the terms of the so-called Broughton Act (St. 1905, p. 777) in granting said franchise. Said act is entitled, "An act providing for the sale of street railroad and other franchises in counties and municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies, and repealing conflicting acts." It provides that "every franchise or privilege to erect or lay telegraph or telephone wires * * * or to exercise any other privilege whatever * * * shall be granted upon the conditions in this act provided, and not otherwise." Section 1.

Defendants admitted that the conditions of said act had not been complied with, but contended, first, that said act did not apply to the granting of the contract under attack, and, second, that if the act did apply, plaintiffs could not maintain their action as the exclusive remedy was in quo warranto. Code of Civ. Proc. § 803. The trial court found and concluded that the contract constituted a franchise or other privilege within the meaning of the Broughton Act; that said act had not been followed; and that plaintiffs were entitled to judgment declaring said contract null and void.

Defendants again raise the same contentions on this appeal, but we believe it is only necessary to consider the second contention above mentioned. We say this for the reason that the judgment in plaintiffs' favor can stand only in the event that it is determined, first, that the contract was null and void, and, second, that plaintiffs were entitled to maintain an action to have said contract declared null and void. We may assume, without deciding, that plaintiffs are correct in their claim that the contract constituted a franchise within the meaning of the Broughton Act and was null and void because of the failure to comply with the conditions set forth in said act. Plaintiffs cite *People v. Board of Supervisors*, 122 Cal. 421, 55 P. 131, in support of this proposition. But if this be true, we are of the opinion that the validity of such contract could not be questioned in an action by private persons. It appears entirely clear that the city council had authority to grant such a franchise and that the most that may be said is that it erred in exercising that authority. As was said in *Truckee & Tahoe Turnpike Road Co. v. Campbell*, 44 Cal. 89,

at page 91, "The authority of the Board being conceded, the question whether the Board erred in its exercise cannot be raised by a private person; and clearly the inquiry will not be entertained in a collateral proceeding. A grant of such a franchise by a Board of Supervisors, has the same standing in respect to its validity, the presumptions in its favor, and the mode in which it may be attacked, as a grant of any other right, privilege, or thing made by any department of the Government under the authority of law. And the rule in all such cases, is that the grant is not liable to be attacked by a private person, or in a collateral proceeding, for mere error in the exercise of the authority to make the grant." We are of the opinion that if the contract granting the exclusive franchise was void, the exclusive remedy was in quo warranto as contended by defendants. 22 Cal. Jur. 210, § 8.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.



WATTSON et al. v. DILLON et al. *
Civ. 1705.

District Court of Appeal, Fourth District,
California.

July 29, 1935.

Rehearing Denied Aug. 26, 1935.
Hearing Granted by Supreme Court
Sept. 26, 1935.

1. Appeal and error §999(3)

Question of negligence is general one for the trier of facts.

2. Judgment §443(1)

In suit to vacate judgment, equity will afford relief where judgment sought to be vacated was rendered as result of extrinsic fraud practiced on party seeking relief.

3. Judgment §435

Judgment may be vacated by equity on ground of mistake where enforcement of the judgment would be unconscionable and unjust to party seeking relief.

4. Judgment §436, 443(1)

Power of equity to grant relief from final judgment either on ground of extrinsic fraud

or mistake is limited to cases where fraud or mistake was not result of negligence on part of party seeking relief.

5. Judgment §412

Where complaint and summons were served on defendants, duty was imposed on them to appear and set up their defense in default of which they were concluded by the judgment.

6. Judgment §461(3)

In action to vacate final judgment rendered against defendant contractors, evidence that contractors had referred the complaint against them to bonding companies as was their custom, had been assured that bonding companies would defend the suit, and had been told by subcontractor that the matter was taken care of, held insufficient to sustain finding that defendants were not guilty of negligence in failing to defend the action, where defendants made no other effort to discover status of the case until year later when plaintiffs sought to enforce the judgment, though record of the default was open to inspection.

7. Judgment §403

Provisions of remedial statute relieving party from judgment taken against him through his neglect before judgment has become final, where court discovers reasonable excuse for such neglect held not to broaden powers of equity court in independent action to vacate judgment, which calls for exercise of equitable powers based on established rules (Code Civ. Proc. § 473).

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Suit by R. A. Wattson and another against Dan L. Dillon and others. From judgment for plaintiffs, defendants Dan L. Dillon and another appeal.

Judgment reversed with directions.

Fred W. Heath, of Los Angeles, for appellants.

Halverson & Halverson, by Byron Halverson, and Chauncey E. Snow, all of Los Angeles, for respondents.

JENNINGS, Justice.

The plaintiffs instituted this action for the purpose of vacating a final judgment rendered against them in a prior action wherein they were defendants and the defendants Dan L. Dillon and Lilly Dillon were plaintiffs. Upon a trial of the action, judgment was entered in favor of

plaintiffs vacating the former judgment. From this judgment, the above-named defendants have appealed.

The material facts which were developed by the evidence produced during the trial and as to which there is no dispute are as follows: Prior to January 9, 1928, the plaintiff R. A. Wattson had entered into a contract with the city of Los Angeles whereby he agreed to perform certain street improvement work, a part of which consisted of the filling of certain canals in Venice. On January 9, 1928, the said plaintiff entered into a contract with the Hollywood Granite Company, Inc., whereby the corporation agreed to perform a portion of the work which the plaintiff was obligated to perform under his contract with the city. Included in the work covered by this contract was the filling of the canals. At some subsequent date the Hollywood Granite Company, Inc., entered into a contract with the Lewis Construction Company, whereby the last-mentioned company agreed to perform the work which the Hollywood Granite Company, Inc., was obligated to perform under its contract with the plaintiff R. A. Wattson. On October 7, 1930, Dan L. Dillon and Lilly Dillon instituted an action in the superior court of Los Angeles county whereby they sought to recover damages for an alleged trespass to real property owned by them. The trespass consisted of the removal of earth from the premises of the plaintiffs. In this action R. A. Wattson, John H. Wattson, Hollywood Granite Company, Inc., and Raymond Lewis, doing business under the fictitious name of Lewis Construction Company, were named as defendants. On October 8, 1930, service of process in the suit was made on the Wattsons. After they had been served with process and on the date of service, John H. Wattson telephoned the agent of the bonding company, which had executed a bond in behalf of the Hollywood Granite Company, Inc., guaranteeing to the Wattsons faithful performance of the work to be done under the contract between the Wattsons and the Hollywood Company. In this telephone conversation John H. Wattson informed the agent of the bonding company of the fact that service of process in the suit of Dillon v. Wattson had been made, that the Wattsons expected the bonding company "to take care of it," and was advised to send the complaint and summons to the

bonding company "and they would take care of it." Acting on this advice, John H. Wattson thereupon, on the same date, sent by mail the summons and complaint in the action of Dillon v. Wattson to the Standard Accident Company. In a letter which accompanied the above-mentioned documents, John H. Wattson stated that he was inclosing a copy of the complaint, referred to his telephone conversation of the same date with the agent of the company, and concluded with the following statement: "Please be advised that we look entirely to you for protection in this matter." Receipt of the complaint and summons was acknowledged in a letter sent to R. A. Wattson by agents of the Standard Accident Company on October 15, 1930, wherein it was stated: "In connection with the complaint served on you we handed this claim over to our claim department and we understand they took this matter up with the Union Indemnity Company and the latter company will handle this matter." Approximately a week or ten days after the Wattsons had been served with process, R. A. Wattson had a telephone conversation regarding the action of Dillon v. Wattson with Raymond Lewis of the Lewis Construction Company and was informed by Lewis "that the matter had been handled satisfactorily." No appearance was made in the action of Dillon v. Wattson by the Wattsons or by any one in their behalf. Their default for failure to make an appearance was accordingly noted on December 13, 1930. A demurrer to the complaint in said action was interposed by the defendant Raymond Lewis on October 15, 1930. On October 20, 1930, this demurrer was sustained with leave to plaintiffs to amend their complaint. So far as appears, the plaintiffs did not, however, amend the complaint as to the defendant Lewis. On May 22, 1931, evidence respecting the damage alleged to have been sustained by the Dillons was presented to the superior court and a judgment after default was rendered in favor of Dan L. Dillon and Lilly Dillon in the amount of \$1,575 and costs against R. A. Wattson and John H. Wattson. A writ of execution to enforce collection of the amount specified in the judgment was issued on July 2, 1931. This writ of execution was placed in the hands of the sheriff of Los Angeles county on December 30, 1931, and on December 31, 1931, the sheriff attached a bank account of R. A. Wattson under authority of the writ.

This attachment conveyed to the Wattsons notice for the first time that no appearance in the action had been made for them and that judgment by default had been taken against them. On January 4, 1932, they instituted the present equitable action to vacate the judgment.

The trial court made certain findings of fact which are material to this appeal. It found that prior to the date of service of process in the action of Dillon v. Wattson, the respondents herein "had referred all claims and other matters requiring attention arising out of the said sub-contract with Hollywood Granite Company, Inc., and with Raymond Lewis to the said bond company, Standard Accident Insurance Company, and the bond company for said Lewis Construction Company, namely, Union Bond and Indemnity Company, and that all such claims had been satisfactorily adjusted by said bond companies." The court also found "that pursuant to such practice, on October 8, 1930, plaintiffs notified said bond companies that they had been served with a copy of the complaint and summons in said action, and were told by said bond companies that if said complaint and summons were sent to the said Standard Accident Company, that it would be duly cared for." The court further found that on October 8, 1930, the complaint and summons which had been served on respondents were forwarded by them to the Standard Accident Company and this company notified respondents "that said complaint and summons would be attended to." There is also a finding that "on or about October 21, 1930, plaintiff R. A. Wattson telephoned to said Raymond Lewis and was then and there told by him that said complaint had been attended to, and that there was nothing further for the above plaintiffs R. A. Wattson and John H. Wattson to do."

With respect to the above-mentioned findings, examination of the record impels the conclusion that they are not lacking in evidentiary support.

The finding which is most material to the appeal is that wherein the trial court found that "without negligence on the part of the above plaintiffs and through mistake and accident the above plaintiffs believed that said complaint and summons had been properly disposed of, and that they had no further knowledge, notice or information regarding the same until December 31, 1931, at which time a levy of execution

was made against the bank account of plaintiff R. A. Wattson pursuant to judgment in favor of said Dan L. Dillon and Lilly Dillon." The question which arises with respect thereto is whether or not it may be declared that the finding that respondents were free from negligence is fairly supported by the evidence which, as has been observed, was undisputed.

[1] In giving consideration to this question, it may be remarked at the outset that the question of negligence is generally one for the trier of facts. This principle has been developed in tort actions which are based on failure to perform a legal duty known to the law as negligence. No citation of authorities is required in support of a principle so familiar and so thoroughly established. It may be assumed that the principle is applicable to the problem here presented.

It should next be observed that the present action is one whereby respondents are seeking the aid of equity to relieve them from a judgment duly rendered against them whose enforcement they claim will be unjust and inequitable as to them.

[2-4] In an action of this character it is settled that equity will afford relief when it is made to appear that the judgment sought to be vacated was rendered as a result of extrinsic fraud practiced on the party who seeks to have it vacated. It is equally well established that mistake furnishes a ground for equitable interposition where enforcement of the judgment would be unconscionable and unjust to the party seeking relief. *Bacon v. Bacon*, 150 Cal. 477, 491, 89 P. 317. The power of equity to grant relief from a final judgment either on the ground of extrinsic fraud or mistake is limited, however, to those cases wherein the fraud or mistake was not the result of negligence on the part of the complainant. *Jeffords v. Young*, 98 Cal. App. 400, 404, 277 P. 163.

It is not pretended that fraud furnished the ground for seeking equitable relief in the instant proceeding. The complaint is bare of any allegation respecting fraud. No evidence tending to show that fraud was practiced on respondents was produced during the trial. No finding indicating the existence of fraud was made by the trial court. It is obvious from the allegations of the complaint and from the evidence presented during the trial that the ground for seeking relief was mistake. As above noted, the court found

that through mistake and accident respondents believed that proper disposition of the process served upon them had been made. The only mistake which the evidence indicated was present was that respondents believed that some appearance in the action wherein they were named as defendants would be made in their behalf. It must, however, be conceded that this mistake of itself would not warrant the very broad relief which they sought in the form of a decree vacating a solemn judgment duly rendered upon evidence submitted to the court. Upon respondents rested the further burden of showing that the mistake was not due to their own negligence. This burden they attempted to sustain by showing that, prior to the service of process in the action of *Dillon v. Wattson* upon them, they had received numerous complaints respecting the performance of the work; that they had referred those complaints to the surety on the faithful performance bond of the subcontractor; and that such complaints had been satisfactorily adjusted. They also showed that a prior action for work and labor performed for the subcontractor, Hollywood Granite Company, had been instituted in the municipal court of the city of Los Angeles; that R. A. Wattson was named as a defendant in such action; that he had transmitted the papers served upon him in the action to a bonding company which had executed a material and labor bond for the subcontractor; and that this action had been dismissed as to them. They then showed that, when they were served with process in the action of *Dillon v. Wattson*, they pursued the same course which they had theretofore followed with satisfactory results, viz., they referred the matter to the bonding company and were assured by the representative of this company that the matter would receive proper attention and that some ten days later they were assured by one of their codefendants in the action, the subcontractor who was actually carrying on the work out of which the claim for damages had arisen, that attention had been given to the complaint and that no further action on their part was required. These are the circumstances which constitute the evidentiary basis for the finding that respondents were not guilty of negligence.

[5,6] With this finding we cannot agree. It may be conceded that respondents were warranted in referring the proc-

ess served upon them to the bonding company. It may further be conceded that, when they were advised by the representative of this company that the matter would receive proper attention, they were warranted in believing that an appearance would be made in their behalf in the suit and that they would be afforded the opportunity to present their defense which it may be assumed was meritorious. It may further be conceded that, when they were later informed by their codefendant that attention had been given to the matter and that no further action was required of them, they were justified in believing that the bonding company had entered an appearance for them in the action. It is, however, our opinion that these concessions are all that the uncontradicted evidence supports and that, under the circumstances, they are not sufficient to absolve them from the clear and palpable neglect of which they were guilty. The complaint served upon respondents informed them of the nature of the action. The summons notified them that, if they did not appear in the action within the time specified, the plaintiffs in said action would take judgment for the amount demanded in the complaint. The duty was then imposed upon respondents of appearing in the action and of setting up whatever defense they may have had. In default of the performance of this duty they were concluded by the judgment. *Brum v. Ivins*, 154 Cal. 17, 20, 96 P. 876, 129 Am. St. Rep. 137. There is no showing that, after they had been assured that attention would be given to the matter, they ever made any inquiry to discover whether any appearance had actually been made for them in the action. The evidence shows that their default was not noted until more than two months after they had been served with process. The evidence further shows that more than five months elapsed after default was noted before judgment was rendered. During all of this time respondents made no effort to discover what, if anything, had been done in the action. The suit was a matter of public record. It was open to inspection. The slightest exercise of diligence by respondents would have disclosed that no appearance in their behalf had been made. They made no inquiry. They put forth no effort to discover the status of the case. They consulted no attorney. They remained inactive and quiescent for more than a year after service of process and

it was not until the bank account of one of them was attached by virtue of a writ of execution that they exhibited any interest in the proceedings. Under such circumstances, the following language from the decision in *Rudy v. Slotwinsky*, 73 Cal. App. 459, at page 466, 238 P. 783, 785, is apropos to the situation:

"While it is true that one seeking to set aside a judgment is not limited to the relief provided for by section 473, Code of Civil Procedure, but may, where the facts justify it, invoke the aid of a court of equity, he must, in doing so, exercise due diligence. The instant case in our opinion, however, does not present such a situation. Here, as stated, the default was a matter of public record, open to inspection at all times to the plaintiffs and their attorneys. This fact should have put them upon inquiry which would have led to the discovery of the alleged fraud in the procurement of the judgment."

Here, also, the default was a matter of public record open to inspection by respondents. It put them on inquiry which would have immediately disclosed that they were mistaken in their belief that an appearance had been made for them in the action. The uncontradicted evidence, in our opinion, entirely fails to support the trial court's finding that respondents were free from negligence.

[7] It should finally be observed that we are not here dealing with an application for relief under the provisions of section 473 of the Code of Civil Procedure. The provisions of that remedial statute are broad enough to relieve a party from a judgment taken against him through his neglect if the court to whom the application is addressed can discover some reasonable excuse for such neglect. The breadth of the provisions of the statute may not, however, properly be construed as an attempt to broaden the powers of a court of equity in determining its jurisdiction in an independent proceeding. The application for relief under the statute is addressed to the discretion of the trial court within a limited time and before the judgment has become final. The institution of an independent action to vacate a judgment calls for the exercise of equitable powers by an independent court based upon established rules. *Amestoy Estate Co. v. City of Los Angeles*, 5 Cal. App. 273, 277, 90 P. 42. One of such rules

which is so well established that it is denominated a maxim of jurisprudence in the Civil Code of California is the familiar principle that "the law helps the Vigilant, before those who sleep on their rights." Section 3527, Civ. Code.

For the reasons stated, the judgment is reversed and the trial court is directed to correct its findings in accordance with the views herein expressed and to enter judgment in favor of appellants.

We concur: BARNARD, P. J.; MARKS, J.



RAINEY v. MICHEL et al. *
Civ. 1717.

District Court of Appeal, Fourth District,
California.

July 10, 1935.

Hearing Granted by Supreme Court
Sept. 5, 1935.

1. Statutes ☞80(1)

In amending constitutional provision so as to authorize Legislature to legislate as to corporations "by general laws and not otherwise," people were presumed to have understood term "general laws" by its popular meaning and signification in course of legislation as laws which apply equally to all persons embraced within class to which they are addressed, provided that such class is founded on some natural or intrinsic or constitutional distinction between persons composing it and others not embraced in it (St. 1931, p. 338).

[Ed. Note.—For other definitions of "General Law," see Words & Phrases.]

2. Statutes ☞80(1)

Bank Stockholders' Liability Act held not invalid as in conflict with constitutional provision authorizing Legislature to prescribe liabilities of corporate stockholders "by general laws and not otherwise" because act imposed liability on stockholders of state banks and none on those of other corporations, since act was a "general law" as it was applicable to all persons within a class founded on a natural, intrinsic, and constitutional distinction (St. 1931, pp. 338, 339, §§ 1, 2; Const. art. 4, § 25; art. 12, § 1, as amended in 1930 [see St. 1931, p. lviii]).

3. Corporations Ⓒ227

People by repealing constitutional provision imposing liability on corporate stockholders for proportionate share of corporation's debts and liabilities *held* not to have shown intention to do away with all stockholders' liability, but, in view of fact that people at same election amended Constitution to authorize Legislature to prescribe liabilities of stockholders, merely to have shown intention to vest in Legislature power to legislate on matter of stockholders' liability free from former constitutional restrictions and within other constitutional limitations (St. 1931, p. 338; Const. art. 12, § 1, as amended in 1930 [see St. 1931, p. lviii]; art. 12, § 3 [repealed Nov. 3, 1930]).

4. Banks and banking Ⓒ47(1)

Bank Stockholders' Liability Act *held* not to make action of superintendent of banks conclusive on stockholders in calling assessment, but merely to make such action conclusive on stockholders of necessity for assessment (St. 1931, p. 339, § 2).

5. Constitutional law Ⓒ251

"Due process of law" requires that a plaintiff be given a forum in which to enforce and protect his rights, and the defendant to be heard and defend against claims against him (Const. Cal. art. 1, § 13; Const. U. S. Amend. 14, § 1).

[Ed. Note.—For other definitions of "Due Process of Law," see Words & Phrases.]

6. Constitutional law Ⓒ299

Bank Stockholders' Liability Act *held* not to deny due process because it made action of superintendent of banks conclusive on stockholders of necessity for assessment without giving stockholders right of hearing, since under act superintendent could not render judgment against stockholder nor issue execution on property, but must resort to courts to enforce collection, and since, should necessity arise, court of equity could relieve against fraud, oppression, or palpable mistake of fact on theory that superintendent was thereby rendered without jurisdiction to make assessment (St. 1931, p. 339, § 2; Const. Cal. art. 1, § 13; Const. U. S. Amend. 14, § 1).

7. Statutes Ⓒ47

Bank Stockholders' Liability Act *held* not invalid as too vague and uncertain on theory that it would permit, where majority of stockholders were insolvent, imposition of assessment on solvent stockholders in excess of par value of stock, since provision of act that stockholders should be "individually liable, equally and ratably, and not one for another * * * to the extent of the amount of their

stock therein, at the par value thereof" would prevent any such imposition (St. 1931, p. 339, § 2).

8. Banks and banking Ⓒ44

Bank Stockholders' Liability Act *held* not unconstitutional because it rendered stockholder liable for his share of costs of liquidation (St. 1931, p. 338).

9. Constitutional law Ⓒ80(1)

Bank Stockholders' Liability Act *held* not unconstitutional because it vested in superintendent of banks judicial power when he was given right to determine necessity for liquidating banks and to fix amount of assessments on stockholders, since such acts were only quasi judicial (St. 1931, p. 338; Const. art. 6, § 1).

10. Constitutional law Ⓒ126

Constitutional provisions reserving to state right to authorize or repeal laws affecting corporations become a part of the charter of every corporation organized in state.

11. Banks and banking Ⓒ44

Bank Stockholders' Liability Act *held* not unconstitutional because it authorized the imposition of a liability on stockholders for debts acquired after effective date of act where no such liability existed before, in view of constitutional provision reserving to state right to alter or repeal laws affecting corporations (St. 1931, p. 338).

12. Corporations Ⓒ215

Under constitutional provision imposing liability on corporate stockholders for proportionate share of corporation's debts, and under statute giving effect to such provision, contractual relationship existed between corporation's stockholders and creditors, and a direct and personal obligation was imposed on each stockholder to pay each creditor such proportion of debts and liabilities contracted or incurred during time he was stockholder as amount of his stock bore to whole of subscribed capital stock of corporation (Civ. Code, § 322 [repealed see St. 1931, p. 444]; Const. art. 12, § 3 [repealed Nov. 3, 1930]).

13. Constitutional law Ⓒ24

Repeal of constitutional provision and statute imposing liability on corporate stockholders for proportionate share of corporation's debts *held* not to have relieved bank stockholder of his contractual liability to creditors for his proportionate share of debts contracted by bank during time he was stockholder and before repeal of constitutional provision and statute (Const. Cal. art. 12, § 3 [repealed Nov. 3, 1930]; Const. Cal. art. 1, § 16; Const. U. S. art. 1, § 10).

14. Constitutional law 113

State and federal constitutional provisions prohibiting passage of laws impairing obligations of contracts, throw their protection around entire contract, and give no right or protection to creditor that can be denied to debtor (Const. Cal. art. 1, § 16; Const. U. S. art. 1, § 10).

15. Constitutional law 154(2)

Bank Stockholders' Liability Act, if construed to permit superintendent of banks to levy assessments on stockholders to pay all indebtedness of bank regardless of whether debts or any portion of them were contracted prior to repeal of constitutional provision imposing liability on corporate stockholders for proportionate share of corporation's debts, would be unconstitutional as imposing greater obligation on stockholders than existed before passage of act and levy of assessment (St. 1931, p. 338; Const. Cal. art. 1, § 16; art. 12, § 3 [repealed Nov. 3, 1930]; Const. U. S. art. 1, § 10).

16. Constitutional law 24

Repeal of constitutional provision imposing liability on corporate stockholders for proportionate share of corporation's debts held not to have effected repeal of statute imposing a similar liability, since statute did not find its origin or existence in repealed constitutional provision, but found it either in general powers of Legislature over corporations or in constitutional provision continuing in force all laws in existence prior to adoption of Constitution, or in both (Civ. Code, § 322 [repealed see St. 1931, p. 444]; Const. art. 12, § 3 [repealed Nov. 3, 1930]; art. 22, § 1).

17. Corporations 215

Statute imposing liability on corporate stockholders for proportionate share of corporation's debts created a contractual liability on stockholders to pay their proportionate shares of debts of corporation to creditors coming within its provisions and such contractual relations were of continual creation between creditors and stockholders up to time of repeal of statute (Civ. Code, § 322 [repealed see St. 1931, p. 444]).

18. Constitutional law 154(2)

Bank Stockholders' Liability Act, if construed to permit superintendent of banks to levy assessment on stockholders to pay all indebtedness of bank regardless of whether debts or any portion of them were contracted prior to repeal of statute imposing liability on corporate stockholders for proportionate share of corporation's debts, would be unconstitutional as imposing greater obligations on stockholder than existed before passage of

act (St. 1931, p. 338; Civ. Code, § 322 [repealed see St. 1931, p. 444]; Const. Cal. art. 1, § 16; Const. U. S. art. 1, § 10).

19. Constitutional law 154(2)

Construction of Bank Stockholders' Liability Act which would permit superintendent of banks to levy assessment for, and pay money collected on debts incurred prior to effective date of act could not be upheld as valid exercise of police powers in financial emergency, where such construction would interfere with obligations of contract (St. 1931, p. 338; Civ. Code, § 322 [repealed see St. 1931, p. 444]; Const. Cal. art. 1, § 16; art. 12, § 3 [repealed Nov. 3, 1930]; Const. U. S. art. 1, § 10).

20. Constitutional law 48

Courts will not hold statutes unconstitutional unless it is clearly necessary to do so, and where two reasonable constructions may be placed on an act, one resulting in holding it constitutional, and the other unconstitutional, court has duty to adopt constitutional construction.

21. Constitutional law 154(2)

Bank Stockholders' Liability Act held applicable only to debts and liabilities contracted or incurred after effective date of act, notwithstanding act was equally susceptible to construction that it applied also to debts and liabilities contracted or incurred before such date, where such construction would have rendered act unconstitutional (St. 1931, p. 338; Civ. Code, § 322 [repealed see St. 1931, p. 444]; Const. Cal. art. 1, § 16; art. 12, § 3 [repealed Nov. 3, 1930]; Const. U. S. art. 1, § 10).

22. Banks and banking 49(8)

That liabilities of bank contracted after effective date of Bank Stockholders' Liability Act amounted to \$512,013.07 and stockholders' assessments if fully paid would produce only \$111,600 held sufficient showing of necessity for assessment, especially where question was not raised in answer, and was not litigated, nor considered in trial court (St. 1931, p. 339, § 2).

23. Appeal and error 172(1)

In action by superintendent of banks to enforce assessment liability of stockholder under Bank Stockholders' Liability Act, contention that record did not disclose amount of assets of bank, and that such assets with assessments might furnish surplus of money after payment of debts and liabilities, advanced for first time in a final reply brief filed in District Court of Appeal by amici curiae after all other briefs had been filed held raised too late to require serious consideration (St. 1931, p. 338).

Appeal from Superior Court, Los Angeles County; Georgia Bullock, Judge.

Action by Edward Rainey, superintendent of banks of the state of California, against Herman Michel and others. From a judgment for plaintiff as against the named defendant, the named defendant appeals.

Affirmed.

Ivan G. McDaniel, of Los Angeles, for appellant.

Pillsbury, Madison & Sutro, Alfred Sutro, Eugene M. Prince, and Francis N. Marshall, all of San Francisco, Gibson, Dunn & Crutcher, E. E. Bacon, Henry B. Ely, all of Los Angeles, White, Miller, Needham, Harber & Mering, of Sacramento, Holcomb, Holcomb & Kempley, of Los Angeles, Elliott, Atkinson & Sitton, C. F. Metteer, and Devlin & Devlin & Diepenbrock, all of Sacramento, amici curiæ for appellant.

Sullivan, Roche, Johnson & Barry, of San Francisco, for respondent.

Griffith & Thornburgh and Butcher & Haines, all of Santa Barbara, amici curiæ for respondent.

MARKS, Justice.

This is an appeal from a judgment against appellant in the sum of \$75,550, rendered on his liability as a stockholder of the Marine Bank of Santa Monica, under the provisions of an act of the Legislature defining the liability of stockholders in California state banks. Stats. 1931, p. 338. For convenience, we will refer to this act as the Bank Stockholders' Liability Act.

The Marine Bank of Santa Monica, which we will hereafter refer to as the bank, was organized under the banking laws of the state of California. It had issued 1,166 shares of capital stock of the par value of \$100 each, of which appellant owned 780½ shares on August 14, 1931. He owned 175 shares of this stock prior to November 4, 1930, and acquired 595½ shares between that date and August 14, 1931. It does not appear just when he acquired the other 10 shares, though the finding that he owned all of his stock on August 14, 1931, is not questioned by him. When the bank was taken over by respondent, it had liabilities in the total sum of \$925,055.42, of which the sum of \$413,042.-

35 was incurred prior to August 14, 1931, and \$512,013.07 subsequent to that date.

The complaint alleges the official position of respondent; the corporate existence of the bank; the number and par value of its issued shares of stock and the number owned by appellant; that on December 18, 1931, as a result of an examination of the business and affairs of the bank, respondent concluded that it was in an unsafe and unsound condition and took possession of its property, assets, and business for the purpose of liquidating its affairs; that during the process of such liquidation respondent determined and found it necessary to enforce the individual liability of its stockholders and that it was necessary for him to and that he did call for and levy a ratable assessment upon the stockholders in the sum of \$100 on each share of issued stock; that the necessary assessment was levied, call made, and notice given to and served upon the stockholders; that no part of appellant's assessment of \$78,050 was paid by appellant except the sum of \$2,500. Judgment was sought against him in the sum of \$75,550.

The answer of appellant did not deny any of the allegations of the complaint. It set up the following affirmative defenses: (1) That appellant became the owner of his stock prior to August 14, 1931, the effective date of the Bank Stockholders' Liability Act; and (2) that all the debts and liabilities of the bank were incurred and created prior to August 14, 1931.

The case comes before us on a type-written clerk's transcript which includes, besides the judgment roll, an agreed statement of facts. No question is raised as to the propriety of including the latter document in the clerk's transcript, nor of our consideration of its contents without any certification other than that given by the county clerk, and many of the arguments advanced on this appeal are based on matters disclosed by this agreed statement of facts. For purposes of clarity, we have concluded to consider this agreed statement of facts in deciding the issues presented and the various arguments of counsel and amici curiæ based upon it. This must not be construed as a precedent holding that this manner of presenting such a document can be approved in another case. The constitutional questions presented on this appeal are grave and of wide importance. They

affect many pending cases involving the liability of stockholders in state banks. We cannot decide some of these questions without reference to this document.

Many grounds for a reversal of the judgment are urged by counsel for appellant and the several amici curiæ who appear in his behalf. There is not entire uniformity in the views expressed. For our own convenience and in order that this opinion may not be unduly extended, we will consolidate such of these grounds as we deem necessary to consider and will refer to them as though all were urged by appellant. We find it appropriate to state that our task has been made easier by the splendid manner in which the case has been briefed by counsel for the parties and by the several amici curiæ.

The Constitution of 1849 (article 4, § 36) and of 1879 (article 12, § 3) placed a liability on every stockholder of a corporation for a proportion of its debts. The latter section provided that a stockholder shall be liable for his proportionate share of all its debts and liabilities contracted or incurred while he was such stockholder. This section was repealed by the people of the state at the election held November 3, 1930. Section 322 of the Civil Code was enacted in its original form on March 21, 1872. It was based on the Statutes of 1853, p. 87, which gave effect to the provisions of the Constitution of 1849 to which we have referred. Section 322 of the Civil Code contained provisions subsequently written into section 3 of article 12 of the Constitution of 1879 and gave the creditor a right of action directly against the stockholder. This section was repealed on August 14, 1931 (St. 1931; p. 444). Both the Constitution of 1849 (article 4, § 31) and that of 1879 (article 12, § 1) reserved to the state the right to alter, change, or repeal laws concerning corporations. It will thus be seen that up to the time of the election held on November 3, 1930, the state has always had a constitutional provision placing a liability on stockholders of all corporations for certain of its debts, and from 1853 to August 14, 1931, had statutes placing like liabilities on such stockholders. Also the state has always reserved to itself the right to repeal, alter, or amend laws concerning corporations. After August 14, 1931, there was no law in this state imposing a stockholder's liability on the stockholders of all corporations.

At the election of November 3, 1930, when section 3 of article 12 of the Constitution was repealed, the people amended section 1 of article 12 to read as follows: "The Legislature shall have power, by general laws and not otherwise, to provide for the formation, organization and regulation of corporations and to prescribe their powers, rights, duties and liabilities and the powers, rights, duties and liabilities of their officers and stockholders or members. All laws now in force in this State concerning corporations and all laws that may be hereafter passed pursuant to this section may be altered from time to time or repealed." See St. 1931, p. lviii.

[1, 2] In 1931 the Legislature passed the Bank Stockholders' Liability Act (Stats. 1931, p. 338) which went into effect concurrently with the repeal of section 322 of the Civil Code. The Bank Stockholders' Liability Act provides in part as follows: "The stockholders of every banking corporation organized under the laws of the State of California shall be held individually liable, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporation, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. * * *" Section 1. "Whenever the superintendent of banks shall hereafter take possession of the business and property of any bank doing business in this state, for the purpose of liquidating its affairs, as provided by law, he may at any time during the process of such liquidation, if necessary to pay the debts of such corporation, enforce the individual liability of the stockholders set forth in section 1. For the purpose of enforcing such liability, the superintendent of banks may call for a ratable assessment upon the stockholders of such bank without previous judicial ascertainment of the necessity for such action, and the action of the superintendent of banks in calling for such assessment shall be conclusive on the stockholders of the necessity for such assessment. * * * The superintendent of banks shall have power to maintain an action or actions in this state, or in any other state or country to enforce and collect any sums or amounts due and payable and remaining unpaid upon any such assessments from any stockholder or stockholders failing to pay the same in full. * * * All sums collected from

any such assessment, less the expenses of collection, shall be used by the superintendent of banks against the liquidation of claims in the same manner as the assets of the bank are so used. If such ratable assessment, first made, shall prove inadequate to pay all of the creditors of the bank in full, the superintendent of banks may levy further assessment or assessments, and proceed to collect the same in like manner so long as the total of such assessments does not exceed the liability set forth in section 1 above. If, after the payment of all liabilities against such bank, and the costs and expenses of liquidation, any surplus shall remain, the court in the liquidation proceedings shall determine and provide for any equities as between the respective stockholders, including proportions belonging to each stockholder and of any surplus of any of the assets remaining after payment of all liabilities and the costs and expenses of liquidation by reason of full or partial payment of any such assessment or assessments, and shall direct the payment thereof by the superintendent of banks accordingly." Section 2.

Appellant urges that the Bank Stockholders' Liability Act violates the provisions of section 1 of article 12 of the Constitution as amended in 1930, as it imposes a stockholders' liability on stockholders in state banks and none on stockholders of other corporations. He urges that as this section authorizes the Legislature to prescribe the liabilities of corporate stockholders "by general laws and not otherwise," any law imposing a liability on stockholders of corporations must apply to stockholders in all corporations, and that the Legislature cannot pass a law imposing a liability on a single class of corporations. It should be observed that the same language is used in the section in relation to the "formation, organization and regulation of corporations" and prescribing "their powers, rights, duties and liabilities." If this argument of appellant is sound, all corporations would have to be formed, organized, and regulated by a single law which would have to provide uniform powers, rights, duties, and liabilities for them and their officers, stockholders, or members. We now have many corporations successfully operating in the fields of business, finance, education, and others, under the provisions of sections found in titles 2 to 24, inclusive, part 4 of division 1 of the Civil Code (section 414 et seq.). The purposes for which these

corporations have been formed run the entire scale from corporations to receive and administer bequests, gifts, and donations, to insurance companies, banks, railroads, and public utilities. As the complexities of life have increased, the Legislature has provided for the formation of corporations possessing different powers, rights, duties, and liabilities from those previously authorized. This has seemed a wise exercise of legislative discretion, employed to meet the new conditions as they developed. It is obvious that if the interpretation placed by appellant on the provisions of section 1 of article 12 of the Constitution be adopted, it would require that the same powers, rights, and duties be given to and liabilities placed upon all corporations organized after the adoption of the amended section. If the Legislature cannot classify corporations, and if a general law must apply to all equally, a small corporation organized to own and operate a tract of farming land in a sparsely settled agricultural community, a great bank, a trust company, an insurance company, or a railroad must have the same organization and the same "powers, rights, duties and liabilities." This would indeed be a radical departure from the traditional theory of corporate legislation in California. It would result either in ending the formation of all smaller corporations organized for industrial, commercial, and educational purposes through their inability to conform to the rigid requirements of organization of large banks, trust companies, insurance companies, and public service corporations which experience has proved necessary for their safety and stability, or a loose and unsafe corporate structure for these large corporations, if an effort were made to pass a general law affecting all which would include the organization and operation of the smaller corporations. It would seem hardly probable that in adopting this amendment to the Constitution the electors had in view any such revolutionary result when we remember that for many years they have been accustomed to the organization and operation of corporations according to well-defined classifications established by the Legislature.

Appellant further urges that at the election the people understood the term "general laws" in the ordinary sense of the word, this wording conveyed to them only one meaning—that the formation, organization and regulation of *all corporations* would be governed by general laws—uni-

form laws. * * *” He quotes a portion of the following language of the Supreme Court in the case of *Miller v. Dunn*, 72 Cal. 462, 14 P. 27, 28, 1 Am. St. Rep. 67: “It is useless to attempt to apply iron-clad rules of interpretation to any phrase or word used in a constitution. Especially is this true of a word which has a technical as well as a popular meaning. There is no word in the language which, in its popular and technical application, takes a wider or more diversified signification than the word ‘law.’ Its use in both regards is illimitable. In determining the office of words used in a constitution, the object is to give effect to the intent of the people adopting it. *Coolley*, Const. Lim. (5th Ed.) § 66. And, ‘where a word having a technical as well as a popular meaning is used in the constitution, the courts will accord to it its popular signification, unless the very nature of the subject indicates or the text suggests that it is used in its technical sense.’ *Weill v. Kenfield*, 54 Cal. 111; *Sprague v. Norway*, 31 Cal. 173. Words used in a constitution should be construed in the sense in which they were employed. They ‘must be taken in their ordinary and common acceptation, because they are presumed to have been so understood by the framers, and by the people who adopted it. This is unquestionably the correct rule of interpretation. It, unlike the acts of our legislature, owes its whole force and authority to its ratification by the people; and they judged of it by the meaning apparent on its face according to the general use of the words employed where they do not appear to have been used in a legal or technical sense.’ *Manly v. State*, 7 Md. 135.” He then quotes from Webster the definition of “general” as “the whole; the total; that which comprehends or relates to all or the chief part;—opposed to particular.” From this he draws the conclusion that the construction placed by him on the amendment must have been in the minds of the people at the time they adopted it.

We have no quarrel with the rule laid down by the many authorities, some cited by appellant, which support *Miller v. Dunn*, *supra*. And we would not presume to question a definition given by that eminent lexicographer, Webster. However, we notice that in *Miller v. Dunn*, *supra*, the Supreme Court said that in adopting an amendment to the Constitution the people will be presumed to have understood “it by the meaning apparent on its face according to the general use of the words employed *where*

they do not appear to have been used in a legal or technical sense.” (Italics ours.)

In measuring the intent, understanding, and purpose of the people in adopting this amendment, we must bear in mind the customary use of the term “general law” or “laws of a general nature” in the course of legislation in California since its statehood. Section 11 of article 1 of both the Constitution of 1849 and that of 1879 were identical and provided that “all laws of a general nature shall have a uniform operation.” Section 25 of article 4 of the present Constitution provides that “the Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * In all other cases where a general law can be made applicable.” The statutes are full of laws that do not apply alike to all persons, natural or artificial, in the state, which laws have been held constitutional. As said by the Supreme Court, through Mr. Chief Justice Waste, in *Re Weisberg*, 215 Cal. 624, 12 P.(2d) 446, 449: “A law is general and uniform and affords equal protection in its operation when it applies equally to all persons embraced within the class to which it is addressed, provided that such class is founded upon some natural or intrinsic or constitutional distinction between the persons composing it and others not embraced in it.” This rule has been the accepted rule in California for more than fifty years. It has been applied to so many laws affecting the daily life of our citizens that they must have been cognizant of it and have become accustomed to its application and understanding of the meaning given it in legislative and judicial circles for more than half a century. In fact, the definition which we have quoted, because of its long use and general acceptance in all matters pertaining to legislation, must be considered to be the “popular meaning” and “popular signification” given to the terms under discussion by the people of the state when the constitutional amendment was adopted. Under this definition we can unhesitatingly hold that the Bank Stockholders’ Liability Act is a general law as it is applicable to all persons within a class founded upon a natural, intrinsic, and constitutional distinction which carves that class out from the body of the people and permits it to stand by itself.

[3] Appellant urges that by the repeal of section 3 of article 12 of the Constitu-

tion the people of the state announced as their policy a firm intention to do away with all stockholders' liability in California which had existed since it became a state. We cannot so construe the results of that election. It has been held that section 3 of article 12 of the Constitution was a restriction on the power of the Legislature to create any different or greater liability on the part of a stockholder than that contemplated in the section. *Wood v. Hamaguchi*, 207 Cal. 79, 277 P. 113, 63 A. L. R. 861. The repeal of this section removed that limitation of power. At the same election the people amended section 1 of article 12 of the Constitution and provided that the Legislature "shall have power, by general laws and not otherwise, to * * * prescribe * * * [the] liabilities of * * * stockholders" of corporations. The results of the election show an intention on the part of the people to vest in the Legislature the power to legislate on the matter of stockholders' liability free from the former constitutional restrictions and within other constitutional limitations rather than an intention to do away with all stockholders' liability in this state.

[4-6] Appellant urges that the Bank Stockholders' Liability Act violates the due process of law provisions of the Federal and State Constitutions. Section 1, Fourteenth Amendment U. S. Const.; section 13, art. 1, Const. of California. He particularly urges that section 2 of that act (St. 1931, p. 339) makes the action of the superintendent of banks conclusive on the stockholders in calling the assessment without giving the stockholders the right of hearing and therefore deprives them of their day in court and deprives them of their property without due process of law. We do not so read the section. It only makes the action of the superintendent of banks in calling the assessment "conclusive on the stockholders of the necessity for such assessment." (Italics ours.) From this language, it is evident that the conclusion of the superintendent of banks as to the necessity for the assessment is the only step in the proceedings which the Legislature attempted to make conclusive on the stockholders. It may be that in a future case for the collection of an unpaid assessment when the question of its necessity is properly made an issue this question may be inquired into by the courts. In the instant case, this issue is not pre-

sented as the answer does not deny any of the allegations of the complaint, but merely raises the two affirmative defenses we have mentioned.

The provisions of our Bank Stockholders' Liability Act are patterned after the similar provisions of the National Bank Act. Therefore the decisions of the federal courts have compelling weight here.

In one of its earlier decisions construing some of the provisions of the National Bank Act, the United States Supreme Court said: "The liability of the stockholders is several and not joint. The limit of their liability is the par of the stock held by each one. Where the whole amount is sought to be recovered the proceeding must be at law. Where less is required the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court—if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted. It would be attended with injurious consequences to forbid action against the stockholders until the precise amount necessary to be collected shall be formally ascertained. This would greatly protract the final settlement, and might be attended with large losses by insolvency and otherwise in the intervening time. The amount must depend in part upon the solvency of the debtors and the validity of the claims. Time will be consumed in the application of these tests, and the results in many cases cannot be foreseen. The same remarks apply to the enforced collections from the stockholders. A speedy adjustment is necessary to the efficiency and utility of the law; the interests of the creditors require it, and it was the obvious policy and purpose of Congress to give it. If too much be collected, it is provided by the statute, that any surplus which may remain after satisfying all demands against the association, shall be paid over to the stockholders. It is better they should pay more than may prove to be needed than that the evils of delay should be encountered. When contribution only is sought, all the stockholders who can be reached by the process of the court may be joined in the suit. It is no objection that there are others beyond the jurisdiction of the court who cannot for that reason be made codefendants." *Kennedy v. Gibson*, 8 Wall. 498, 505, 19 L. Ed. 476.

In the case of *Bernheimer v. Converse*, 206 U. S. 516, 27 S. Ct. 755, 758, 51 L. Ed. 1163, the court had before it the provisions of the Stockholders' Liability Law of the state of Minnesota. This act provided that an assessment levied upon the stockholders of a corporation "shall be conclusive upon and against all parties liable upon or on account of any shares of said stock of such corporation, whether appearing or having notice thereof or not, as to all matters relating to the amount of and the necessity for said assessment. * * *" Laws 1899, c. 272, § 5. This statute goes further than the California Bank Stockholders' Liability Act as the Minnesota act provides that the assessment shall be *conclusive* as to its *amount* as well as to its *necessity*. The Supreme Court of the United States cited with approval a decision of the Supreme Court of Minnesota and said: "This statute came before the supreme court of Minnesota in *Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co.*, 80 Minn. 125, 83 N. W. 36. In that case it was given full consideration and its constitutionality sustained, and it was held that while the assessments upon the outstanding shares of stock in an amount necessary to meet the deficiency in the assets of the corporation was conclusive upon the stockholders as members of the corporation, yet the statute, properly construed, did not have the effect to deprive a person, when sued for the amount assessed on shares of stock under the provisions of the act, from showing that he was not a stockholder, or that he was not the holder of so large an amount of stock as was alleged, or that he had a claim against the corporation which, in law or equity, he might be enabled to set off as against a claim for assessments, or from making any other defense personal to himself; and that the order of assessment was conclusive upon stockholders only in so far as it decided the amount of assets or liabilities of the insolvent corporation and the necessity of making an assessment upon the stock to the extent and in the amount ordered." *Bernheimer v. Converse*, 206 U. S. 516, 27 S. Ct. 755, 758, 51 L. Ed. 1163.

In the case of *United States v. Knox*, 102 U. S. 422, 425, 26 L. Ed. 216, it was said: "Although assessments made by the comptroller, under the circumstances of the first assessment in this case, and all other assessments, successive or otherwise,

not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders, yet if he were to attempt to enforce one made, clearly and palpably, contrary to the views we have expressed, it cannot be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction."

While the language quoted from the foregoing decisions is largely dicta, it has the compelling force of reason and sound sense. Should occasion arise, a court of equity would undoubtedly find grounds upon which to protect against fraud, oppression, or such palpable mistake of fact as would raise the question of the right of the superintendent of banks to take any action at all. These matters would go to his jurisdiction. Jurisdiction to act should exist before his acts be given the protection of the statute.

It would seem that the contention of appellant that the Stockholders' Liability Act violates the due process of law provision of the Federal and State Constitutions is answered by the case of *Bernheimer v. Converse*, supra. Many cases are cited to support the conclusions there reached.

It is well settled that due process of law requires that a plaintiff be given a forum in which to enforce and protect his rights, and the defendant to be heard and defend against claims against him. Under the terms of the Bank Stockholders' Liability Act, the superintendent of banks cannot render judgment against a stockholder nor issue execution upon his property. Resort must be had to the courts to enforce collection from a stockholder who does not voluntarily pay the assessment levied against him. Thus the act itself specifies the forum in which the superintendent of banks must appear and in which the stockholder may defend the action against him, and the due process of law provisions of the two Constitutions are fully satisfied.

[7] Appellant urges that the act is too vague and uncertain to be enforced. He argues that it may be so construed that in a case where the majority of the stockholders are insolvent a burden of debt far in excess of the par value of their stock may be fastened upon the solvent stockholders through the means of repeated assessments which the act permits. This cannot be done because the act itself makes stockholders "individually liable, equally and ratably, and not one for another * * * to the extent of the

amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." A similar argument was answered by the Supreme Court of the United States in the case of *United States v. Knox*, supra, as follows: "With respect to the character of that liability, it is entirely clear from the language employed in creating it, that it is several and cannot be made joint, and that the shareholders were not intended to be put in the relation of guarantors or sureties, 'one for another,' as to the amount which each might be required to pay. In the process to be pursued to fix the amount of the separate liability of each of the shareholders, it is necessary to ascertain, 1, the whole amount of the par value of all the stock held by *all the shareholders*; 2, the amount of the deficit to be paid after exhausting all the assets of the bank; 3, then to apply the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank at its par value. There is a limitation of this liability. It cannot in the aggregate exceed the entire amount of the par value of all the stock. The insolvency of one stockholder, or his being beyond the jurisdiction of the court, does not in any wise affect the liability of another; and if the bank itself, in such case, holds any of its stock, it is regarded in all respects as if such stock were in the hands of a natural person, and the extent of the several liability of the other stockholders is computed accordingly. *Crease v. Babcock*, 10 Metc. (Mass.) 525."

[8] Appellant further urges that the Bank Stockholders' Liability Act places an unlawful burden upon him when it makes him liable for his share of the costs of liquidation. This precise argument was answered by the Supreme Court of the United States adversely to the contention of appellant in the case of *Bernheimer v. Converse*, supra.

[9] Appellant urges that Bank Stockholders' Liability Act is unconstitutional because it vests in the superintendent of banks judicial powers when he is given the right to determine that the affairs of a bank are in such condition as to justify his taking it over for purposes of liquidation and fix the amount of the assessments on the stockholders, and that judicial powers can only be given to the courts under

the provisions of section 1 of article 6 of the Constitution. This precise question was considered in the case of *Bushnell v. Leland*, 164 U. S. 684, 17 S. Ct. 209, 41 L. Ed. 598, where it was said: "All these alleged errors may be reduced to the single contention that under the national banking law the comptroller of the currency is without power to appoint a receiver to a defaulting or insolvent national bank, or to call for a ratable assessment upon the stockholders of such bank, without a previous judicial ascertainment of the necessity for the appointment of the receiver and of the existence of the liabilities of the bank; and that the lodgment of authority in the comptroller, empowering him either to appoint a receiver or to make a ratable call upon the stockholders, is tantamount to vesting that officer with judicial power, in violation of the constitution. All of these contentions have been long since settled, and are not open to further discussion. *Kennedy v. Gibson*, 8 Wall. 498 [19 L. Ed. 476]; *Casey v. Galli*, 94 U. S. [673] 674 [24 L. Ed. 168]; *U. S. v. Knox*, 102 U. S. [422] 423 [26 L. Ed. 216]. When, after the adjudication in *Kennedy v. Gibson*, the questions were for a second time pressed in argument, the court contented itself with calling attention to the fact that they had been affirmatively adjudicated upon, and were concluded. We see no reason now to reopen controversies which were then treated as concluded, and have since been approved and in all respects fully affirmed. The contention that there is now presented in argument a grave constitutional question, which was not pressed or considered in the prior cases, is a mere assumption which has no foundation in fact. A casual inspection of the points pressed by counsel in *Casey v. Galli*, makes evident the fact that the very arguments now advanced were then urged upon the court, and held to be untenable." We have not been cited to, nor have we found a single decision of the United States Supreme Court which questions the soundness of this conclusion. Many decisions support it.

Appellant seeks to escape the result of these decisions by urging that under the Constitution of the United States Congress may give to executive and administrative officers and boards judicial powers, while in California the Constitution expressly vests in the courts, provided for in section 1 of article 6 of the Constitution,

all the judicial powers of the state. While this is true, we have had for many years executive and administrative officers and boards and legislative bodies vested with quasi judicial powers with the full sanction of the courts under the limitations of the Constitution. Illustrations of the quasi judicial powers given to officers and boards may be found in 6 California Jurisprudence 681 to 684, inclusive, with the authorities cited supporting the grants of such powers. The quasi judicial powers thus granted are incidental and supplemental to the main powers of the officers and boards and are not held primarily judicial. If the act of the superintendent of banks in adding the figures showing the liability of a bank, and doing the same with those showing its assets, and counting its liquid assets and then comparing the results, and, where necessary calling for an assessment, can constitute something resembling a judicial act, they are incidental powers and can be nothing more than quasi judicial acts. They do not possess the qualities of judicial acts nearly as much as those of city councils and boards of supervisors in phases of local improvement proceedings which have been recognized and upheld by the courts. If these powers given the superintendent of banks are in any manner judicial, they are not such powers as are restricted to the courts by section 1 of article 6 of the Constitution.

Appellant urges that all of his stock in the bank having been acquired prior to August 14, 1931, the effective date of the Bank Stockholders' Liability Act, the Legislature has changed the nature of his contract as a stockholder which it cannot do under the provisions of the Constitution prohibiting the passage of laws impairing the obligations of contracts.

[10, 11] In considering this question, we must bear in mind that our Constitution has reserved to the state the right to alter or repeal laws affecting corporations. This provision becomes a part of the charter of every corporation organized in this state. This rule has been recognized in this state since the decision in the case of *French v. Teschemaker*, 24 Cal. 518. In *McGowan v. McDonald*, 111 Cal. 57, 43 P. 418, 420, 52 Am. St. Rep. 149, the precise question we are considering was before the Supreme Court. It was there said: "It is objected, however, that, if the provisions of the Code and constitution are applicable, they impose obligations upon appellants for which they were not liable when they be-

came stockholders, and are in conflict with that provision of the constitution of the United States which inhibits the states from passing laws impairing the obligation of contracts, and are therefore as to them unconstitutional and of no effect. The answer to this objection is that the constitution of 1849 provided: 'Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed.' Article 4, § 31. (Under the authority thus conferred, both the legislature and the people had power to change the law in regard to the liability of stockholders, without violating any provision of the constitution of the United States." See, also, *Pacific Gas & Electric Co. v. State of California*, 214 Cal. 369, 6 P.(2d) 78; *Peterson v. Ball*, 211 Cal. 461, 296 P. 291, 74 A. L. R. 187; *Aronson & Co. v. Pearson*, 199 Cal. 286, 249 P. 188, 51 A. L. R. 1380; *Kaiser Land & Fruit Co. v. Curry*, 155 Cal. 638, 103 P. 341. The case of *Sherman v. Smith*, 1 Black (66 U. S.) 587, 17 L. Ed. 163, is authority for the conclusion that where a state has reserved the right to amend an act under which a bank was organized, it might impose a liability on stockholders for after-acquired debts where none existed before without violating any of the provisions of the Federal Constitution.

Appellant contends that if the Bank Stockholders' Liability Act be held constitutional and sufficient to create a liability on the stockholders for subsequent debts, it cannot be held to apply to and justify an assessment for antecedent debts because such interpretation of the law would violate the obligations of contracts already incurred. This argument naturally divides itself into two parts, namely, (1) concerning the stock owned prior to the repeal of section 3 of article 12 of the Constitution, and (2) concerning the stock acquired after that time and before August 14, 1931. The second problem involves the question of whether or not there remained in California any law imposing liability on the stockholders of a corporation between the date of the repeal of section 3 of article 12 of the Constitution and the time the Bank Stockholders' Liability Act became effective. We will consider these two questions in the order stated.

[12, 13] It is too well settled to require extensive citation of authorities that under

the provisions of section 3 of article 12 of the Constitution, and section 322 of the Civil Code, a contractual relation existed between the stockholders of a corporation and its creditors. *Whittier v. Visscher*, 189 Cal. 450, 209 P. 23; *Coombes v. Getz*, 285 U. S. 434, 52 S. Ct. 435, 437, 76 L. Ed. 866. The contracts were created by law and their terms imposed upon the stockholders the direct and personal obligation of each stockholder to pay to each creditor such proportion of the "debts and liabilities" contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation. Section 322, Civ. Code. In the case of *Coombes v. Getz*, supra, the Supreme Court of the United States had before it the effect of the repeal of that portion of section 3 of article 12 of the Constitution placing a joint or several liability on the directors of corporations to the creditors and stockholders for money embezzled or misappropriated by the officers during the terms of office of the directors. The situation there presented was exactly analogous to the one we are considering. The Supreme Court of the United States there said: "When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute." That case must be regarded as settling the law in California that the repeal of section 3 of article 12 of the Constitution did not relieve the stockholders of a corporation of their contractual liability to the creditors for their proportionate share of the debts contracted by the corporation during the time they were stockholders and before the repeal of that section. Article 1, § 10, Const. of U. S.; article 1, § 16, Const. of Cal. It is also authority for the conclusion that the repeal of section 322 of the Civil Code did not relieve the stockholders from a like liability for antecedent debts unless the repeal of the constitutional provision effected an implied repeal of the Code section.

[14, 15] These last-cited provisions of the Federal and of the State Constitutions are general in their terms and throw their protection around the entire contract. They give no right or protection to the

creditor that can be denied to the debtor. The contractual benefits to the creditor cannot be lessened, nor the obligations of the debtor increased by any law passed in this state. The case of *Coombes v. Getz*, supra, dealt with the question from the point of view of the creditor and held that his contractual rights could not be impaired or taken away by the repeal of section 3 of article 12 of the Constitution. In the instant case we have the reverse of that situation presented. We must answer this question: If we uphold the contention of respondent and hold that he may levy the assessment on appellant to pay all indebtedness of the bank regardless of whether the debts or any portion of them were contracted prior to the repeal of section 3 of article 12 of the Constitution, is a greater obligation placed on appellant than existed before the passage of the Bank Stockholders' Liability Act and the levy of the assessment under it? If we answer this question in the affirmative, we must hold that the assessment cannot be levied to pay any debts contracted prior to the repeal of the constitutional provision in question.

Appellant owned about 15 per cent. of the issued stock of the bank at the time of the repeal of the constitutional provision. For the purpose of convenience and illustration only, we may assume that the bank had contracted about \$308,000 of debts before that date and during the time defendant owned that stock. We may also assume that other stockholders were insolvent and judgment proof. Appellant's total liability to these creditors, assuming he owned 15 per cent. of the issued stock, was \$46,200 and no more. The payment of that sum would completely satisfy the obligation of his contract to these creditors. He could be called upon to pay no more. This obligation would be extinguished by such payment. In the instant case, the superintendent of banks is calling upon appellant to pay \$78,050 (\$2,500 of which is paid) to be applied upon \$925,055.42 of the indebtedness of which we have assumed that \$308,000 was incurred prior to November 4, 1930, and which he proposes to pay in part with the assessment collected from appellant. Thus about one-third of the \$78,050, or the sum of \$26,016.66, is to be applied on the indebtedness created prior to the repeal upon which appellant had a contractual obligation of \$46,200 and no more. It will thus be seen that under the construction of the law urged by respondent

ent, and the facts we have assumed, the obligation of appellant would be increased by \$26,016.66 from \$46,200 to \$72,366.66 on these debts. This cannot be done. It increases the obligation of his contract contrary to the provisions of both the Federal and State Constitutions.

[16] We next consider the effect of the repeal of section 3 of article 12 of the Constitution on the effectiveness of section 322 of the Civil Code. Appellant acquired 595½ shares of stock in the bank between the election repealing the constitutional provision and August 14, 1931, the effective date of the repeal of section 322 of the Civil Code by act of the Legislature. It is obvious that if the Code section was not in effect during that time, there was no contractual relation to be interfered with that could attach to the ownership of these shares.

There is no final decision of the supreme or appellate courts of the state to which we have been cited bearing on this problem. In the case of *W. Fine & Son v. Hall*, 21 P.(2d) 697, the Third District Court of Appeal decided that the repeal of the constitutional provisions did not effect a repeal of section 322 of the Civil Code. A hearing was granted by the Supreme Court in that case and the appeal was dismissed before it was decided there. The Honorable Adolphus F. St. Sure, United States District Judge for the Northern District of California, held that the repeal of section 3 of article 12 of the Constitution repealed section 322 of the Civil Code by necessary implication. *Hoffman v. W. H. Worden Co.* (D. C.) 2 F. Supp. 353. The Honorable William P. James, United States District Judge for the Southern District of California reached a contrary conclusion and held that the Code section was not repealed by the repeal of the section of the Constitution. In *re Motor Transit Terminal Corporation* (D. C.) 4 F. Supp. 841.

The Senate resolution setting forth the amendment to section 1 and the repeal of section 3 and other sections of article 12 of the Constitution thus states the purpose of the Legislature: "For the purpose of removing existing limitations upon the power granted by section 1 of article 12 of the constitution amended as herein proposed, sections 2, 3, * * * of article 12 of the constitution is hereby amended.
* * * " St. 1929, p. 2239.

Under the general powers possessed by the Legislature, we have no doubt that independent of section 3 of article 12 of the Constitution it possessed the authority to impose upon stockholders of corporations the liabilities fixed by section 322 of the Civil Code and that section 3 of article 12 of the Constitution simply imposed a limitation on these powers. That section did not pretend to be a grant of power. If the Legislature possessed the power to impose a liability on stockholders, the repeal of the constitutional provisions limiting the extent of the exercise of that power should not be construed as a repeal of section 322 of the Civil Code passed under general powers possessed by the Legislature independent of the repealed section. We have read and studied all the cases cited by counsel and amici curiæ on this question and those cited in the three cases we have just cited, besides others. We have concluded that the correct rule is announced in *W. Fine & Son v. Hall*, supra, and in *Re Motor Transit Terminal Corporation*, supra. In our opinion the conclusions in those cases are supported by sound reasoning and ample authority which it would serve no good purpose to repeat here.

Our study of the subject has given us an additional reason for our conclusion that the repeal of section 3 of article 12 of the Constitution did not repeal section 322 of the Civil Code. It was first adopted in 1872 while the Constitution of 1849 was still in force. Our present Constitution was not adopted until 1879, seven years after the adoption of the Code section. During those years the Code section could not have drawn its vitality from the present Constitution. It has been held that the adoption of the Constitution of 1879, which superseded that of 1849, did not repeal section 322 of the Civil Code, but that it was continued in force and effect by section 1 of article 22 of the Constitution of 1879. *Borland v. Haven* (C. C.) 37 F. 394; *Gardiner v. Bank of Napa*, 160 Cal. 577, 117 P. 667. This section of the Constitution stands in its original form. While section 322 of the Civil Code has been amended at various times, there was no material difference between its provisions as to the liability of stockholders to creditors at the time of its repeal than those contained in the section as adopted in 1872. If section 1 of article 22 of the Constitution be considered as necessary to have continued the Code section in force, that sec-

tion of the Constitution, which is still unrepealed, gave the Code section lasting force and effect. The repeal of section 3 of article 12 of the Constitution, which was but a virtual copy of the opening sentences of section 322 of the Civil Code as then in effect, should not be held to effect a repeal of the Code section as that law did not find its origin or existence in the repealed section of the Constitution, but either in the general powers of the Legislature over corporations or in the section 1 of article 22 of the Constitution or both. It is our conclusion that section 322 of the Civil Code was not repealed by the repeal of section 3 of article 12 of the Constitution, but remained in full force and effect until the effective date of its repeal by the Legislature on August 14, 1931.

[17, 18] It is settled law that section 322 of the Civil Code created a contractual liability upon the stockholders of a corporation to pay their proportionate shares of the debts of the corporation to creditors coming within its provisions. *Sonoma Valley Bank v. Hill*, 59 Cal. 107; *Brown v. Merrill*, 107 Cal. 446, 40 P. 557, 48 Am. St. Rep. 145; *Winona Wagon Co. v. Bull*, 108 Cal. 1, 40 P. 1077; *Chambers v. Farnham*, 182 Cal. 191, 187 P. 732; *Anderson v. Schloesser*, 153 Cal. 219, 94 P. 885. These contractual relations were of continual creation between creditors and stockholders up to the time of the repeal of the Code section on August 14, 1931. What we have just said concerning the liability of stockholders who owned stock prior to the repeal of section 3 of article 12 of the Constitution and the conclusions reached on that subject are equally applicable to the liability of stockholders who acquired their stock after the repeal of that section and before the repeal of section 322 of the Civil Code. No law can change the obligation of an existing contract. The liability of appellant on his stock acquired after the repeal of the constitutional provision was contractual in nature and was fixed by the Code section. The Bank Stockholders' Liability Act could not increase the amount of that obligation. Therefore the superintendent of banks could not levy an assessment on the stock of appellant to pay any debts of the bank antedating August 14, 1931, the date of the repeal of the Code section. He must apply the money collected by him on such assessment on debts contracted on or after that date.

[19] As a last resort in seeking to support the right to levy an assessment for and to pay the money collected upon antecedent debts, respondent urges that we should take judicial notice of the general financial conditions existing during the past several years and uphold his position under the general police powers of the state. He cites many cases, among which is *Noble State Bank v. Haskell*, 219 U. S. 104, 31 S. Ct. 186, 188, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487, where it is said: "It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518, 17 S. Ct. 864, 42 L. Ed. 260. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." He urges that in the present emergency nothing can promote the "public welfare" more than safe banking and the knowledge on the part of depositors that their money will be repaid to them.

The same contention was made in the case of *Wood v. Hamaguchi*, 207 Cal. 79, 277 P. 113, 117, 63 A. L. R. 861, and was thus answered by the Supreme Court: "It but remains to consider the remaining contention of appellant that authority is found for the liability imposed by the so-called Bank Act, in the general police powers of the state. This contention requires little discussion. The case of *Frost v. City of Los Angeles*, 181 Cal. 22, 183 P. 342, 6 A. L. R. 468, cited by appellant in support of his contention, contains language to the effect that, while the legislature possesses the entire police power of the state, such power is limited by the provisions of the Constitution of California and the Constitution of the United States. Volume 12 of *Corpus Juris*, p. 929, states this limitation as follows: 'However broad the scope of the police power it is always subject to the rule that the legislature may not exercise any power that is expressly or impliedly forbidden to it by the state constitution.' The following cases are to the same effect: *Ex parte Whitwell*, 98 Cal. 73, 32 P. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152; *In re Smith*, 143 Cal. 368, 77 P. 180; *San Diego, etc., Ass'n v. City of East San Diego*, 186 Cal. [252], 254, 200 P. 393, 17 A. L. R. 513. And in *People v. Holder*, 53 Cal. App. 45, 199 P. 832, the court said: 'It is well settled that the po-

lice power cannot be made a cloak under which to overflow or disregard constitutional rights.'” The Constitution of the United States and of California both prohibit the Legislature from passing any law that would interfere with the obligations of contracts. For the reason that the Bank Stockholders’ Liability Act, if held applicable to antecedent debts, would violate the express provisions of both Constitutions as to those debts, it cannot be upheld as a valid exercise of the police powers of the state.

Another line of cases holds that under the police power private property may be summarily destroyed without violating either the provisions of the Fourteenth Amendment to the Federal Constitution or those of sections 13 and 14 of article 1 of the State Constitution. *Patrick v. Riley*, 209 Cal. 350, 287 P. 455; *Graham v. Kingwell*, 218 Cal. 658, 24 P.(2d) 488; *Adams v. Milwaukee*, 228 U. S. 572, 33 S. Ct. 610, 57 L. Ed. 971. In these cases and those of similar import the property involved was usually inherently dangerous to life, health, or morals or to the safety of person or property. The facts of the instant case do not bring it within the classification upon which the foregoing cases and those which follow the same rule depend for the soundness of their reasoning to escape the effect of the rule announced in *Wood v. Hamaguchi*, *supra*, which must be considered as controlling here.

[20, 21] Courts will not hold acts of the Legislature unconstitutional unless it is clearly necessary to do so. Where two reasonable constructions can be placed on an act, one resulting in holding it constitutional and the other unconstitutional, it is our duty to adopt the one resulting in holding it constitutional. We can see no reason why the constitutionality of the Bank Stockholders’ Liability Act may be questioned if its provisions are held to apply only to debts and liabilities contracted or incurred after the effective date of the act. We therefore hold that the assessment cannot be levied to pay, and the money collected cannot be used to liquidate debts or liabilities of the bank contracted or incurred prior to August 14, 1931. Creditors of that period must be left to their remedies against the stockholders under the laws in force at that time.

[22] We do not need to reverse the judgment because we conclude that the assessment cannot be levied for, or the money

collected to pay, antecedent debts. It is stipulated that the liabilities of the bank contracted after August 14, 1931, amount to \$512,013.07. The assessments if fully paid will produce only \$111,600. This is sufficient showing of the necessity for the assessment in view of the fact that the question was not raised in the answer and was not litigated nor considered in the trial court. In making this statement we are not passing upon the meaning of the word “conclusive” as used in section 2 of the Bank Stockholders’ Liability Act (St. 1931, p. 339).

[23] In a final reply brief filed by amici curiæ after all other briefs had been filed, the point is made for the first time that the record does not disclose the amount of the assets of the bank and that these assets with the assessments might furnish a surplus of money after paying the debts and liabilities contracted or incurred after August 14, 1931. This question was not raised at the trial or in any of the other briefs and its presentation at that time is entirely too late to require us to consider it seriously.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



9 Cal.App.2d 6

LACEY et al. v. McCONNELL et al.

Civ. 9329.

District Court of Appeal, Second District,
Division 1, California.

Aug. 15, 1935.

1. Novation ☞7

Agreement to convey realty, signed by one of three parties, held not a novation of earlier agreement to convey, signed by all three of parties, in view of absence of any suggestion that agreement was intended to be a novation, or of an intention to release any one from first contract.

2. Vendor and purchaser ☞352

In action for damages for failure to convey property, finding that one of the three defendants had executed agreement to convey the property held not inconsistent with a finding that the three defendants had executed a prior agreement to convey the property.

3. Vendor and purchaser ⇨352

In action for damages for failure to convey property, finding that one of the three defendants had executed an agreement to convey *held* not irreconcilable with a finding that all three defendants had executed a prior agreement to convey; hence, even if inconsistency existed in findings, findings were sufficient to sustain judgment under rule that all inconsistencies must, if reasonably possible, be resolved in favor of judgment rendered.

4. Judgment ⇨250

Finding that allegations of complaint which charged fraud were untrue *held* not to prevent granting of relief sought, where other facts pleaded and proved established cause of action irrespective of fraud, since party is entitled to any relief appropriate under scope of his pleadings and within facts alleged and proved, irrespective of theory upon which they may be alleged.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Will L. Lacey and another against Lucile McConnell, administratrix of the estate of William C. McConnell, deceased, Margaret A. Bott, formerly Margaret A. Putnam, and another. From an adverse judgment on one of the four causes of action stated, Margaret A. Bott, formerly Margaret A. Putnam, appeals. Affirmed.

Patterson & Montgomery, William S. Scully, and Earl S. Patterson, all of Los Angeles, for appellant.

Spencer Ward, of Los Angeles (Scott McReynolds, of Los Angeles, of counsel), for respondents.

ROTH, Justice pro tem.

[1-3] This appeal is prosecuted on the judgment roll alone. The record before us shows that the respondents filed their complaint setting forth four causes of action. The motion of defendant Bott for nonsuit was granted as to the first, second, and third causes of action. On the fourth cause of action judgment went against her, as well as against the other defendants, who do not appeal. The first question presented is whether the findings made by the trial court are so inconsistent that the judgment against appellant must be set aside. The inconsistency to which our attention has been directed arises from a finding made by the trial court on the

second cause of action (in which judgment was against the nonappealing defendants), and one on the fourth cause of action, which is against all defendants. With reference to the second cause of action the trial court found it to be a fact that McConnell for himself and as liquidator of the partnership of McConnell & Watson made an agreement, dated May 5, 1929 (Exhibit A attached to the complaint), wherein they agreed to deliver to respondents property of the value of \$3,000 as consideration for property which had been theretofore conveyed to appellant by respondents. Respondents had owned a parcel of property of the value of \$3,000 which they had conveyed to appellant, apparently, as will appear from the subsequent finding to be excerpted, for the benefit of appellant and nonappealing defendants; this conveyance having been made under an agreement executed on or about March 9, 1929, which is alleged in the fourth cause of action. The nature of the transaction made as of March 9, 1929, is specifically set forth in a finding made by the trial court in which the court says: "That on or about the 9th day of March, 1929, the defendant Margaret A. Bott and the said William C. McConnell, the latter acting for himself and as liquidator of the assets of said partnership, as the agent of the defendant Floyd Watson, entered into an agreement with the plaintiffs wherein and whereby the plaintiffs agreed to convey and did convey to said Margaret A. Bott, who was then known as Margaret A. Putnam, the real property described in paragraph I hereof; and the defendant Margaret A. Bott, then known as Margaret A. Putnam, the defendant Floyd Watson, through said William C. McConnell, his agent, and the said William C. McConnell, in consideration thereof agreed to cause to be conveyed to plaintiffs certain of said fig lands in Riverside County, California, which were of the value of three thousand dollars." Since we do not have the benefit of a record of the evidence, we do not know why the separate findings were made, but we see no inconsistency in the two findings on their face which would warrant a reversal of the judgment. The finding excerpted in *hæc verba* clearly indicates that on March 9, 1929, respondents, pursuant to agreement with all three defendants, conveyed to appellant real property of the value of \$3,000, and that defendants agreed

to cause to be conveyed to respondents certain fig lands in Riverside county in consideration therefor. It appears from the finding made on the second cause of action, to which attention has been already directed, that on May 5th the non-appelling defendants directly agreed to convey this Riverside county property. No written agreement apparently was made on March 9th, but respondents actually conveyed the property they owned to appellant apparently for the benefit of all three defendants. It may very well be that the title to the Riverside property was either vested in the nonappelling defendants or such defendants were the ones who could cause this conveyance. To assure respondents that it would be done, a separate agreement was made to that effect, although it does not appear to have been signed by respondents. The court specifically found also that it was not signed by defendant Watson. Assuming that it was an effective agreement binding McConnell, the agreement itself does not pretend to be a novation of the first contract and there is no suggestion anywhere that it is. It sets forth no release of the appellant or any of the defendants from the contract of March 9th, and no facts are found which remotely suggest there was an intention on the part of respondents to release anyone from the first contract. It is clear, therefore, that defendant McConnell, as well as the two other defendants, was bound on the contract of March 9th, and that as to him the finding of the execution of the contract of May 5th was a duplication of the same obligation. Defendant Watson and defendant Bott, however, were bound on the contract of March 9th. The judgment is for the total sum of \$3,000 as against all defendants. We see nothing inconsistent in such findings (Bickerdike v. State, 144 Cal. 681, 693, 78 P. 270); but if there is any inconsistency, it is settled that in the construction of findings all inconsistencies must, if reasonably they can be so construed, be resolved and reconciled in favor of and to sustain the judgment actually rendered and that only when findings cannot be reconciled should a judgment be reversed. Haight v. Haight, 151 Cal. 90, 90 P. 197. The findings in this case are not irreconcilable. Faure v. Drollinger, 60 Cal. App. 594, 213 P. 724; Anderson v. Anderson, 68 Cal. App. 218, 228 P. 715; Goodwin v. Snyder, 70 Cal. App. 98, 232 P. 763; Wil-

son v. Mattei, 84 Cal. App. 567, 258 P. 453.

[4] The second and final point urged by appellant is that the fourth cause of action sounded in fraud and was for damages, and that because the court specifically found there was no fraud, the cause of action cannot be sustained. It is true that the court found that the allegations in the fourth cause of action which charged fraud were untrue. In view of the other allegations, however, this is immaterial. The facts were pleaded and proved and as pleaded and proved established a cause of action irrespective of any fraud. It is well settled that a party is entitled to any and all relief which may be appropriate under the scope of his pleadings and within the facts alleged and proved, irrespective of the theory upon which they may be alleged. Haight v. Stewart, 36 Cal. App. 514, 172 P. 769; Corey v. Struve, 170 Cal. 170, 172, 149 P. 48. The relief granted in this case was within the scope of the facts alleged and found to be true.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.



8 Cal.App.2d 704

PEOPLE v. FOSS.

Cr. 2743.

District Court of Appeal, Second District,
Division 2, California.

Aug. 8, 1935.

Homicide 250

Evidence held sufficient to sustain conviction of murder.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

David Rudolph Foss was convicted of murder, and he appeals.

Judgment affirmed.

Stanley Visel, of Los Angeles, and J. D. Willard, of Redwood City, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

CRAIL, Justice.

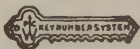
This is an appeal from a conviction of murder and from the order denying the defendant's motion for a new trial.

It is the first contention of the defendant that the evidence does not support the verdict as a matter of law. We have carefully read the record. It would serve no useful purpose to set forth the nauseating details of the crime, nor to set out the facts and circumstances in evidence upon which the verdict is based. It is sufficient to say that there is substantial evidence to support the verdict.

The second and last contention of the defendant is "that the evidence, if it shows the defendant to be guilty at all, does not support any degree of crime greater than manslaughter and that the trial court erred in not so reducing the degree on the motion for new trial." This contention has already been answered by our statement that there is substantial evidence to support the verdict.

Judgment and order affirmed.

I concur: STEPHENS, P. J.



9 Cal.App.2d 27

SCHAFFLER et al. v. HURLBERT.

Civ. 9632.

District Court of Appeal, First District,
Division 1, California.

Aug. 17, 1935.

Specific performance § 121 (3)

Evidence that aged father, no longer able to care for his property, had induced daughter and her family to make their home upon parcel of father's land near father and to erect and maintain gasoline station thereon upon promise to give such parcel to daughter, that daughter and family had entered into complete possession of parcel, and that parcel was specifically located, staked out, and agreed upon by parties, held to entitle daughter to specific performance of promise to convey parcel.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Violet R. Schaffler and another against Benjamin Franklin Hurlbert. Judgment for plaintiffs, and defendant appeals.

Affirmed.

F. H. Arb, of Hayward, for appellant.

Crosby & Crosby and Stanley R. Sterne, all of Oakland, for respondents.

TYLER, Presiding Justice.

Action for specific performance of an oral agreement to convey real property. Trial was had before the court and judgment went in favor of plaintiffs. Defendant appeals. The facts, briefly stated, are in substance as follows: In 1929, defendant, appellant herein, was the owner of a parcel of real property located at the intersection of Niles highway and Harder road in Alameda county. He was desirous of having his daughter and her family, who resided in San Francisco, live upon and improve the same. There were some buildings facing the Niles highway upon the property, in one of which appellant lived and conducted a small store, selling gasoline and oil. In the same year the state took steps to widen Niles highway and a strip of some fifty feet in width was taken, and the buildings were either moved back or torn down. Appellant informed his daughter and her husband that it would make a fine gas station and that if the husband would give up his position in San Francisco, where he was earning \$200 a month, he would deed the property to his daughter after he received his compensation for the land taken by the state and a homestead which stood upon the property was released. At this time the daughter was under the impression that her father's offer included the entire tract. Later the father sent for his other daughters and consulted with them concerning the contemplated gift. He informed them of his intention to make a gift of the property in question to his daughter Violet, and stated to them that they were to receive like values out of his property, but one of them would have to await her share from the proceeds of his life insurance. To this arrangement they all agreed. The father then pointed out and designated the portion of the tract his daughter Violet was to receive. Subsequently, in the same year, said daughter went to live on the property in question, and her husband

came there a few days later and she with her husband and children have been in exclusive possession of the same ever since. Appellant has continued to live in a small cottage located on part of the original tract, which is separated from the land in question by a fence. After taking possession of the premises, pursuant to the agreement of the parties, respondents proceeded to improve the same, erecting thereon a new gasoline station and installing proper equipment, which improvements amounted to some \$2,000.

Aside from the testimony of respondents, there is abundant testimony in the record from disinterested witnesses to the effect that appellant agreed to give the property in question to his daughter. It is contended by appellant the evidence is not sufficiently certain to authorize specific performance, and the boundaries of the property claimed were not definitely identified or agreed upon; further, that respondents did not have or exercise exclusive occupancy or control over the same. The evidence shows complete possession by the donee, together with the erection of valuable improvements upon the property. It also shows that it was specifically located, staked out, and agreed upon by the parties. The evidence clearly establishes, and the court found in reliance upon the agreement, that the land so improved has been in the possession of the donee ever since the agreement. This evidence is sufficient to justify a decree of specific performance as against the donor. *Peixouto v. Peixouto*, 40 Cal. App. 782, 181 P. 830. The claim that there was no exclusive possession of the property is equally without merit. The testimony of appellant himself shows that he occupied a little cottage in another portion of the tract, which portion was fenced off from the property in question, and that appellant assisted in the erection of the fence.

The case presents the situation of an aged and infirm parent, no longer able to care for his property, inducing his daughter to enter into the agreement in question; that the daughter accepted her parent's proposition, has lived near him, and in so doing has materially changed her position. The transaction was one in which no unfair advantage was taken of the parent by his daughter; it was proposed by him without any inducement on her part. It would be inequitable under

all the circumstances were the agreement not enforced.

The judgment is affirmed.

We concur: CASHIN, J.; KNIGHT, J.



8 Cal.App.2d 653

ALAMEDA COUNTY v. FREITAS.

Civ. 9519.

District Court of Appeal, First District,
Division 2, California.

Aug. 6, 1935.

Hearing Denied by Supreme Court
Oct. 4, 1935.

1. Penalties ⇐16

Where mode of enforcement of statutory penalty is there prescribed, no other procedure is ordinarily available.

2. Master and servant ⇐83

Statute providing that amount of penalties against contractor who failed to observe provisions of Public Works Wage Rate Act should be withheld when making payments to contractor of money due under contract held to provide exclusive mode of enforcing penalties, and to preclude recovery of alleged penalties by action after final payment had been made (*St. 1931, p. 910*).

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Action by the County of Alameda, of the State of California, against George Freitas. Judgment for defendant, and plaintiff appeals.

Affirmed.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., and Robert H. McCreary, Deputy Dist. Atty., all of Oakland, for appellant.

Johnson & Shaw and J. P. Shaw, all of Oakland, for respondent.

SPENCE, Justice.

Plaintiff sought by this action to recover certain penalties alleged to be due from the defendant contractor under the so-called Public Works Wage Rate Act (*St. 1931, c. 397, p. 910*). A demurrer was sustained to plaintiff's second amended complaint and, upon plaintiff's failure to

amend within the time allowed, judgment was entered in favor of defendant. Plaintiff appeals from said judgment.

Said act requires that the public body awarding any contract for public work on behalf of any county shall ascertain the general prevailing rate of per diem wages in the locality in which the work is to be performed for each craft or type of workman needed to execute the contract, and shall specify such rate of wages in the call for bids and in the contract. It is made mandatory upon the contractor to pay not less than the prevailing rates so specified, and it is provided that the contractor shall forfeit, as a penalty to the county, \$10 for each calendar day or portion thereof, for which any workman is paid less than such prevailing rate. It is required by section 3 of the act that the contractor and each subcontractor shall keep accurate records showing the names and occupations of all workmen and the per diem wages paid to each workman which records must be open to the inspection of the public body awarding the contract, its officers and agents. By section 2 of the act, it is made the duty of the public body awarding the contract, its officers and agents, to withhold all sums forfeited by the provisions of the act when making payments to the contractor of money due under the contract.

It is entirely clear from what has been said that the right to the penalties in question was of statutory creation and that the statute creating the right also provided the means of enforcement by authorizing the withholding of the penalties from the payments due under the contract. In the present case, it appeared that plaintiff failed to withhold the penalties as authorized but, after the final payment had been made, sought to recover said penalties in this action.

[1,2] Appellant contends that each of the counts of the second amended complaint stated a cause of action against the defendant and that the trial court erred in sustaining the demurrer to said complaint. In our opinion this contention cannot be sustained. The general rule is stated in 25 Corpus Juris at page 1185 as follows: "Where a statute gives a penalty and prescribes the form of remedy for its recovery, such form is exclusive." The rule is similarly stated in 20 California Jurisprudence, p. 987, § 9, as follows:

"The right is purely of statutory creation, and if the mode of enforcement is prescribed no other procedure is ordinarily available." See, also, *In re Estate of Ward*, 127 Cal. App. 347, 354, 15 P.(2d) 901; *County of Monterey v. Abbott*, 77 Cal. 541, 18 P. 113, 20 P. 73; *Reed v. Omnibus R. Co.*, 33 Cal. 212; *Ward v. Severance*, 7 Cal. 126; *People v. Craycroft*, 2 Cal. 243, 56 Am. Dec. 331; 25 R. C. L. 1058. The statute here did not purport to give the county a right of action to recover alleged penalties after the final payment had been made, but merely authorized the enforcement of the right to the penalties by withholding from the payments made under the contract. We conclude that this was the exclusive mode of enforcement and that the demurrer to the second amended complaint was properly sustained.

The judgment is affirmed.

We concur: **NOURSE, P. J.; STURTEVANT, J.**



9 Cal.App.2d 32

DUTY v. DENNIS et al.

Civ. 1938.

District Court of Appeal, Fourth District,
California.

Aug. 19, 1935.

Appeal and error — 371

Motion to dismiss appeal was granted where transcript on appeal was not accompanied by required filing fee, transcript was never filed nor fee paid, appellant did not appear to contest motion after due notice of hearing, and no excuse for failure to pay filing fee had been presented.

Appeal from Superior Court, Imperial County.

Action by Harry L. Duty against V. R. Dennis, doing business under the name and style of the V. R. Dennis Construction Company, and others. From the judgment, plaintiff appeals. On motion to dismiss plaintiff's appeal.

Appeal dismissed.

Frank Birkhauser, of El Centro, for appellant.

William H. Wylie and Ed P. Sample, both of San Diego, for respondents.

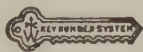
JENNINGS, Justice.

This motion by respondent to dismiss the appeal herein is based on the failure of appellant to have filed a transcript of the record within the time prescribed by the rules of this court for filing such document. The motion is supported by the certificate of the county clerk. This certificate shows that judgment was entered on May 4, 1934, and that on May 11, 1934, appellant filed notice of appeal. The clerk's transcript on appeal was thereafter prepared and was sent to the clerk of this court. It was not, however, accompanied by the fee required by law to be paid for the filing thereof. The records of this court show that the filing fee has not been paid and that for this reason the aforesaid transcript has not been filed. It is obvious that the appellant was not entitled to have the transcript filed without payment of the filing fee. Due notice of the hearing of this motion was served on appellant's counsel and he did not appear to contest the motion. No excuse for appellant's long-continued failure to pay the filing fee has been presented.

It is therefore ordered that the motion be granted and the appeal is accordingly dismissed.

I concur: MARKS, Acting P. J.

BARNARD, P. J., being absent, does not participate herein.



8 Cal.App.2d 709

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. CLARK et al.
Civ. 9834.

District Court of Appeal, First District,
Division 1, California.
Aug. 9, 1935.

Rehearing Denied Sept. 7, 1935.
Hearing Denied by Supreme Court
Oct. 7, 1935.

I. Escrows ⇨10

Where grantee in escrow agreement fails in performance of his obligation under agree-

ment between grantor and grantee for compliance with certain conditions precedent to delivery of deed, escrow holder may not deliver deed until there is strict compliance with conditions.

2. Escrows ⇨1

Agreement by grantor and grantee to all terms of instructions, and acceptance by third party of position of depository creates escrow.

3. Escrows ⇨1

Before proposed escrow is valid there must be binding contract between parties.

4. Deeds ⇨58(1)

Delivery of deed to third person merely constitutes depository as agent of grantor.

5. Escrows ⇨1

Where grantor deposits deed with third person to await performance of condition, escrow does not exist until there is acceptance of condition by grantee.

6. Escrows ⇨1

Designation of transaction as escrow does not make it such unless essential characteristics of escrow exist.

7. Escrows ⇨10

After creation of escrow, grantee may amend or modify terms of instruction relative to delivery of deed; but in such case depository acts as grantor's agent and ceases to represent grantee.

8. Escrows ⇨1

Where grantor deposited deed with bank to be delivered to grantee upon compliance with certain conditions to which bank agreed, but to which grantee did not agree, and bank was without authority to agree to conditions on behalf of grantee, escrow agreement did not exist as between grantor and grantee.

9. Escrows ⇨9

Grantor, who failed to insist upon grantee's compliance with conditions of escrow agreement after knowledge that deed had been delivered without grantee's compliance with such condition, and that escrow holder had loaned money to grantee on security of trust deed to property, held estopped from claiming violation of escrow agreement.

10. Estoppel ⇨58

Conduct of person whose rights would be affected by waiver of legal right which is such that other person was misled, to his prejudice, into honest belief that waiver was intended or consented to, held sufficient to work estoppel.

11. Escrows ⇨10

Improper delivery of deed by escrow holder before grantee had complied with con-

dition of escrow agreement held ratified by failure of grantor to insist upon performance of such condition after knowledge of grantee's failure to comply therewith, and of fact that money was loaned by escrow holder to grantee on security of property conveyed.

12. Appeal and error ◊1116

In action to quiet title, Court of Appeal would not decree that defendant should pay plaintiff purchase price of property in question as condition precedent to decree that defendant had title to property, in absence of basis for such action other than prayer for general relief in complaint.

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by the Security-First National Bank of Los Angeles against Harry A. Clark, the San Diego Trust & Savings Bank, and others. Judgment for the San Diego Trust & Savings Bank, and plaintiff appeals.

Affirmed.

William M. Hiatt, of Los Angeles, and Hamilton, Lindley & Higgins, of San Diego, for appellant.

Stearns, Luce & Forward and Fred Kunzel, all of San Diego, for respondents.

WARD, Justice pro tem.

This is an action to quiet title. The Security-First National Bank of Los Angeles is the successor in interest to the Pacific-Southwest Trust & Savings Bank; the defendants Harry A. Clark, Elizabeth Clark, and Los Angeles Trust & Safe Deposit Company were served with summons but defaulted. The real controversy is between the Security-First National Bank of Los Angeles and the San Diego Trust & Savings Bank, located in San Diego, relative to a certain parcel of land in San Diego county. As a matter of brevity plaintiff and appellant herein will be referred to as the "Los Angeles bank," and the defendant and respondent as the "San Diego bank."

Plaintiff through its predecessor held the legal title to the property involved in trust for certain beneficiaries who had, under the terms of the trust indenture, the entire management and control of the property. Clark offered to buy the property for an agreed sum of \$15,000. He deposited \$1,000 to apply on the purchase price, the bal-

ance to be paid in ninety days. Prior to the expiration of this period and without a written acceptance of the offer by the Los Angeles bank, Clark took possession of the property and started the erection of buildings thereon. Requiring financial aid to continue the work, Clark applied for a loan of \$18,000 from the San Diego bank. The Los Angeles bank forwarded to the San Diego bank a deed to Clark and his wife, and a promissory note for \$14,000 to be executed by Clark and his wife to be secured by a deed of trust to the Los Angeles bank subject to a first deed of trust to the San Diego bank. A letter accompanied the documents, the portion thereof pertinent to the controversy in this case reading as follows: "Also, it is a further condition of this escrow that the loan of \$18,000.00 obtained by Mr. and Mrs. Clark from the San Diego Trust and Savings Bank be used only for the payment of material and labor claims existing vs. the property on this date and the balance for the completion of the Bungalow Court now in the process of construction to the extent of 32 cottages, under a contractors bid and bond guaranteeing the completion of such project without further incumbrance." No bid or bond as set forth in the letter of instruction was procured by the San Diego bank. Clark was personally superintending the construction of the work and refused to employ a contractor. The San Diego bank claims title through the deed from the Los Angeles bank to the Clarks, the trust deed from Clark and his wife to the San Diego bank, and a foreclosure of said trust deed at which the San Diego bank become the purchaser. It will be noted that the deed was deposited by the grantor, appellant herein, with respondent San Diego bank to be delivered to grantees upon the performance of certain conditions; namely, obtaining a contractor's bond guaranteeing the completion of the project without further incumbrance, to be used only for the payment of material and labor claims existing against the property on the date of delivery of the deed, and the balance for the completion of the building project then in course of construction.

[1-8] When there is an agreement between the grantor and the grantee to comply with certain conditions, and the grantee fails in whole or in part in the performance of his obligation, the third party as an escrow holder may not deliver the

deed until there is a strict compliance with the conditions. *Dyson v. Bradshaw*, 23 Cal. 528-536; *McLaughlin v. Clausen*, 85 Cal. 322-327, 24 P. 636; *Los Angeles City High School Dist. v. Quinn*, 195 Cal. 377-383, 234 P. 313. The agreement by the grantor and the grantee to all terms of instructions, and the acceptance by a third party of the position of depository, create the escrow. *Holland v. McCarthy*, 173 Cal. 597, 160 P. 1069. "It is equally well established in this state that before a proposed escrow may have any validity there must be a binding contract in existence between the parties to such escrow." *Elliott v. Title Insurance & Trust Co.*, 64 Cal. App. 508, 511, 222 P. 175, 177. The delivery of a deed to a third person merely constitutes the depository the agent of the grantor. If the grantor deposits with a third party, to await the performance of some condition, an escrow does not exist until there is an acceptance by the grantee of the condition. *Kenney v. Parks*, 125 Cal. 146-149, 57 P. 772. The designation of a transaction as an "escrow" does not necessarily make it such unless the essential characteristics of an escrow exist. *Keyes v. Meyers*, 147 Cal. 702, 82 P. 304; *Fitch v. Bunch*, 30 Cal. 208, 209-212. If an escrow is created the grantor may amend or modify the terms of the instruction relative to delivery, but if so the depository merely becomes and acts as the grantor's agent and ceases to represent the grantee. *Huntington Park Improvement Co. v. Park Land Co.*, 165 Cal. 429-435, 132 P. 760. There was an acceptance and agreement by the third party, the San Diego bank, subject to a modification in the letter of instructions, by substituting a deed of trust for a mortgage, that the matter was "to be handled in accordance with the instructions." However, the agent could not agree on behalf of the principal, the grantee, unless authorized to do so. There is no evidence in the record to prove that the San Diego bank was authorized to agree to the terms of the instructions in behalf of the grantee, and there was no acceptance by the grantee of the provision in the letter of instruction to supply a contractor's bond. We must therefore conclude that as between the grantor and the grantee in this case an escrow agreement did not exist.

[9-11] Appellant cites authorities upholding its contention that the terms of escrow instructions must be strictly construed, and that any delivery of a deed in

violation of the instructions passes no title. Assuming that Clark directly or through the San Diego bank accepted the conditions set forth in the letter of instructions, we are confronted with the fact that the Los Angeles bank waived compliance with the conditions in controversy. In response to appellant's communication requesting the filing of a completion notice by the contractors, or requesting that steps be taken to enforce the bond, the San Diego bank in reply explained that "the Clarks are also negotiating for the sale of other property in San Diego, the proceeds of which will be used in full payment of all unpaid claims and amounts due * * *." There were other communications between appellant and C. C. C. Tatum, a beneficiary under the original trust indenture and agent of plaintiff in this transaction, showing that the deviation by respondent from the instructions given by the grantor was known by appellant. Knowledge of the failure to perform in accordance with the condition, without protest, was a waiver of the failure to secure a contractor's bond. Appellant was apprised of the facts and its conduct indicated that the waiver should be acted upon. Respondent, relying upon the failure of appellant to insist upon the contractor's bond, continued to advance money to the grantee to finish the work under his own supervision. Appellant was estopped from claiming a violation of the instructions. *Lusitanian-American Development Co. v. Seaboard D. C. Corp.*, 1 Cal. (2d) 121-128, 34 P.(2d) 139. Respondent was aware of the true state of the facts relative to the method of the grantee in erecting the buildings under his own supervision instead of by the employment of a contractor, but it was ignorant of appellant's claimed insistence after communications thereon that a bond should be provided. In *Johnson v. Kaeser*, 196 Cal. 686, 698, 239 P. 324, 329, the court said: "It is no less true that where the conduct or the acts of the party whose rights would thus be affected by a waiver have been such as to mislead the other party, to his prejudice, into the honest belief that a waiver was intended or consented to, then such conduct or acts will be held sufficient to work an estoppel as against the former." Appellant knew that the deed had been delivered and that a contractor's bond had not been obtained. If there was an improper delivery it was ratified by the conduct of the appellant. *Sunderlin v. Warner*, 42 Idaho, 479-491, 246 P. 1-5.

The written instructions, except the request for a contractor's bond, were fully complied with. In lieu of the bond respondent obtained from the grantee a deed and agreement on property, other than the property in question, guaranteeing the completion of the project. The buildings were completed substantially and no liens or incumbrances attached to the property which would have been discharged by a contractor's bond. Under all of the circumstances appellant was practically protected and stood in the same position as if a bond had been secured.

Appellant attacks the findings as "wholly unreliable," the result of conflict and error; but we find that the findings are amply supported by the evidence.

[12] The action filed by plaintiff and appellant Los Angeles bank is to quiet title. In the closing brief appellant requests this court to reverse the judgment of the court below, or, if respondent San Diego bank be permitted to have title to the land, that as a condition precedent to such holding this court decree that the San Diego bank pay to the Los Angeles bank the purchase price of the property. Except under the prayer for general relief in the complaint there is no basis for such action. The respondent in its reply brief lays stress upon the point that it should not be deprived of the property without receiving compensation for the improvements. The neglect or failure of the parties to adjust their difficulties is a matter in which this court is not concerned.

The Los Angeles bank executed a deed to the Clarks, and accepted in return a deed of trust subject to the deed of trust of the San Diego bank. If the San Diego bank had not deviated from the letter of instructions but had demanded a contractor's bond from Clark instead of the deed to the other property accepted as security, we are not satisfied from the record that the Los Angeles bank would be in any better situation to protect itself than without the contractor's bond. No evidence of a substantial detriment or injury by noncompliance with the letter of instruction appears from the record. Before the institution of the foreclosure proceedings by the San Diego bank, the Los Angeles bank wrote the San Diego bank in part as follows: "However, so far as this bank is concerned, you need not withhold any ac-

tion, but may proceed with the foreclosure of the trust deed in your favor."

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.



9 Cal.App.2d 31

MILLER v. BANDY et al.

Civ. 1936.

District Court of Appeal, Fourth District,
California.

Aug. 19, 1935.

Appeal and error ⇐787

Appeal from judgment of superior court entered June 10, 1931, would be dismissed where superior court made order on June 5, 1935, terminating proceedings to procure transcript, no proceedings were pending to procure bill of exceptions, and nothing was filed in District Court of Appeal except notice of motion to dismiss appeal, points and authorities, affidavit of service, and supporting certificate of county clerk (Code Civ. Proc. § 953a).

Appeal from Superior Court, Kern County.

Action by Robert S. Miller against Carroll L. Bandy, Jack Hughes, and others, in which the named defendants filed cross-complaints. From the judgment, defendant Carroll L. Bandy appeals.

Appeal dismissed.

Borton, Petrini & Conron, of Bakersfield, for respondents.

MARKS, Acting Presiding Justice.

This is a motion to dismiss an appeal from a judgment of the superior court of Kern county which was entered on June 10, 1931. On June 5, 1935, the superior court made an order terminating the proceedings to procure a transcript under the provisions of section 953a, of the Code of Civil Procedure. There are no proceedings pending to procure a bill of exceptions. Nothing has been filed in this court except the notice of motion to dismiss the appeal, points and authorities, affidavit of service,

and the supporting certificate of the county clerk of Kern county.

The motion is granted, and the appeal is dismissed.

I concur: JENNINGS, J.



BURNS v. PETERS et al. *
Civ. 1120.

District Court of Appeal, Fourth District,
California.

Aug. 17, 1935.

Hearing Granted by Supreme Court
Oct. 14, 1935.

1. Mortgages ⇨138

While ordinarily trust deed conveys title and is not strictly speaking a lien, it may at times and for some purposes be treated as an encumbrance.

2. Trusts ⇨169(1)

Trust will not be permitted to fail because of refusal of named trustee to act.

3. Mortgages ⇨67

Delivery to beneficiary of trust deed which was given to secure indebtedness owing to beneficiary held sufficient delivery so far as principal parties were concerned, notwithstanding that there was no delivery to trustee.

4. Mortgages ⇨97

Where clause in trust deed conflicts with other portions of instrument and meaning of entire instrument is involved, court must look to entire instrument and to surrounding circumstances to determine intention of parties.

5. Contracts ⇨162

Where two clauses of contract cannot be reconciled, first clause should be received and the latter rejected.

6. Contracts ⇨163

Intention disclosed by written portions of contract prevail over printed portions where the two are conflicting (Civ. Code, § 1651).

7. Contracts ⇨170(1)

Construction placed upon instrument by parties themselves is most persuasive.

8. Contracts ⇨153

Where two constructions of contract are possible, construction which leaves contract

valid will be preferred, since it is reasonable to suppose that parties meant something by their agreement.

9. Mortgages ⇨8, 151(4)

Trust deed which was given to secure indebtedness owing to beneficiary created equitable lien or mortgage as between parties thereto, whether or not trust deed was effective as a trust deed, and took precedence over subsequent attachment by settlor's creditor.

10. Mortgages ⇨151(4)

Attaching creditor is not bona fide purchaser, and when attaching property subject to mortgage, whether recorded or not, he takes only interest mortgagor had at time of levy.

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by May B. Burns against W. H. Peters and another. From a judgment in favor of the named defendant, the plaintiff appeals.

Reversed, with directions.

John T. Hon and Wright, Monroe, Thomas & Glenn, all of San Diego, for appellant.

Hamilton, Lindley & Higgins and John H. McCorkle, all of San Diego, for respondents.

BARNARD, Presiding Justice.

In this action both parties sought to quiet their title to certain real property in San Diego county. This appeal is from a judgment in favor of the defendant Peters, who will be referred to as the respondent. The facts are undisputed and the question involved is whether a sale under a trust deed given to the appellant by the corporation owning the property gave her title, notwithstanding another sale to the respondent upon execution and after attachment in an action brought by him against the corporation.

The action last referred to was filed on May 4, 1931, and an attachment issued the same day was levied against the real property. Judgment followed on May 24, 1932, and the property was sold on execution to the respondent on July 5, 1932.

The appellant was the secretary of the corporation which was indebted to her in the sum of \$5,000. On August 30, 1928, the corporation executed and handed to her a note for that amount, together with a trust deed securing the same and cover-

ing this real property. The trustee named in the trust deed was Title Insurance & Trust Company and, admittedly, the instrument was not delivered to that company. This trust deed was recorded on December 13, 1930, and was apparently acknowledged on that date; the acknowledgment being irregular, as will hereafter appear. On September 4, 1931, the appellant commenced an action in the superior court of San Diego county to have a trustee appointed under the trust deed. Judgment was entered in this action on September 23, 1931, appointing another trustee in lieu of Title Insurance & Trust Company. A foreclosure sale under the trust deed was had on January 23, 1932, and a trustee's deed to the appellant was recorded on February 16, 1932.

This controversy has arisen in part because of the manner in which the instrument was acknowledged but mainly because of the following statement which appears in the trust deed: "This deed of trust shall not be effective unless prior to its recordation, the trust is accepted by the trustee, under its corporate name and seal, by a duly authorized official thereof." A photostatic copy of the trust deed is in the record, from which it appears that a printed form was used in which the name of the trustee, Title Insurance & Trust Company, occurs three times; the last being at the end of the instrument where a place was provided for the acceptance of the trust by that company. While the name of the company is there printed, no signature appears in the space provided for the signature of a trust officer of the company. With this exception the blanks in the body of the instrument are appropriately filled in and the instrument was executed by the corporation owning the land through its president and secretary, with its seal attached. The trusts upon which the land is to be held are set forth in seven numbered paragraphs and following that the paragraph above quoted appears.

At the beginning of the acknowledgment are the printed words, "State of California, County of Los Angeles." The words "Los Angeles" therein are crossed out and "San Diego" written in place thereof with a pen. The acknowledgment then recites that on "this 13th day of December," no year appearing, the president and secretary of the corporation, all named, appeared before William H. Frailey, a notary public "in and for said county"

and acknowledged in the usual manner that the corporation had executed the same. Following the notary's signature appear the words, "Notary Public in and for the county of Los Angeles, State of California." Attached to the acknowledgment is the notary's seal containing the words, "Wm. H. Frailey, Notary Public, San Diego Co., Calif."

While the respondent concedes that an attachment lien reaches only such interest as a debtor has at the time of the levy and that a deed or trust deed which actually conveys a title takes precedence over a subsequent attachment, he argues that there was no conveyance or pledge here which had become effective at the time his attachment issued, that this trust deed was an absolute nullity unless the trust was accepted before the instrument was recorded, that having been recorded before the trust was accepted by the trustee it could never become effective for any purpose and that, in any event, it was without force and effect until a decree was entered in the action seeking the appointment of a trustee, which was after the attachment had been levied. It is further argued that the clause requiring acceptance by the trustee named is a condition precedent which was never performed, that no title ever passed to the trustee, that a trust deed does not create a lien but conveys a title, and that, therefore, no question of a lien can be here considered. And, further, that the instrument in question was never delivered, since it was handed to the beneficiary and not delivered to the trustee named therein.

[1-3] While ordinarily a trust deed conveys title and is not, strictly speaking, a lien, we are not in accord with respondent's contention that it may not be considered in that light under proper circumstances. The general nature of a trust deed is well set forth in *MacLeod v. Moran*, 153 Cal. 97, 94 P. 604, where the court points out that such an instrument is, after all, practically and substantially only a mortgage with a power of sale. It may at times and for some purposes be treated as an encumbrance. *Hollywood Lumber Co. v. Love*, 155 Cal. 270, 100 P. 698. It is a general rule that a trust will not be permitted to fail because of the refusal of the named trustee to act. In view of the purpose of such a trust deed as this and the nature of the interest of the parties thereto, it must be held that

it is not rendered void by failing to deliver the same to the trustee, and that the delivery to a beneficiary is a sufficient delivery, at least in so far as the principal parties thereto are concerned. *Field v. Arrowsmith*, 3 Humph. (Tenn.) 442, 39 Am. Dec. 185; *Stewart v. Fowler*, 3 Ala. 629; *Wells v. German Ins. Co. of Freeport, Ill.*, 128 Iowa, 649, 105 N. W. 123; *Crocker v. Lowenthal*, 83 Ill. 579.

[4-8] While the respondent argues that the clause requiring an acceptance by the trustee is plain and calls for no construction, he overlooks the fact that that clause conflicts with other portions of the instrument and that the meaning of the entire instrument is involved. Under such circumstances the courts often must look to the entire instrument and to the surrounding circumstances for the purpose of determining the intention of the parties. 6 R. C. L. 849. The general rule is that where two clauses of a contract cannot be reconciled the first shall be received and the latter rejected. 6 R. C. L. 847. The intention disclosed by the written portions of a contract should prevail over the printed portions thereof, where the two are conflicting. Civ. Code, § 1651. The construction placed upon an instrument by the parties themselves is also most persuasive. *Moore v. Superior Court*, 114 Cal. App. 333, 299 P. 760. Where two constructions are possible, the one leaving the contract valid will be preferred, since it is reasonable to suppose that the parties meant something by their agreement. 6 Cal. Jur. 268. A contract must be so interpreted as to make it operative if this can be done without violating the intention of the parties. Civ. Code, § 1643. An interpretation which gives effect is preferred to one which makes void. Civ. Code, § 3541.

In applying these rules we are not convinced that the clause relied upon by the respondent destroys the effect of this instrument as a trust deed. The clause in question appears in the printed form which was used and obviously was not noticed or considered controlling by the parties as shown by their conduct. Not only was this clause for the protection and benefit of the trustee, but the entire circumstances negative the idea that it was the intention of the parties that this instrument should have no effect until an acceptance by the trustee was secured. The trial court found that \$5,000 had been actually ad-

vanced by the beneficiary to the corporation which then owed her that amount. The trust deed was delivered to her and later acknowledged and then recorded. The evidence is that the trustee was not spoken to about the matter until foreclosure proceedings were being started. In a subsequent court action between the principal parties to the transaction another trustee was appointed, followed by the sale of the property. The clause in question is practically the last clause in the instrument, and theretofore the trust deed recites that the corporation is indebted to the beneficiary in the sum of \$5,000 and has agreed to pay the same, that one of the purposes of the execution of the instrument is to secure the payment of said indebtedness, that in consideration of the debt the trustor does hereby grant and convey the property to the trustee to secure the debt and to be reconveyed upon payment of the same, with appropriate provisions for sale and payment of the amount due in case of default, and paragraph 7 reads as follows: "This deed of trust secures the payment of all the indebtedness and the performance of all the obligations hereinbefore referred to, and in all its parts, except as herein otherwise provided, applies to, inures to the benefit of, and binds, the heirs, administrators, executors, successors and assigns of all and each of the parties hereto."

The appellant and the corporation treated this as a valid trust deed as between themselves, as shown by their actions and conduct, and its validity as between them was recognized in the action for the appointment of another trustee, in which action the corporation was a defendant, and which action is binding on the real parties in interest to the trust deed. In *Wood Estate Co. v. Chanslor*, 209 Cal. 241, 286 P. 1001, 1004, the court said:

"It is too elementary to need citation of authority that, if the corporation is estopped, in absence of fraud, the estoppel likewise applies against the creditors of the corporation. This is so because the creditors get only the rights of the debtor, and no more. 10 Cal. Jur. 652.

"It should also be pointed out that the two parties to the trust deed—i. e., the mining company and respondent—are not seeking to avoid the instrument, but, in fact, both are seeking to uphold it. Appellants' objection is that the authority of

the agent must be in writing under our statute of frauds. Just how a third party to such a contract can attack it, when the two principals do not object, is not made to appear. It would seem to be the rule that third parties cannot avail themselves of the defense of the statute if the two principals acquiesce. 12 Cal. Jur. 925; 25 R. C. L. 736."

[9, 10] Whether or not this instrument be construed to be sufficient as a trust deed, we think it must be upheld as an equitable lien or mortgage. *Earle v. Sunnyside Land Co.*, 150 Cal. 214, 88 P. 920; *Hollywood Lumber Co. v. Love*, supra; *Wood Estate Co. v. Chanslor*, supra; *Withers v. Bousfield*, 42 Cal. App. 304, 183 P. 855.

Being effective as between the parties this instrument took precedence over a subsequent attachment. An attaching creditor is not a bona fide purchaser and when attaching property subject to a mortgage, whether recorded or not, he takes only the interest the mortgagor had at the time of the levy. *Motor Acceptance Co. v. Finn*, 124 Cal. App. 766, 13 P.(2d) 761; *Ahern v. Tulare Lake Canal Co.*, 115 Cal. App. 93, 1 P.(2d) 490; *Iknoian v. Winter*, 94 Cal. App. 223, 270 P. 999; *Richman v. Bank of Perris*, 102 Cal. App. 71, 282 P. 801; *Eichler v. Gray* (C. C. A.) 27 F.(2d) 328; *Farmers' Exch. Bank v. Purdy*, 130 Cal. 455, 62 P. 738.

Under our views on the main points presented it is not necessary to pass on the sufficiency of the acknowledgment on this instrument, although we would hesitate to hold that it was not sufficient to entitle the paper to be recorded, since it plainly appears therefrom that it was acknowledged in San Diego county before a notary public in and for that county, although the name of the county was not changed in the final line of the printed form of certificate.

The trial court found that on August 30, 1928, the corporation in question was indebted to the appellant in the sum of \$5,000, that it then executed this instrument for the purpose of securing this indebtedness, that on that day it placed the same in the hands of the appellant, and that it was filed for record on December 13, 1930. As conclusions of law, the court found that the deed of trust was not delivered, that the purported delivery to the appellant was not sufficient to pass any

title, that the deed of trust by its own terms did not become effective for any purpose because it was not accepted by the trustee named therein prior to its recordation, that the deed of trust was not so acknowledged as to entitle it to be recorded, that the spreading of it upon the records of San Diego county did not constitute notice to the respondent, and that the appellant had no right, title, or interest of any kind in and to said real property at the time the attachment was levied on May 14, 1931. Under the circumstances here appearing we think this instrument was not a nullity, and that the conclusions drawn are erroneous.

For the reasons given, the judgment is reversed, with directions to the trial court to enter a judgment in favor of the appellant, quieting her title.

I concur: JENNINGS, J.



9 Cal.App.2d 10

PEOPLE v. PAIVA.

Cr. 1434.

District Court of Appeal, Third District,
California.

Aug. 15, 1935.

Criminal law §538(3)

Evidence held to sustain conviction for murder and rape of seven year old sister, and murder of six year old sister, where defendant fully comprehended nature of confession, and it was not procured by threats, undue influence, or an offer of reward, especially where confession was corroborated by circumstances.

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Cieverino Paiva who answers his true name to be Sevrino Paiva was convicted of rape and murder of his seven year old sister and of murder of his six year old sister, and he appeals.

Affirmed.

Clinton W. Johnson and George Foote, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant was convicted on three counts as charged in an information which was filed against him and sentenced to state prison for life. The first count charged him with the murder of his seven year old sister Marion. The second count charged him with the murder of his six year old sister Mary, and the third count charged him with the rape of his sister Marion. Notice of appeal from the judgment which was accordingly rendered and from the order denying a motion for new trial was duly filed.

The cause was set for hearing before this court for June 24, 1933, at which time George W. Foote, Esquire, was substituted as attorney for the defendant. At his request the defendant was granted fifteen days in which to file his opening brief on appeal. The cause was not orally argued. No brief has been filed in behalf of the defendant within the time allowed or at all. The cause was duly submitted.

In spite of the fact that the case was not argued and that no brief was filed in behalf of the defendant, on account of the seriousness of the charges of which the defendant was convicted, the transcript of evidence and proceedings has been carefully examined. We are unable to find that it contains any reversible error in procedure, rulings, or instructions, and it therefore becomes necessary to affirm the judgment.

It appears that the defendant, who was sixteen years of age, resided with his parents in Sacramento. The family consisted of several children, including Marion, aged seven years; Mary, aged six years; and Alfred, aged about fourteen years. September 1, 1934, the defendant's parents left their home at 4 o'clock in the afternoon to pick hops at a ranch nearby. The defendant and his brother Alfred, together with the two named sisters, were left at the house. The following day the defendant and his brother Alfred appeared at the hop ranch about 1 o'clock in the afternoon. The entire family returned to their home where they arrived at 8 o'clock in the evening. It does not appear that the parents had previous information regarding the death of the little girls. Entering the kitchen, the parents discovered the remnant of a cake of ice and the shelves which had been removed from the ice box. Opening the ice box the bodies of Marion and Mary were found therein.

Both of the children were dead. A physician was called and made a post mortem examination of the children. There is ample evidence to sustain the verdicts against the defendant of his conviction of rape upon the person of his sister Marion and of the murder of both children. The record sustains the charges and satisfactorily indicates that the defendant, after committing the crime of rape upon the person of Marion, removed the ice and the shelves from the large ice box and placed both children therein, closing the door upon them and thereby causing them to suffocate. After an investigation of the circumstances, Sevrino was arrested and placed in jail.

On September 11th the defendant made a voluntary confession to one of the inmates of the jail, who communicated this statement to the sheriff. On the same day this confession was repeated to the officers by the defendant. Four witnesses, including the sheriff and Ralph Clark, a newspaper reporter, testified that this confession was made by the defendant voluntarily with the statement that he wanted to tell the truth because he felt better on that account. This confession was then written out and carefully read and discussed with the defendant, who thereupon voluntarily signed it in the presence of five other individuals. The written confession reads as follows:

"I got the two of them and put them in the ice box and shut the door. The reason that I put them there was because I started to rape them then changed my mind. And I was out of my head. That is the reason I done it. My brother was with me when I done it then we went up the hill with my bicycle and then we went over to the hop fields and that was all. Also while I was doing it my brother kept telling me not to do it.

"Piva
"Sirevino

(Upon the reverse side:)

"Witnesses
"James Jardin
"Joe Perkins

"Sept. 11, 1934. Foregoing confession admitted in presence of James Jardiin, Joe Perkins, Ralph Clark, James Hester and Donald Cox.

"Donald Cox."

Another separate confession in approximately the same language was subsequently written out and signed by the defendant. There appears to be no doubt that he fully

comprehended the nature of this confession and that it was not procured by threats, undue influence, or an offer of reward. It is corroborated by all of the circumstances disclosed by the record.

The judgment and the order are affirmed.

I concur: PULLEN, P. J.



8 Cal.App.2d 482

LOCKE v. MELINE et al.

Civ. 7966.

District Court of Appeal, Second District,
Division 1, California.

July 23, 1935.

Rehearing Denied Aug. 20, 1935.

Hearing Denied by Supreme Court
Sept. 19, 1935.

1. Accord and satisfaction ☞25(1)

Defense of accord and satisfaction must be specially pleaded.

2. Appeal and error ☞1002

Verdict of jury on question of fact would not be disturbed, where there was sharp conflict in evidence with probative evidence on each side in which every feature of cause of action was put in issue.

3. Trial ☞169

Motion for directed verdict should be granted only when evidentiary status of case is such that court would be warranted in granting nonsuit.

4. Judgment ☞199(1)

Order for entry of judgment notwithstanding verdict held improperly entered on motion for new trial, where motion for directed verdict had been properly denied (Code Civ. Proc. § 629).

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by Applewite S. Locke, administratrix of the estate of Benjamin F. Locke, deceased, against Frank L. Meline and another. From an order for judgment for defendants entered on motion of defendants for new trial, plaintiff appeals.

Reversed and remanded.

Thomas H. Hearn, of Los Angeles, for appellant.

Walter H. Hewicker, of Los Angeles, for respondents.

Hearing denied by Supreme Court; SEAWELL and SHENK, JJ., dissent.

ROTH, Justice pro tem.

[1, 2] This action was instituted by Benjamin F. Locke, now deceased. Appellant, as administratrix of his estate, has been substituted in his place. The complaint contained three causes of action, but was actually tried on the first, which was a cause of action based on a written contract made with Locke by defendants to pay him a sum of money in return for certain services. The answer of defendants to the first cause of action denied all of its material allegations and set up separate defenses based upon the statute of limitations and the statute of frauds. The action was tried before a jury. It would serve no good purpose to recite in detail, or otherwise, the evidence submitted. It is sufficient to say that Locke submitted substantial evidence to support all of the material allegations of the first cause of action and that defendant placed every material allegation in issue and submitted substantial evidence in defense. The defense of the statute of limitations and the statute of frauds pleaded did not apply since the contract alleged was proved to be in writing, and although evidence was submitted upon the subject of accord and satisfaction, this defense was not specially pleaded, and, under the law, it must be. *Hansen v. Fresno Jersey Farm Dairy Co.*, 220 Cal. 402, 409, 31 P.(2d) 359. Further, it is apparent that the jury did not believe it to have been proved. It is clear, therefore, that there was a sharp conflict with probative evidence on each side, in which every feature of the cause of action was put in issue, and on such a situation it is unnecessary to cite authorities to say that a verdict of a jury on a question of fact will not be disturbed. Prior to submission of the cause, a motion was made by defendants, respondents herein, for a directed verdict. The motion was denied. The jury brought in a verdict for the deceased in the sum of \$15,000. Judgment was entered thereon, and thereafter respondents moved for a new trial on all statutory grounds. In ruling upon said motion, the court made the following order: "Defendant's motion for a new trial, heretofore submitted, is now by the Court granted, and under section 629, C. C. P. Judgment ordered for defendants with their costs. * * *"

Appellant does not appeal from the order granting the motion for new trial. Her ap-

peal is limited to that part of the order which reads: " * * * And under section 629, C. C. P. Judgment ordered for defendants with their costs. * * *"

[3, 4] Section 629 of the Code of Civil Procedure provides: "When a motion for a directed verdict, which should have been granted, has been denied and a verdict rendered against the moving party, the court, at any time *before the entry of judgment*, either of its own motion or on motion of the aggrieved party, shall render judgment in favor of the aggrieved party notwithstanding the verdict. * * *" (Italics ours.) No motion was made prior to the entry of the judgment by defendants or either of them, nor did the court of its own motion order the entry of the judgment for defendants notwithstanding the verdict, pursuant to this portion of the Code section. The second paragraph of the section in question provides: "A motion for judgment notwithstanding such verdict may also be made in the alternative form, asking therefor and reserving, if that be denied, the right to apply for a new trial. If the motion for a directed verdict or for judgment notwithstanding the verdict be denied, the trial court on motion for new trial or the appellate court on appeal from the judgment may order judgment to be so entered when it appears from the whole evidence that a verdict should have been so directed at the trial. * * *"

A perusal of the record demonstrates, as has already been stated, that there was a sharp conflict in the evidence on all material issues. It is settled that a motion for directed verdict should be granted only when the evidentiary status of a case is such that a court would be warranted in granting a motion for nonsuit. *Card v. Boms*, 210 Cal. 200, 202, 291 P. 190; *Hunt v. United Bank & Trust Co. of Cal.*, 210 Cal. 108, 117, 291 P. 184; *Landers v. Crescent Creamery Co.*, 118 Cal. App. 707, 714, 5 P.(2d) 934; *Reinders v. Olsen*, 60 Cal. App. 764, 767, 214 P. 268. The motion for directed verdict was properly denied in this case, and it therefore follows that an order on a motion for new trial for the entry of a judgment notwithstanding the verdict was improperly made.

In the case of *Card v. Boms*, supra, the court in 210 Cal. 200, at page 202, 291 P. 190, 191, says: "The right of the trial court to set aside a verdict and enter a contrary judgment is absolutely the same as its right

to grant a nonsuit. * * * The court should therefore grant such a motion when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff."

The order herein appealed from for judgment in favor of defendants is reversed and the cause remanded for new trial.

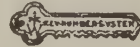
We concur: HOUSER, Acting P. J.; YORK, J.

On Petition for Rehearing.

PER CURIAM.

The petition of respondents for rehearing of this cause is denied. Notwithstanding the intemperate and impertinent language of the attorney for respondents in his petition for rehearing, we have carefully re-read and again scrutinized the record. Upon consideration of respondents' petition in connection with the record, we find no sufficient reason for change or modification of the original opinion.

The petition of appellant for a rehearing is also denied.



9 Cal.App.2d 94

IN RE REED'S ESTATE.

Civ. 9883.

District Court of Appeal, First District,
Division 2, California.

Sept. 4, 1935.

1. Executors and administrators $\Rightarrow$ 315(4)

Where final account of executor was settled and decree of distribution was entered without provision for interest to general legatees, their remedy was to set aside decree of distribution and petition for interest on their several legacies.

2. Executors and administrators $\Rightarrow$ 504(3)

Claim of residuary legatee who sought to charge executor personally because of executor's neglect for an unreasonable time to pay general legatees should be heard on settlement of executor's account, and filing objec-

tions to such account after it had become settled was idle act.

3. Executors and administrators ⚡510(2)

Order denying motion of residuary legatee to surcharge executor's account *held* not appealable (Probate Code, § 1240).

4. Executors and administrators ⚡510(7)

Order denying motion of residuary legatee to surcharge executor because of his neglect to pay general legatees could not be considered on appeal, where no evidence had been brought up, since alleged delinquency of executor was issue of fact, and appellate court must assume that probate court had sufficient evidence before it to support its order.

5. Executors and administrators ⚡314(12)

Order denying objections to supplemental petition for distribution *held* not reviewable, where supplemental decree had granted petition from which no appeal had been taken.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Proceeding in the matter of the estate of Minna V. Reed, deceased. From an order denying the petition of the California Association of the New Jerusalem to surcharge the account of Harvey S. Craig, executor, petitioner appeals.

Affirmed.

David McC. McKell, of San Francisco, for appellant.

Harvey S. Craig, of Oakland, for respondent.

NOURSE, Presiding Justice.

On March 7, 1934, the probate court entered its decree of settlement of final account and of final distribution. On April 30, 1934, an order was entered vacating the decree of distribution and the executor was directed to file a supplemental petition for distribution. On June 1, 1934, a supplemental petition was filed from which it appeared that a number of specific legacies should carry interest under the provisions of section 162 of the Probate Code. On the day following, objections were filed by the residuary legatee to the first and final account and to the supplemental petition for distribution. This supplemental petition was heard in due course, and, on June 21, 1934, a new decree was entered under which the executor was or-

dered to pay to the named legatees "out of the property of the estate" specific amounts as legacies and interest thereon. At the request of the residuary legatee, all the residue was held undistributed until determination of its objections. On July 31, 1934, the residuary legatee filed a petition to surcharge "the first and final account" with the interest ordered paid to the legatees. On November 14, 1934, an order was filed denying the objections and the petition to surcharge the account. The residuary legatee has appealed from the order denying its petition to surcharge the executor's account, and "from that portion of the order of distribution made and entered the same date."

[1] The appeal presents questions of procedure alone. When the final account was settled and the decree of distribution was entered without provision for interest to the general legatees, their remedy was to set aside the decree of distribution and petition for interest on their several legacies. In *re* Estate of Willey, 140 Cal. 238, 73 P. 998. This course was followed, and the final account and the new decree of distribution became final and conclusive of all matters involved therein. This interest was ordered paid the general legatees without any finding of fault or neglect on the part of the executor; it was ordered paid "out of the property of the estate"; and no appeal has been taken from that part of the decree.

[2] The remedy of the residuary legatee is different. It sought to charge the executor personally because of his neglect for an unreasonable time to pay the general legatees. This is a matter to be heard on settlement of the executor's account. In *re* Estate of Sylvar, 1 Cal. App. 35, 37, 81 P. 663. When the final account was settled, the question of interest had not been raised, but it was raised in ample time to enable the residuary legatee to move to set the account aside and reopen the settlement. It was an idle act to file objections to this account after it had become settled.

[3-5] The order appealed from must be affirmed for these reasons: That part of the order denying appellant's motion to surcharge the executor's account is not an appealable order (section 1240, Probate Code); if there be any doubt as to wheth-

er this order is appealable, the order must be affirmed because, since the alleged delinquency of the executor is an issue of fact, and since none of the evidence has been brought up, we must assume that the probate court had sufficient evidence before it to support its order; that part of the order denying appellant's objections to the supplemental petition for distribution has been foreclosed by the supplemental decree granting the petition and from which no appeal was taken. That portion of the supplemental decree of distribution from which the appeal is noticed is not supported by either record or evidence, and no attack is made upon it in any of the briefs.

The orders are affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.



8 Cal.App.2d 716

CASTERA v. GABELLIERI et al.
Civ. 10538.

District Court of Appeal, Second District,
Division 1, California.
Aug. 9, 1935.

Rehearing Denied Aug. 16, 1935.

Execution ⇐ 185

Third party claimant who desires to release property of judgment debtor from levy must give security therefor (Code Civ. Proc. § 710).

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by John Castera against Alessandro Gabellieri and another. From the judgment, Alessandro Gabellieri and the Italian Statuary & Art Company appeal. On petition of Alessandro Gabellieri and the Italian Statuary & Art Company for writ of supersedeas to stay proceedings on execution issued for enforcement of plaintiff's judgment against defendants.

Petition denied.

Ernest M. Torchia and W. A. Martin, both of Los Angeles, for appellants.

PER CURIAM.

This petition of a judgment debtor and of a third party claimant, for writ of supersedeas to stay proceedings on execution issued for enforcement of plaintiff's judgment against the judgment debtors, is denied. The judgments or orders from which petitioners have appealed are not the judgment on which execution has been issued. The statute contemplates that third party claimant, who desires to release property from levy, shall give security therefor. Code Civ. Proc., § 710; Mazuran v. Finn, 53 Cal. App. 656, 200 P. 769.



McBRIDE v. SAYLIN et al. *
Civ. 9265.

District Court of Appeal, Second District,
Division 1, California.
Aug. 16, 1935.

Hearing Granted by Supreme Court
Oct. 14, 1935.

Physicians and surgeons ⇐ 18(9)

Evidence that physician should have suspected presence of foreign body in eye, that he failed to exercise that degree of care which practice of his profession required in failing to make such examination as would make reasonably certain that there was nothing in eye, and that such lack of care was proximate cause of loss of sight, established prima facie case of malpractice against physician, and granting of nonsuit was error.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Clifton R. McBride against Dr. Joseph Saylin and another. From a judgment of nonsuit, the plaintiff appeals. Reversed.

Ben F. Griffith and Malcolm Archbald, both of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondents.

EDMONDS, Justice pro tem.

Plaintiff sued the defendant physicians for alleged malpractice in the treatment of an injury. The trial court granted a mo-

⇐ For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 56 P.2d 941.

tion for a nonsuit and entered judgment accordingly.

The injury suffered by the plaintiff was sustained on August 23d when the head of a nail struck him in the eye. He went for treatment to a medical office owned by the defendant Saylin and operated under the fictitious name of Venice Industrial Emergency Hospital. There he saw Dr. Bulpitt, who was working for Dr. Saylin under a written contract "as resident physician and surgeon of the Venice Industrial Emergency Hospital * * * and as assistant in the general practice of medicine and surgery," on a percentage basis with a minimum salary guaranteed.

According to the testimony of the plaintiff, he told Dr. Bulpitt that he had been struck in the eye by a nail head. The doctor examined the eye with a magnifying glass, and found a lineal laceration of the cornea, with air bubbles present. He removed some particles of rust from the eye, but he did not examine the laceration to see how far it extended, nor did he attempt to extract anything therefrom. The eye was washed out with boric acid, argyrol solution was instilled, and the eye covered with a pad. Plaintiff returned each day for treatments which consisted of washing out the eye and instilling the argyrol. On September 3d, according to plaintiff's testimony, Dr. Bulpitt told him that it would not be necessary to have further treatment. Under date of September 6th Dr. Saylin signed and sent to the insurance carrier of plaintiff's employer a "surgeon's final report", stating that first aid had been rendered by him, with professional services thereafter until September 3d, and that the results were "recovery."

On October 23d plaintiff returned to Dr. Bulpitt complaining of pain in the eye and diminishing sight. Dr. Bulpitt treated him for seven days, when he sent him to Dr. Morgan, and later to Dr. Osburn, both eye specialists. When Dr. Osburn examined the eye, he found a piece of steel in it which he removed. Some days after this operation the retina collapsed and plaintiff finally lost the entire sight of the eye.

Dr. Osburn and another physician were called and testified for plaintiff and the points presented on appeal arise from their testimony. In addition to the questions asked of Dr. Osburn concerning the condition of the eye as he found it and the treat-

ment he gave the plaintiff, the two physicians were asked more than sixty questions seeking to bring out that Dr. Bulpitt was negligent in not looking for and finding the piece of steel in plaintiff's eye at the time of the injury, and that the loss of sight resulted from the foreign body remaining in the eye until removed by Dr. Osburn. The trial court sustained objections to practically all of these questions. Plaintiff, however, presents as the first point on appeal that the evidence adduced by the few questions which were allowed to be answered proved a prima facie case of negligence. Error is also predicated upon the ruling sustaining objections to plaintiff's offered evidence.

The scant evidence received shows that when Dr. Osburn examined the plaintiff's eye in October he found a puncturing injury in the cornea, and directly behind it a window or tear in the iris with scars and inflamed vitreous; that by the use of an ophthalmoscope an opaque object was shown to be imbedded in the vitreous; and that this was a piece of steel which was removed in an operation taking about ten minutes. Dr. Osburn expressed the opinion that the piece of steel was probably in the same position when found by him as when it came to rest; that the loss of sight was caused by the entrance, presence, and removal of a foreign body; that the route the object took did not necessarily cause the eye to become blind; that the removal had nothing to do with the loss of vision; and that the length of time the particle stayed in the eye contributed considerably to the loss of vision, due to the inflammation resulting from its presence. Dr. Peters testified that the customary means used by physicians and surgeons to determine the presence or absence of a foreign body in the eye are the ophthalmoscope and the X-ray.

Under the settled law of this state, this evidence was sufficient to prove a prima facie case. In *re Estate of Lances*, 216 Cal. 397, 14 P.(2d) 768. The legitimate inference which may be drawn from it is that Dr. Bulpitt should have suspected the presence of a foreign body in the eye; that he failed to exercise that degree of care which the practice of his profession requires, in failing to make such examination as would make reasonably certain that there was nothing in the eye; and that this lack of care was the proximate cause of the serious and unfortunate injury to

plaintiff. The evidence would support such findings, and the action of the trial court in granting the motions for a nonsuit was unwarranted.

From the evidence in this case, it is difficult to understand how a physician looking at plaintiff's injured eye with air bubbles present and the laceration before him could feel that he had exercised ordinary professional care and skill without making any examination to see how deeply the injury extended, or doing anything to give reasonable assurance that there was no foreign body in the eye. Dr. Bulpitt had an X-ray in his office, but made no use of it in connection with plaintiff's injury. It would seem that with an injury to a portion of the human body as delicate and important as the eye, ordinary care and skill would at once suggest the importance of the most careful examination. In *Reynolds v. Struble*, 128 Cal. App. 716, 725, 18 P.(2d) 690, 694, in discussing the failure of a physician to use the X-ray in connection with the diagnosis of an injury, the court said: "There is further evidence that ordinary skill and care required the use of the X-ray as an essential aid to a skillful diagnosis, employing that skill and care possessed and used by the ordinary practitioner in that community. Indeed, it might be almost said that the use of the X-ray as an aid to diagnosis, in cases of fracture or other indicated cases, is a matter of common knowledge. Even the layman, when injured, of his own accord seeks the X-ray. And under the rule of *Jacobson v. Massachusetts*, 197 U. S. 11, 25 S. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765, the court could, in the absence of testimony, take judicial notice of this scientific advancement."

Also, the evidence establishes sufficiently at least for a prima facie case, that Dr. Bulpitt's lack of care was the proximate cause of the loss of sight. "If * * * it is necessary to demonstrate conclusively and beyond the possibility of a doubt that the negligence resulted in the injury, it would never be possible to recover in a case of negligence in the practice of a profession which is not an exact science." *Dimock v. Miller*, 202 Cal. 668, 671, 262 P. 311, 312.

The judgment is reversed.

We concur: CONREY, P. J.;
HOUSER, J.

8 Cal.App.2d 567

C. J. KUBACH CO. v. CITY OF LONG
BEACH et al.
Civ. 9378.

District Court of Appeal, Second District,
Division 1, California.
Aug. 1, 1935.

1. Municipal corporations ☞863

Under constitutional provision that no city shall incur any indebtedness or liability exceeding in any year income and revenue for that year, creditor of city who could not collect debt out of revenues collected in year indebtedness was incurred was not barred from recovery, where in that year indebtedness incurred by city did not exceed revenue for that year (Const. art. 11, § 18).

2. Action ☞35

Statutory remedy is generally cumulative to common-law remedy and does not abrogate it.

3. Municipal corporations ☞1038

Judgment creditor of city had right to levy upon property of city not exempt from execution in addition to statutory remedy of including judgments against city in tax levy (Gen. Laws 1931, Act 3918, §§ 1-4; Code Civ. Proc. § 688; § 690, subd. 15).

4. Municipal corporations ☞1038

Property held by city in its governmental capacity and income derived therefrom is exempt from execution.

5. Municipal corporations ☞1038

Parcel of land acquired by city to be used as needed for accommodation of municipal buildings held to have been purchased by city in its governmental capacity and to be impressed with public use exempting entire parcel from levy of execution, where two-thirds of parcel was used for accommodation of buildings and remainder leased for parking lot until such time as it would be needed (Code Civ. Proc. § 690, subd. 15).

6. Municipal corporations ☞1038

Public utility, such as waterworks, is held and operated by city in its proprietary and not its governmental capacity.

7. Municipal corporations ☞1038

Property owned by city in its proprietary capacity for purpose of exercising proprietary functions authorized by constitution is exempt from execution, since subjecting it to sale would interfere with exercise by city of some of powers for which it was organized.

8. Execution ☞38

Lessor's interest in oil lease can be sold separate and apart from land itself, and levy

upon lessor's interest is not levy upon land covered thereby.

9. Municipal corporations ⚡1038

Oil lease by city on subsurface of property, surface of which was used for city waterworks, *held* not exempt from execution, since lease was not made in city's governmental capacity or as necessary incident to exercise of proprietary use function (Code Civ. Proc. § 690, subd. 15).

10. Municipal corporations ⚡1038

Royalties received by city under oil lease are received merely as proprietor and are not devoted to use of public character or held in trust for public use, except as all moneys received by city are in a sense received for public purposes.

11. Municipal corporations ⚡1038

Public revenues derived from taxes are not generally subject to execution.

12. Municipal corporations ⚡1038

Royalties received by city from oil lease on subsurface of property owned by it *held* subject to execution by creditor of city even though city classified such royalties as revenues (Code Civ. Proc. § 690, subd. 15).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by the C. J. Kubach Company against the City of Long Beach and another. From an order denying defendant's motion to quash writ of execution, denying motion to recall and quash levy of execution on one parcel of land, and granting motion to recall and quash levy as to another parcel of land, both parties appeal.

Order denying motion to quash execution affirmed, order denying motion to quash the levy of the execution on the first parcel reversed, and order quashing levy as to second parcel reversed.

Richard J. O. Culver, of Los Angeles, and Denio, Hart, Taubman & Simpson, of Long Beach (Mathew C. Simpson, of Long Beach, of counsel), for C. J. Kubach Co.

Nowland M. Reid, City Atty., George W. Trammell, Jr., Asst. City Atty., and John O. Palstine, Deputy City Atty., all of Long Beach, for City of Long Beach and Title Guarantee & Trust Co.

ROTH, Justice pro tem.

C. J. Kubach Company, a corporation, hereinafter referred to as "company," re-

covered a judgment against the city of Long Beach, hereinafter referred to as "city," in the sum of \$117,822.59, which was entered on December 31, 1932. There was no appeal taken from the judgment and it is therefore final. The company on May 19, 1933, procured a writ of execution against city, delivered the same to the sheriff of Los Angeles county, who by authority thereof and pursuant to written instructions of company proceeded to levy upon the property of city described in said instructions, which property for brevity will hereinafter be referred to as parcel 1 and parcel 2. Thereafter, a notice of motion was served upon company by city requiring company to show cause why an order should not be made quashing the writ of execution and recalling and quashing the levies made thereunder. Pursuant to said notice of motion, a hearing upon affidavits was had in the court below, the matter submitted, and shortly thereafter the trial court made its order in which it denied the motion to quash the writ of execution, denied the motion to recall and quash the levy as to parcel 1, and granted the motion to recall and quash the levy as to parcel 2. The matter is before us on cross-appeals, since company has appealed from that portion of the order which recalls and quashes the levy as to parcel two, and city appeals from that portion of the order which denies the quashing of the writ and permits a levy on parcel 1.

The affidavits filed by the respective litigants at the hearing show that parcel 1 was purchased by city with the intention that it should be used at some time for public purposes, to wit, the construction of municipal buildings thereon. It is clear, however, that at the time of the levy the portion of parcel one which was levied upon was not actually being used for a public purpose, and never had been, but was at the time of the levy and had been for at least three years prior thereto leased by the city as "a private yard for parking of automobiles for hire" to an individual, and that the portion of parcel one which was levied upon was not and never had been used by city or any of its departments in either a governmental or proprietary capacity, except in the leasing thereof, as already stated. It was further established that city did not have, nor did it ever, have any plan drawn or pro-

posed, nor did it specifically set aside said portion of parcel 1 for any public building or purpose. Parcel 2 consists of an oil lease in which city is lessor. The affidavits show that city purchased certain real property as water-bearing lands for a municipal waterworks, and that the said lands were used by the municipal water department as a reservoir site and pumping station until 1923, when an oil lease was made by city as lessor, since which date city has received in oil royalties a sum approximating ten millions of dollars, which moneys as received were deposited in an oil fund. Oil wells were subsequently drilled on parcel 2, but do not in any manner interfere with the water use of the property, and the surface of the land included in parcel 2 is now and has been since the lease used by the water department. This oil fund was not allotted to nor used by the water department, or allotted or devoted to any other department, or set aside for any particular use, but as moneys were received they were spent for various and sundry purposes. In short, the affidavits show that city used this money as it saw fit. With reference to parcel 2 company levied upon the "city lessor's interest" in the oil lease. Title Guarantee & Trust Company, one of the appellants herein, is an assignee of the judgment held by company, and any disposition herein with reference to company includes Title Guarantee & Trust Company as well.

Generally in connection with all points urged by city, it contends that all property of a municipality whether held in its governmental or proprietary capacity is exempt from execution, but specifically it argues:

1. Company had no right to a writ of execution at all, since the Statutes of 1901, p. 794, provide the exclusive mode by which a judgment creditor may proceed to enforce a judgment against a municipality.

2. With reference to parcel 1, that all property acquired by a municipality for the express purpose of accommodating municipal buildings, even though the whole of it was not used for that purpose at the time of the levy, is exempt from execution.

3. With reference to parcel 2, that the moneys derived from the oil lease were revenues of the city and used for the same purposes as funds which were derived from taxes, and that since public revenues are

not subject to sale or execution, that the revenues derived from the oil lease are not subject to sale or execution.

4. That company has no remedy and cannot collect its judgment at all by reason of section 18, article 11, of the Constitution of California, which provides in substance that no city shall incur any indebtedness or liability exceeding in any year the income and revenue for such year. In other words, if the judgment creditor cannot be paid out of the revenues collected in the same year in which the indebtedness was incurred, he cannot be paid at all. Further, the city contends in this connection that even though certain property of a city is not exempt from execution, such nonexempt property cannot be levied upon when it is shown that it was purchased with the revenue of years other than the year in which the indebtedness was incurred.

[1] Since the Supreme Court in the recent case of Title Guarantee & Trust Company and C. J. Kubach Co. v. City of Long Beach et al., 47 P.(2d) 472, has decided point 4 above, we dispose of said contentions first by quoting from that decision, which decision is based upon the identical facts (summarized in said decision) of this case on this point: "We are unable to agree with the reasoning of respondents herein, for in our view no indebtedness was incurred in excess of the revenue provided. In the fiscal year in which the obligation to compensate for harbor work was incurred, 1928-1929, over a million dollars, proceeds of the bond issue, were available for payment; and at the end of the following fiscal year ample funds still remained. Eventually this money was expended by the city, that is, for obligations incurred in subsequent years. In such a situation there is no justification in principle or authority for the application of the constitutional provision. There were, in fact, ample funds provided for the very obligation incurred, and the subsequent expenditure of those funds in their entirety, either for harbor work or for other purposes, cannot be permitted to defeat the rights of the creditor. The cases relied upon by respondents deal with situations where the funds were exhausted before the end of the fiscal year in which the obligation was incurred. Even if the rule contended for might be applied to a judgment, nevertheless where, as here, funds still remained in that

year, but were expended for other purposes in subsequent years, the moneys, thus expended are considered as still in the treasury so far as the inhibitions of article 11, § 18, are concerned. *Brooks v. Gilroy*, 219 Cal. 766, 29 P.(2d) 212; *Bilby v. McKenzie*, 112 Cal. 143, 44 P. 341; see, also, *Martin v. Fisher*, 108 Cal. App. 34, 291 P. 276; *Montague & Co. v. English*, 119 Cal. 225, 51 P. 327."

The Statute of 1901, p. 794, as amended (Deering's Gen. Laws, 1931, Act 3918, p. 2067), upon which city predicates its first point, is in part as follows:

"§ 1. Judgments against counties and municipalities, how to be paid. All final judgments now existing or that may be obtained hereafter against any county, city and county, city, or town of the state of California, shall be paid by the treasurer of such county, city and county, or town, as hereinafter provided."

Section 2 then goes on to provide that the county clerk shall file with the auditor and the officers or board authorized to levy taxes, a complete list of all final judgments against a city "at least fifteen days before the day on which any tax levy must by law be made." Provision is made in section 3 for the inclusion of these matters in the tax levy, the effect of an omission to so include and an option is given to the tax-levying authority to provide by the rate fixed for payment of a judgment in full or in installments by fractional levies, except that such installments and levies shall in no case be less than one-tenth of the amount of such judgment. Section 4 deals with "limitations of actions" in the event this procedure is adopted.

[2, 3] City argues that the remedy provided by the statute is exclusive, and that the judgment creditor is not entitled to a writ of execution against a city, but in order to collect a judgment must follow the procedure outlined in the statute. The wording of the statute, the case of *LeClerc v. San Diego*, 218 Cal. 494, 24 P. (2d) 156, and much persuasive reasoning is set forth as the basis of city's position on this point. It becomes necessary then to determine whether the statutory remedy is exclusive and if not what property, if any, of a municipality is exempt. The statute does not declare the remedy it provides is exclusive, and generally speaking a statutory remedy is held to be cumulative to a common-law remedy and not as abro-

gating it. *Westman v. Dye*, 214 Cal. 28, 37, 4 P.(2d) 134. The case of *LeClerc v. San Diego*, supra, cited by city to support its position, does not so hold, nor does any other case cited by counsel, and we know of none that does. The *LeClerc* Case simply declares that a city cannot be compelled to use funds which have been raised for other purposes to satisfy a judgment not included in such purpose. The case does not hold, nor does it suggest, that an execution cannot be levied against property of a city which is not exempt from execution.

City claims in effect that all of the property of a municipality is exempt from execution. There is, however, no such rule in this state. Section 688, Code Civ. Proc., declares in part: "All goods, chattels, money, and other property, both real and personal, or any interest therein, of the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action, are liable to execution." This section does not distinguish between an individual and a municipal corporation. It undoubtedly refers to both, and this is demonstrated when we proceed to section 690, subd. 15, Code of Civil Procedure, which specifically provides what is exempt from execution so far as a public corporation is concerned, and is as follows: "All courthouses, jails, public offices and buildings, lots, grounds and personal property, the fixtures, furniture, books, papers, and appurtenances belonging to the jail and public offices belonging and appertaining to any county of this state; and all cemeteries, public squares, parks, and places, public buildings, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament or public use, or for the use of any fire or military company organized under the laws of this state."

Company concedes that property of a municipality that is being used for public purposes or in the execution of its governmental functions is exempt from execution. Company further concedes that property held by a municipality in its proprietary capacity, but actually in use for public purposes is also exempt. Company asserts, however, that property of a

municipality held in its proprietary capacity, which is not actually in use for public purposes is not exempt from execution. *Smith v. Morse*, 2 Cal. 524; *Holladay v. Frisbie*, 15 Cal. 630; *Wheeler v. Miller*, 16 Cal. 124; *LeRoy v. Dunkerly*, 54 Cal. 452; *Dunham v. Angus*, 145 Cal. 165, 78 P. 557; *Marin Water, etc., Co. v. Sausalito*, 49 Cal. App. 78, 83, 193 P. 294; 3 *Dillon on Municipal Corps.* (5th Ed.) p. 1586.

In the last-named case (*Marin Water, etc., Co. v. Sausalito*, supra) the Supreme Court in denying a hearing says, 49 Cal. App. 78, at pages 83, 84, 193 P. 294, 296: "The true rule is that the property which it holds for the purpose of exercising its governmental powers or for the purpose of exercising its constitutional power to operate waterworks to supply its inhabitants with water or other like public purposes is not subject to execution; the reason being that to subject it to sale would interfere with the exercise by the city of some of the powers for which it was organized. On the other hand, property which it holds merely as a proprietor, devoting it to no use of a public character, such as lands acquired or held for other than public purposes and not in trust for public use, is subject to execution, unless some statutory or constitutional provision forbids it. *Holladay v. Frisbie*, 15 Cal. 630; *Wheeler v. Miller*, 16 Cal. 124. The property here proposed to be taken in execution was used for public purposes and was necessary therefor, and hence it comes within the classes first described."

The *Sausalito Case* was decided after the statute of 1901 became effective, and as the quotation shows, the Supreme Court in denying a hearing expressly holds that property which is not exempt is subject to execution. It is true that the question here presented is not treated in the opinion, but the clear language of the opinion, the context of which is reiterated in the later case of *United Taxpayers Co. v. San Francisco*, 202 Cal. 264, 259 P. 1101, the earlier cases, and a study of the Code sections, impel us to the conclusion, on the first point raised by city that the Statute of 1901, p. 794, does not provide the exclusive remedy a judgment creditor has against a city, and that a judgment creditor may, in addition to the remedy provided by the statute referred to, levy upon property of a city which is not exempt from execution.

Since we believe it settled in this state that a city may own property which is not exempt from execution, we proceed to a determination of points two and three.

It appears from the affidavit of Brison, city clerk of city, that parcel 1 is a portion of a downtown one-half block, 140 feet by 256 feet in dimension, which entire one-half block was acquired by a single purchase by the city; that from time to time and as needed for such purposes various portions of said half block were actually used for the accommodation of additional municipal buildings, offices, and quarters, such buildings, offices, and quarters now occupying approximately two-thirds of the area of such half block, and that the remaining one-third of said half block not being immediately necessary for municipal buildings, offices and quarters, the same has been leased as and for an automobile parking lot, each lease or other official record referring to said portion of said half block expressly reserving to the lessor city therein the right and power to cancel said lease in the event the city council of city determines that said property is necessary for a permanent city building.

[4,5] It is clear from the above recital of facts, which seem to be admitted, that parcel 1 was acquired by city in its governmental capacity, and that the greater portion thereof, at least two-thirds, was actually used for governmental purposes. The mere fact that a one-third portion thereof was being temporarily used for a parking lot under a lease (which could be terminated at will) with an individual, does not change the character of the property. It is settled that such property held by a city in its governmental capacity and any income from same is exempt from execution. *Wood v. San Francisco*, 4 Cal. 190; *Hart v. Burnett*, 15 Cal. 530; *Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 50 P. 277; *United Taxpayers Co. v. San Francisco*, 202 Cal. 264, 259 P. 1101; *Marin Water, etc., Co. v. Sausalito*, 49 Cal. App. 78, 193 P. 294; *Kline v. Parish of Ascension*, 33 La. Ann. 562; *Board of Councilmen v. White*, 224 Ky. 570, 6 S.W.(2d) 699; *Russell & Johnson v. Oneonta*, 199 Ala. 64, 73 So. 986.

In *Wood v. San Francisco*, supra, it was held that a public street was not subject to execution, and also that the income derived by the city from a lease of a

portion of the street to a private individual was not subject to execution.

In *United Taxpayers Co. v. San Francisco*, supra, it was held that property which had been acquired for and originally used as a public jail, but which, since the destruction of the jail building in the earthquake and fire of 1906, had been for some twenty years leased by the city to a private person, who used the premises as a café, saloon, and rooming house, was not subject to execution.

In *Board of Councilmen v. White*, supra, execution was levied upon rentals due the city under a lease of the excess portion of the city hall to a private person for use as a theater or opera house, and there the court said: "If it was competent for the city to so equip the space of its public building devoted to such purposes, then it necessarily follows that neither it nor the income therefrom may be appropriated by plaintiff to the satisfaction of his judgment." 224 Ky. 570, 6 S.W. (2d) 699, 701, 702.

We see no practical distinction between the building of one structure called a city hall, a portion of which is leased as a private theater, and the purchase of a parcel of land for governmental buildings, and a lease of a portion of such parcel for private business purposes. In the case of the city hall, it is fair to conclude that as soon as the needs of the city required the space used by the theater for public offices, it would be so used, and in this case it is fair to assume that as soon as city requires the unused portion of parcel 1 for public buildings, city will use it for that purpose.

We conclude from the facts and the foregoing authorities that the whole of parcel 1 was purchased by city in its governmental capacity; that the specific declaration of the purpose for which it was purchased, reinforced with the actual use of more than two-thirds of the parcel for such declared purpose, impresses the whole of said parcel with a public use, as said phrase is used by the cases; and that said parcel 1 was therefore exempt from execution.

[6,7] We now direct our attention to parcel 2 and the answer to city's third proposition. It may be stated at the outset that a public utility such as a waterworks is held and operated by a city in its proprietary and not its governmental ca-

capacity. *Davoust v. City of Alameda*, 149 Cal. 69, 70, 84 P. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847; *South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 579, 593, 93 P. 490. It has been noted, however, that it is not alone property owned by a city in its governmental capacity that is exempt. The property owned by a city in its proprietary capacity for the purpose of exercising proprietary functions authorized by the Constitution is also exempt, "the reason being that to subject it to sale would interfere with the exercise by the city of some of the powers for which it was organized." *Marin Water, etc., Co. v. Sausalito*, 49 Cal. App. 78, 83, 193 P. 294. It may be conceded, therefore, and company does in fact concede, that if city were actually using that portion of parcel 2, which has been levied upon in the operation of its waterworks, that parcel 2 would be exempt.

The uncontroverted facts with reference to parcel 2 are that it was originally purchased as water bearing lands for a municipal waterworks, and was used by city as a reservoir site and pumping station for the use of the municipal water department; that the oil lease was entered into by city on June 6, 1923, since which date said property is still used as a part of the waterworks; that the use of the surface of parcel 2 does not interfere with operations under the lease and that operations under the lease do not interfere with the use of the land as part of the waterworks; that since the making of the lease the city has received approximately ten million dollars in royalties thereunder; and that the revenue so derived was spent for every and any purpose, as determined by the discretion of the city council. Said oil royalties were not at any time and have not been dedicated or allotted to or exclusively used by the water department, nor have they been dedicated or allotted for any particular purpose, although it is shown that some of the funds derived from the oil lease were from time to time granted to and used by the water department.

[8] It should also be made clear at this point that we are not called upon to decide whether the real estate comprised in parcel 2 is subject to execution. Company instructed the sheriff to levy upon "lessor's interest in and to that certain oil and gas lease * * * covering the following described real property

* * *." A lessor's interest in an oil lease can be sold separate and apart from the land itself, and a levy upon a lessor's interest is not a levy upon the land covered thereby. *Standard Oil Co. v. John P. Mills Organization* (Cal. App.) 27 P.(2d) 650; *Id.* (Cal. Sup.) 43 P.(2d) 797.

[9] The operation of a waterworks is within the constitutional power of city, and property used for such a purpose is undoubtedly exempt. *Marin Water, etc., Co. v. Sausalito*, supra. An oil lease on the subsurface of property which is obviously not being used for any purpose in connection with the business of operating waterworks is not, in our opinion, embraced within such an exemption.

We see no distinction in fact or in principle between a situation in which a city obtains money by selling lots not held or used in a governmental capacity, or as a necessary adjunct to the exercise of a proprietary public function authorized by the Constitution, and one in which it obtains money in the form of royalties from an oil lease made, not in its governmental capacity, and not as a necessary incident to the exercise of a proprietary use function. The fact that the oil lease is on land used as a necessary part of a city waterworks does not, in our opinion, place the income from such land in the same category as income received from land held in a governmental capacity. No statute authorizes such exemption with reference to property or the income thereof that may once have been impressed with a public use, when such property is held in a proprietary, as distinguished from a governmental, capacity, nor does any case which has been cited to us. While we cannot say that this question has been clearly settled, the authorities called to our attention suggest that such royalties would not be exempt, and it seems to us that such is the sounder view. In the case of *Hart v. City of New Orleans* (C. C.) 12 F. 292, 293, 294, a judgment creditor garnished installment payments due to a city "for the privileges granted, and the interest of the city in the sugar-shed warehouses," and in upholding the levy, the court said: "These sums are the purchase price of property which the city has sold, the same to be paid in installments. * * * It is a general principle of law that the private property of municipal corporations—i. e., that which is not necessary to the performance of the functions

of government,—may be seized and sold for the payment of debts. See *Holladay v. Frisbie*, 15 Cal. 630."

In the *Sausalito Case*, supra, 49 Cal. App. 78, at page 83, 193 P. 294, the Appellate Court said: "On the other hand, property which it holds merely as a proprietor, devoting it to no use of a public character, such as lands acquired or held for other than public purposes and not in trust for public use, is subject to execution, unless some statutory or constitutional provision forbids it."

[10-12] The royalties received by city under the oil lease it received merely as a proprietor. Except as all moneys which are received by city are in a sense received for public purposes, such royalties were no more devoted to a use of a public character or held in trust for a public use than the moneys obtained by the city in the sale of beach lands. *Holladay v. Frisbie*, 15 Cal. 630; *Smith v. Morse*, 2 Cal. 524; *Wheeler v. Miller*, 16 Cal. 124; *LeRoy v. Dunkerly*, 54 Cal. 452; *Frink v. Roe*, 70 Cal. 296, 11 P. 820; *Dunham v. Angus*, 145 Cal. 165, 78 P. 557. Again referring to the *Sausalito Case*, 49 Cal. App. 78, at [page] 84, 193 P. 294, the Appellate Court said: "The property here proposed to be taken in execution was used for public purposes and was necessary therefor, and hence it comes within the classes first described." The property here proposed to be taken is not used for a public purpose and is not necessary therefor. Since in our view of the matter the royalties under the oil lease are not exempt from execution, it is our further opinion that they cannot be made exempt merely because the city elects to classify such royalties as revenues. Generally speaking public revenues derived from taxes are not subject to execution. 1 *Dillon Municipal Corps.* (5th Ed.) § 248, p. 467. The mere fact, however, that the royalties in this case were in a substantial amount and helped to pay the city's expenses, does not make such royalties revenues in the sense that they are derived from taxes, and as such exempt from execution. *Hart v. City of New Orleans* (C. C.) 12 F. 292, 294. If such were the case, a city having the most obvious kind of exempt property could avoid execution by merely converting it into cash. In the *Hart Case*, supra, stating one of the objections of city in that case which is identical to the one raised here, to wit,

that the moneys levied upon are moneys due the city as a part of the revenue of the corporation, and as such applicable to the current expenses of municipal administration, the court in (C. C.) 12 F. 292, at page 294, says: "*It is not considered that such sums are now or ever were any portion of the regular revenue of the city, even if the last city budget enumerates them.*" (Italics ours.)

The order denying the motion to quash the execution is affirmed. The order quashing the levy of the execution as to parcel 2 is reversed, and the order denying motion to quash the levy as to parcel 1 is reversed.

We concur: HOUSER, Acting P. J.; YORK, J.



9 Cal.App.2d 16

**MORROW et al. v. SUPERIOR COURT IN
AND FOR KINGS COUNTY et al. ***
Civ. 1725.

District Court of Appeal, Fourth District,
California.
Aug. 16, 1935.

Hearing Denied by Supreme Court
Oct. 14, 1935.

1. Courts ⚙️493(1)

Where a state court and federal court have concurrent jurisdiction, tribunal whose jurisdiction first attaches will be left to determine controversy without interference from the other.

2. Courts ⚙️493(3)

Refusal to order party who had instituted action in federal court against parties to action in state court to be brought into action in state court as party defendant held not abuse of discretion, where federal court action involved different controversy, different parties, and additional land, since jurisdiction of different controversy, parties, and additional land was first assumed by federal court.

Application for writ of prohibition by J. E. Morrow and others against the Superior Court of the State of California in and for the County of Kings and K. Van Zante, Judge thereof.

Alternative writ discharged, and petition for peremptory writ denied.

John Douglas Short and Keyes & Erskine, all of San Francisco, Everts, Ewing, Wild & Everts, Wakefield & Hansen, and Harris, Willey, Griffith & Harris, all of Fresno, M. G. Gallaher, of Los Angeles, T. M. Stuart, of San Francisco, David E. Peckinpah, of Fresno, and Shepard & Shepard, of Selma, for petitioners.

Wm. M. Cannon, McCutchen, Olney, Mannon & Greene, and Edwin S. Pillsbury, all of San Francisco, for respondents.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, amici curiae.

BARNARD, Presiding Justice.

This is an application for a writ of prohibition based upon the contention that the respondent court is without jurisdiction to proceed with the trial of a case pending therein until another party, the Medallion Oil Company, is brought in as a defendant.

Petitioners herein are the plaintiffs in the action referred to, which was begun in 1931. The defendants therein are the successors in interest of W. H. Ochsner. The complaint therein alleged that the plaintiffs, or in some instances the predecessors of certain plaintiffs, were in 1910 the owners and in possession of certain placer mining locations covering a described 480 acres in the Kettleman Hills; that in 1910 they entered into a contract with W. H. Ochsner under the terms of which he agreed to do the necessary work and development, to drill oil wells thereon, and to obtain a patent for said lands, and that it was further agreed that when oil was discovered Ochsner was to have one-half of each quarter section of said lands but was to convey the remainder to the plaintiffs. It was further alleged that the said Ochsner did the required work on said lands until November 29, 1920, at which time, in lieu of applying for patents, he made an application for a prospecting permit on said and other lands amounting in all to 2538 acres; that this application was made in his own name but for the use and benefit of all the parties to said contract; and that on April 16, 1921, his application was granted and a permit to prospect for oil and gas was issued to him, which permit has been extended on several occasions and is still in full force and effect. It is then alleged that the said Ochsner obtained said patent because of certain pref-

⚙️For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Hearing denied by Supreme Court 50 P.(2d) 66.

erential rights accruing to him because of work done and money expended under the contract referred to; that thereafter the said Ochsner assigned said permit to certain of the defendants who took the same with full knowledge of the rights of the plaintiffs; that the plaintiffs are entitled to a half interest in and to all the property rights and interests which have accrued or been acquired through or by means of said permit; and that the defendants hold one-half of any rights, rents, issues, royalties, and profits thus acquired in trust for the plaintiffs.

The petition herein alleges that at the time of filing the action referred to these petitioners knew nothing about the claims or even the existence of the Medallion Oil Company; that during the year 1933 they learned that the Medallion Oil Company had filed a suit in equity in the United States District Court for the Southern District of California, naming as defendants all of the parties to the first-named action; that the petitioners thereafter learned that some of the defendants in the other action had moved to dismiss that action in the federal court, which motion was granted; that subsequently, during the year 1934, the Medallion Oil Company filed an amended complaint in the action in the federal court and during the month of November, 1934, the petitioners were informed that motions to dismiss filed by some of the defendants in that case had been denied by the federal court and that suit would have to proceed to trial upon its merits; that, thereafter, these petitioners obtained a copy of the complaint filed in the federal court and determined from the allegations therein that the Medallion Oil Company was a necessary party to the action pending in the respondent court in order to have the issues therein completely determined; that on January 17, 1934, the petitioners filed in the respondent court a notice of motion asking that said court, upon its own motion and under the express provisions of section 389 of the Code of Civil Procedure, order the said Medallion Oil Company brought into said suit as a party defendant; that this motion was supported by affidavits, copies of which are attached to the petition; that the motion to make the Medallion Oil Company a party defendant in that case was denied by the trial court on February 11, 1935; and that the trial court is about to proceed with the trial of said action.

An alternative writ of prohibition was issued by the Supreme Court and made returnable here. In an answer to the petition filed on behalf of the respondents, it is alleged that the petitioners had knowledge of the claims of the Medallion Oil Company as early as July 15, 1931, at which time one of the defendants in the action first referred to, filed an answer in which it was alleged on information and belief that any contract between said Ochsner and the plaintiffs, or their predecessors in interest, was made by said Ochsner as the agent or representative of the Medallion Oil Company and that upon the execution of each such contract the same was, with the knowledge and consent of the plaintiffs and their predecessors in interest, assigned to the Medallion Oil Company, which corporation assumed the obligations of said Ochsner thereunder and which assignments constituted a full and complete novation releasing said Ochsner from any and all liability under such contract.

A copy of the complaint filed by the Medallion Oil Company in the federal court was filed in this proceeding. It is alleged therein that the plaintiff is a corporation organized under the laws of the territory of Arizona and now existing under the laws of the state of Arizona; that the suit is one in equity between citizens in different states of the United States wherein the matter in controversy exceeds the sum or value of \$3,000; that on January 22, 1910, W. H. Ochsner entered into a written contract with one William P. Dunham whereby said Ochsner agreed to enter into the employment of said Dunham for the purpose of securing locations, by leases or otherwise, for prospective oil lands; that by the terms of said agreement the said Ochsner agreed to acquire properties of this nature wherever possible in the name of the said Dunham and for his use and benefit; and that the said Dunham agreed to pay said Ochsner a salary of \$400 per month, necessary traveling expenses, and to give him a 3 per cent. interest in all properties or interests which might be acquired, or 3 per cent. of all stock in any corporation to which such properties might be conveyed; that pursuant to said agreement the said Ochsner made a study of lands in the Kettleman Hills and obtained for the said Dunham contracts with various locators in said district on condition that the said Dun-

ham was to drill certain wells; that the said Dunham organized the Medallion Oil Company, transferring to said corporation the contracts which had been secured for him by said Ochsner and thereafter the corporation expended about \$80,000 in drilling a well; that the said Ochsner was given 3 per cent. of the stock in said Medallion Oil Company; that by December, 1912, a well had been drilled to a depth of 4,069 feet; that a drilling of said well was never abandoned although further work thereon was deferred until such time as improved equipment would be available; that a further reason for suspending work on said well in 1912 was that certain lands, including the land here in controversy, were withdrawn from entry by the United States government; that said lands were reopened for entry in 1920 under an act of Congress which provided for prospecting permits and for leases from the United States in lieu of the patents which had formerly been provided for, and also provided for a preference in favor of an applicant who had theretofore expended money in prospecting for oil; that upon the advice of Ochsner the Medallion Oil Company did not pay its franchise taxes and allowed its rights as a corporation to be suspended with the understanding that such rights could and would be revived when the said Ochsner was successful in obtaining a permit or lease to drill on said lands; that between 1913 and 1920 the said Ochsner continually represented to the Medallion Oil Company that he was using his best efforts to obtain the permit from the government which would enable him to continue drilling on the land referred to; that in November, 1920, the said Ochsner filed an application in his own name for a prospecting permit enabling him to prospect for oil and gas upon these lands; and that on April 16, 1921, such a permit was issued to him, which permit and subsequent lease are still subsisting and in full force and effect; that for the purpose of defrauding the said Medallion Oil Company the said Ochsner concealed from said company the fact that he had applied for such permit and that the same had been issued by continually representing to that company during the years 1920 to 1926, inclusive, that he was endeavoring to obtain such a permit for the sole benefit of said company; that by reason of said misrepresentations the said company was induced not to make an application for said permit and to rely on the fact that the said Ochsner was making

an application for said company; that said Ochsner obtained said permit upon the representation that he had drilled a well on a portion of the lands when, in fact, the well was drilled by the Medallion Oil Company; and that, after receiving said permit, the said Ochsner assigned the same to certain of the corporation defendants. The complaint then sets up in detail the various assignments made by Ochsner with the allegation that each was made with notice of the rights of the plaintiff. It is then alleged that the plaintiff is the sole and only person entitled to the benefits accruing from said lands under the permits and leases issued by the federal government and, among other things, the prayer asks that all of the purported assignments to various defendant corporations be cancelled and set aside and that the plaintiff be given the permit and leases with all that has been taken from the land, and be given complete possession of the land to the exclusion of all other persons.

It is argued by the petitioners that the Medallion Oil Company is a necessary party to the action pending in Kings County since they are claiming one-half of everything that accrued by reason of the permits which Ochsner received and that this claim cannot be determined in the absence of the Medallion Oil Company, which corporation claims everything accruing from those permits in its entirety. The respondent argues that the Medallion Oil Company is not a necessary party in that action since the two claims are separate and distinct and involve different parties, different contracts and additional land, and since the first-named action could be tried as between the parties thereto, making any decree which the plaintiffs therein might recover subject to the rights, if any, of the Medallion Oil Company. The respondents further argue that the court was without power to make the Medallion Oil Company a defendant even if that company be considered a necessary party to that suit since summons could not be served upon that company within three years after the commencement of the action and, further, that in any event the trial court has passed upon the matter upon conflicting evidence and its action cannot be reviewed in this proceeding.

Since we feel this writ should be denied for another reason, it is not necessary to pass upon the questions thus raised. Not only are the issues which the petitioners

seek to add to their action, as filed, already involved in another action now pending between the parties, but it fully appears that the party thus sought to be brought in as a defendant is a citizen of another state which had the right to take its controversy with these petitioners into a federal court and which had already chosen that forum before any effort was made to bring it into the other action.

[1] Where a state court and a federal court have concurrent jurisdiction, the tribunal whose jurisdiction first attaches will be left to determine the controversy without interference from the other. *Thorpe v. Sampson* (C. C.) 84 F. 63; *Gamble v. San Diego* (C. C.) 79 F. 487; *In re Cohen*, 198 Cal. 221, 244 P. 359. In *Baltimore & O. R. Co. v. Wabash R. Co.* (C. C. A.) 119 F. 678, 679, the court said: "It is settled that, when a state court and a court of the United States may each take jurisdiction of a matter, the tribunal whose jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted. *Harkrader v. Wadley*, 172 U. S. 148, 19 S. Ct. 119, 43 L. Ed. 399; *Farmers' Loan & Trust Co. v. Lake Street El. R. Co.*, 177 U. S. 51, 20 S. Ct. 564, 44 L. Ed. 667. * * * The rule is not only one of comity, to prevent unseemly conflicts between courts whose jurisdiction embraces the same subject and persons, but between state courts and those of the United States it is something more. 'It is a principle of right and law, and therefore of necessity. It leaves nothing to discretion or mere convenience.' *Covell v. Heyman*, 111 U. S. 176, 4 S. Ct. 355, 28 L. Ed. 390. The rule is not limited to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all suits of a like nature. *Farmers' Loan & Trust Co. v. Lake Street El. R. Co.* supra; *Merritt v. American Steel Barge Co.*, 24 C. C. A. 530, 79 F. 228, 49 U. S. App. 85. The rule is limited to actions which deal either actually or potentially with specific property or objects."

In *Empire Trust Co. v. Brooks* (C. C. A.) 232 F. 641, 648, it is said: "Conflict of jurisdiction as to the subject-matter of the litigation does not mean merely that the two suits relate to the same physical property.

Moran v. Sturges [154 U. S. 256, 14 S. Ct. 1019, 38 L. Ed. 981] holds directly to the contrary. It means that the issues involved relief prayed for, and parties to the two suits are so substantially alike that the lis pendens of the last brought is included in the first. Unless it can be said that the issues involved, the relief sought, and the parties to the suit in the federal court were included substantially in the lis pendens of the prior suit in the state court, the jurisdiction of the former did not conflict with that of the latter."

[2] The essential question here is whether the state court, having first assumed jurisdiction over a controversy between the parties thereto as between themselves with respect to their interest in certain land, may be said to have also first assumed jurisdiction over the other controversy which has been started in the federal court, in which another party and other issues are involved. The first action in the state court to establish a trust, and somewhat in the nature of a quiet title action, seeks relief as against certain persons and not as against the world, the action involving the effect of a certain contract but only as between the parties to the action. The second action is of a similar nature but involves additional land and a new party who claims under a different contract and under a different set of equitable circumstances. In effect, the first action is to quiet title to the land as between the plaintiffs and the man with whom they dealt, *Ochsner*. In the second action the plaintiff claims that *Ochsner* had no title to the land and that, because of certain circumstances, it is entitled to the land not only as against *Ochsner* and his grantees but as against the plaintiffs in the first action as well. A judgment in the first action would not have been binding on the plaintiff in the second and the state court had not assumed jurisdiction over the question as to whether *Ochsner* himself had title to the land.

The issues in the two cases are not identical and the most that can be said is that both cases relate to the same land. The plaintiff in the second action did not choose to intervene in the state court but saw fit to file suit in the federal court, setting forth a cause of action against all of the parties to the first action. In *Boynton v. Moffat Tunnel Imp. Dist.* (C. C. A.) 57 F.(2d) 772, 781, the court said: "The plaintiffs herein are not parties to the state court

suit, and that court cannot grant them the relief to which they are entitled. It is no answer to suggest that they might intervene in the state court; they have not, and are not required to."

In *Pitt v. Rodgers* (C. C. A.) 104 F. 387, 390, the court said: "Our conclusion is that it must be held, upon the record before us, that the complainant had neither actual nor constructive notice of the pendency of the action in the state court at the date of his purchase, and his rights were unaffected by such action. It follows from this view that, as the complainant, Rodgers, was a nonresident of the state of Nevada, he had the right, notwithstanding the pendency of the action in the state court, to invoke the jurisdiction of the United States circuit court for the purpose of obtaining a judicial determination of the validity of his title to the property purchased by him; and, the United States circuit court having obtained in such action jurisdiction over the appellants before the complainant was made a party to the action in the state court, it had the right to proceed to a final determination of the controversy between the parties, and in the exercise of that jurisdiction properly enjoined the appellants from further proceeding against the complainant in the action pending in the state court. *French v. Hay*, 22 Wall. 250, 22 L. Ed. 857; *Home Insurance Co. v. Howell*, 24 N. J. Eq. [238] 239."

In so far as the Medallion Oil Company and its interests are concerned, and in connection with an entirely different controversy involving other parties and issues as well as additional land, jurisdiction was first assumed by the federal court. Thereafter petitioners sought to amend by bringing in a new party and a new controversy over which the federal court had assumed jurisdiction. Quoting further from *Boynton v. Moffat Tunnel Imp. Dist.*, supra: "Any amendment to the pleadings, or any order made, after the federal court suit was filed, would of course be ineffective to deprive that court of the jurisdiction over the res which attached with the filing of the bill. It is not to be assumed that the state court would direct the payment of the fund to parties not before it. But if the power existed, it was not exercised, for no dominion over the fund was exercised by

the injunctive orders issued prior to the commencement of this suit; no change in the commission's possession was effected by these orders, they operating purely in personam on the members of the commission. Orders issued after the commencement of the action in the federal court would of course be ineffective to oust that court of a jurisdiction in rem which then attached."

If the Medallion Oil Company which has thus started a different controversy in a different forum, can be compelled to abandon that action, in so far as this particular land is concerned, and submit itself to the jurisdiction of the state court, it would be under the necessity of trying a part of its action in the state court and the remainder in the federal court. The state court had not taken possession or control of the land and had not been asked to determine all controversies relating to the title thereto but only those based upon one contract and as between certain parties. A new controversy is involved in the second action. Since the federal court first assumed jurisdiction over that new controversy, with its new party, it should, under established rules, be allowed to complete the same.

Aside from any other consideration we think it would be improper to order the trial court to bring in a defendant when to do so would constitute an interference with a federal court which has first assumed jurisdiction over that party and over a different controversy between that party and the parties to the first action. The petitioners have ample opportunity to meet the claims of the proposed defendant in the other action now pending and, if desired, the action in the respondent court may proceed to trial with respect to the rights of the parties thereto without interfering with the rights of the proposed defendant.

We conclude that under these circumstances the trial court did not abuse its discretion in refusing to order the Medallion Oil Company brought in as a defendant.

The alternative writ is discharged and the petition for a peremptory writ is denied.

We concur: MARKS, J.; JENNINGS, J.

4 Cal.2d 181

PACIFIC ELECTRIC RY. CO. v. DEPARTMENT OF MOTOR VEHICLES et al.

S. F. 15343.

Supreme Court of California.

Aug. 1, 1935.

1. Licenses ⇨19(1)**Taxation ⇨200**

Under constitutional amendment which provided that gross receipts tax should be in lieu of all other taxes and licenses, gross receipts tax assessed in 1934, in so far as it was substitute for ad valorem taxes, was for fiscal year ending in 1935 (Const. art. 13, § 14a, as amended Nov. 4, 1930).

2. Licenses ⇨19(1)

At date of adoption of constitutional scheme setting up gross receipts tax, license taxes of all kinds were henceforth avoided unless already assessed (Const. art. 13, § 14a, as amended Nov. 4, 1930).

3. Automobiles ⇨97

Constitutional amendment which eliminated gross receipts tax as substitute for all other taxes and licenses from January 1, 1935, with provision that gross receipts taxes which had been previously assessed should be fully collected, *held* to render utility's motor vehicles subject to provisions of Motor Vehicle Act on January 1, 1935, although gross receipts tax had been assessed against utility for fiscal year ending July 1, 1935, since exemption from license taxes had commenced January 1, 1911, whereas exemptions from ad valorem taxes had commenced on July 1, 1911, under constitutional amendment substituting gross receipts tax for all other taxes and licenses (St. 1923, p. 517, as amended; Const. art. 13, § 14a, as amended Nov. 4, 1930; § 14½, adopted June 27, 1933).

4. Automobiles ⇨97

Application of Motor Vehicle Act to utility which used motor vehicles in operation of its business as interurban railway corporation from January 1, 1935, *held* not discrimination against utility in favor of mercantile, manufacturing, and business corporations, although gross receipts tax had been assessed against utility for fiscal year ending July 1, 1935, under constitutional amendment substituting gross receipts tax for all taxes and licenses, since utility had received its full quota of exemptions on January 1st, because exemption from license taxes had antedated ad valorem exemptions by six months (St. 1923, p. 517, as amended; Const. art. 13, § 14a, as amended Nov. 4, 1930; § 14½, adopted June 27, 1933).

In Bank.

Application for a writ of mandate by the Pacific Electric Railway Company prayed to be directed to the Department of Motor Vehicles and others to compel the issuance of motor vehicle certificates. Alternative writ discharged and petition dismissed.

For prior opinion, see 40 P.(2d) 820.

Frank Karr and R. E. Wedekind, both of Los Angeles (Alfred Sutro, of San Francisco, of counsel), for petitioner.

Roy V. Reppy and E. W. Cunningham, both of Los Angeles, Guy V. Shoup and Henly C. Booth, both of San Francisco, and LeRoy M. Edwards and Samuel Poorman, Jr., both of Los Angeles, amici curiæ.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen. (Frank M. Keesling, of Sacramento, Roger J. Traynor and Evan Haynes, both of Berkeley, and Dixwell L. Pierce, of Sacramento, of counsel), for respondents.

John A. McGilvray, of Sacramento, F. Bert Fernhoff, City Atty., and Homer W. Buckley, Asst. City Atty., both of Oakland, and Archer Bowden, City Atty., of San Jose, amici curiæ.

PER CURIAM.

Petitioner, a public utility corporation, claiming the benefit of sections 41, 77 (a) and (c), of the California Vehicle Act of the state of California (chapter 266, p. 517, Stats. 1923, as amended by St. 1931, p. 2104, and St. 1929, p. 524), tendered on December 29, 1934, to respondent Department of Motor Vehicles of the state of California the sum of \$5,942, and demanded therefor registration certificates for the calendar year 1935 for 212 motor vehicles used by it in the operation of its business as an electric interurban railway corporation during the year 1934. This demand was refused on the ground that said tender was insufficient in amount to comply with the said statute. Hence this proceeding in mandamus.

No facts essential to determination of the controversy are in dispute. The tender made was for the \$3 registration item in full for each car as required by said section 77 (a), but as to the weight charges provided for in said section 77 (c) petitioner tendered an amount which would have been sufficient only in case registration had taken place on July 1, 1935, instead of January 1st of said year. In

other words, the essence of petitioner's claim is that it has already paid or has already obligated itself to pay a fee in lieu of said charges for the first half of said year 1935 because of the gross receipts tax assessed against it for the fiscal year 1934-5, pursuant to section 14, article 13, of the Constitution of the state of California as it stood on May 1, 1933 (as amended Nov. 4, 1930).

We are here concerned with the following provision of said section 14, subd. (a) which reads: "Such taxes shall be in lieu of all other taxes and licenses, State, county and municipal, upon the property above enumerated of such companies, * * *" when considered in the light of section 14½ of said article, adopted June 27, 1933 (see St. 1933, p. 3077), and which reads as follows: "The provisions of section 14 of this article as they read on May 1, 1933, shall remain fully operative to and including December 31, 1934, notwithstanding any other provision in this Constitution. From and after January 1, 1935, said provisions shall no longer be of any force and effect; provided, however, that any taxes assessed in pursuance thereof, prior to said date, shall remain fully collectible." Petitioners also assert that a provision inserted in said section 14 on June 27, 1933 (see St. 1933, p. 3074), is also involved. This provision reads: "Provided further, that no excise, or income tax or any other form of tax or license charge shall be levied or assessed upon or collected from the companies, or any of them, mentioned in the first paragraph of this section, in any manner or form, different from, or at a higher rate than that imposed upon or collected from mercantile, manufacturing and business corporations doing business within the State."

[1] In the former opinion we were of the view that once it is declared that taxes on gross earnings are a substitute for ad valorem and license taxes and as such ad valorem taxes are assessed for the ensuing fiscal year, that it followed logically that license taxes are for the same period, and therefore when the assessment was made as of the first Monday in March, 1934, for the taxes for the fiscal year 1934-5, the state thereby in effect received the license taxes here involved until June 30, 1935. And as a deduction petitioner owes license taxes only for the remainder of the calendar year of 1935, which it has tendered respondent. We reiterate that as to ad

valorem taxes, prior to 1910, the fiscal year fixed by the Constitution (section 5, art. 20) was the tax year. *Rollins v. Wright*, 93 Cal. 395, 29 P. 58; *Rode v. Siebe*, 119 Cal. 518, 51 P. 869, 39 L. R. A. 342.

We also think that as to the gross receipts tax it must now be held that in so far as it is a substitute for ad valorem taxes, at least, the tax assessed in 1934 is for the fiscal year ending 1935. As to license taxes, the section can validly operate with or without the exemption, as the people may direct. *Pacific Gas & Electric Co. v. Roberts*, 168 Cal. 420, 143 P. 700.

[2, 3] But we cannot now see its applicability to license taxes, especially in view of the new section 14½ of the Constitution above quoted. This court has specifically held that when the constitutional scheme setting up the gross receipts tax was adopted on November 8, 1910, on this self-same day license taxes of all kinds were henceforth avoided unless already assessed. See *San Francisco v. Pacific Telephone & Telegraph Co.*, 166 Cal. 244, 135 P. 971; *Hartford Fire Ins. Co. v. Jordan*, 168 Cal. 270, 284, 142 P. 839, and *Pacific Gas & Electric Co. v. Roberts*, supra, 168 Cal. pages 420, 432, 143 P. 700.

The first levy under the gross receipts plan was in 1911 for the fiscal year 1911-12, ending June 30, 1912. But license taxes ceased not later than January 1, 1911. We thus have exemption from ad valorem tax only from July 1, 1911, to June 30, 1912, whereas license tax exemptions were from January 1, 1911, to June 30, 1912, a period of eighteen months. In other words, license taxes had an exemption which antedated the ad valorem exemption by six months.

Manifestly the framers of section 14½ did not intend that such a situation should continue. Hence it provided the exemption should cease as to petitioner from license charges after December 31, 1934, following which date the license laws should be operative.

[4] Nor can we see discrimination against petitioner in favor of mercantile, manufacturing, and business corporations doing business within the state. Petitioner had had its full quota of exemption on December 31, 1934, or at the time it came under the Motor Vehicle Act (St. 1923, p. 517, as amended).

The alternative writ of mandate is discharged and the petition dismissed.

It is further ordered that this judgment shall be nunc pro tunc as of January 28, 1935, and that the petitioner is hereby allowed to forthwith pay in discharge of said license taxes such sums only as were due as of said date.



4 Cal.2d 258

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. PENDERGRASS et al.

Sac. 4826.

Supreme Court of California.

Sept. 2, 1935.

1. Appeal and error ☞760(1)

Appeal from judgment against defendants on their opening statement will be considered on merits, though their opening brief does not specifically refer to reporter's transcript for portions of record relied on for reversal, where it sets forth substance of record and refers to pages of clerk's transcript where facts included in opening statement are set forth in answer, and their concluding brief specifically indicates portion of transcript where complete report of opening statement may be found (District Court of Appeal Rules, rule 8, subd. 3).

2. Chattel mortgages ☞255

No action lies on note secured by chattel mortgage; only form of action provided for by statute being foreclosure of mortgage (Code Civ. Proc. § 726).

3. Appeal and error ☞532

Plaintiff's contention on appeal from judgment against defendants that note sued on was not secured by chattel mortgage, not part of answer, and appellants' reply there-to, constitute no part of record.

4. Trial ☞109

Trial court erred in disregarding allegation of defendants' opening statement, on which judgment was entered against them, that note sued on was secured by chattel mortgage not introduced in evidence.

5. Evidence ☞434(1)

Parol evidence of fraud is admissible to establish invalidity of written instrument, where such evidence tends to establish some

independent fact or representation, or some fraud in procurement of instrument or some breach of confidence concerning its use, and does not concern promise directly at variance with written promise (Civ. Code, §§ 1625, 1698; Code Civ. Proc. § 1856).

6. Evidence ☞397(1)

Rule that terms of written agreement cannot be varied by oral agreement is not only rule of evidence, but is also rule of substantive law (Civ. Code, §§ 1625, 1698; Code Civ. Proc. § 1856).

7. Evidence ☞434(12)

Parol evidence that payee of note, containing unconditional promise to pay, promised makers at time note was executed that payments due under note would be extended or postponed for one year, held not admissible to establish fraud as defense to action on note or to cancel note (Civ. Code, §§ 1625, 1698; Code Civ. Proc. § 1856).

In Bank.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by the Bank of America National Trust & Savings Association, a national banking association, against T. S. Pendergrass and another. Judgment for plaintiff, and defendants appeal.

Reversed.

For prior opinion, see 35 P.(2d) 346.

Bush & Cleary, of Modesto, for appellants.

Louis Ferrari, T. J. Bricca, and C. H. White, all of San Francisco, and T. B. Scott, of Modesto, for respondent.

THOMPSON, Justice.

This cause was transferred to this court after decision by the District Court of Appeal. We are satisfied with and adopt a portion of the opinion rendered therein, which is as follows:

This action was instituted by the plaintiff to recover judgment on a promissory note in the sum of \$4,750. Trial was had before a jury. The note was payable upon demand, and the complaint was a simple action based upon the promissory note. The defendants in their answer interposed two defenses, to wit: That the note was obtained by fraud, and also was secured by a chattel mortgage. The plaintiff introduced the note in evidence, and also the testimony of a wit-

ness to the effect that the note had not been paid. Following this, counsel for the defendants made an opening statement, at the conclusion of which the court directed judgment in favor of the plaintiff. From this judgment the defendants appeal.

[1] The respondent objects to the consideration of the defendants' appeal on the ground that the appellants have not sufficiently complied with subdivision 3 of rule VIII of the rules governing appeals taken to this court, the point being urged that the briefs of appellants do not sufficiently comply with the rules just referred to in indicating the portions of the record upon which appellants rely for reversal.

The opening brief of appellants, while it sets forth the substance of the record, does not make specific reference to the reporter's transcript, but does refer to the pages of the clerk's transcript where the facts included in the opening statement are set forth in the answer filed by the appellants. The concluding brief of the appellants does specifically indicate the portion of the transcript where a complete report of the opening statement may be found. No difficulty having been experienced by the court in ascertaining the grounds upon which this appeal is based, and also in view of the fact that no trial was had upon the merits of this cause, and judgment having been entered against the defendants upon their opening statement, we conclude that the respondent's objection to a consideration of this appeal upon its merits should be disregarded.

The opening statement, while not referring to the pleadings, constituted an oral presentation to the court and jury of the defenses set up in the answer. While too lengthy to be set forth herein, we glean from the opening statement the following:

In 1928, the defendants took over a ranch near Oakdale in Stanislaus county for the purpose of growing lettuce seed thereon. The ranch was then subject to a trust deed securing a note in favor of the Bank of Italy subsequently becoming the Bank of America, in the sum of \$20,000. From the time of taking over the ranch in 1928, appellants continued the operation thereof in the growing of lettuce seed and marketing the same in the southern portion of the state, particularly in the Imperial Valley. Financial transactions ap-

pear to have been had between the plaintiff and the defendants until January, 1932, at which time the \$20,000 note, secured by a trust deed, remained unpaid, and another note in the sum of \$14,997.40, unsecured, was held by the plaintiff, signed by the defendants. At this time negotiations were entered into between the defendants and the plaintiff, by and through its representatives, relative to the defendants continuing their operation of the ranch during the year 1932. At the time of the beginning of these negotiations it appears that the appellants had on hand personal property consisting of ranch equipment of the value of approximately \$25,000, and also unsold lettuce seed in storage of the approximate value of \$6,000.

The opening statement then sets forth that the plaintiff, by its representatives, promised the defendants that if they would execute a new note for \$4,750, to be credited upon the \$14,997.40 note to which we have referred, and would give a chattel and crop mortgage, which mortgages should secure the notes referred to, the plaintiff would not interfere with the operation of the ranch by the defendants during the year 1932, but would allow them to operate the ranch and make sales of lettuce seeds to prospective purchasers, contracting for the sale and delivery of the seeds in advance, turning the same over to the appellants. In consideration of this promise the defendants were to execute, and did execute, the note and mortgages which would cover all the property owned by the defendants, and which, up to that time, appears to have been unincumbered.

The opening statement then goes on to recite that the defendants made preparations to operate the ranch, to secure contracts for the seed to be raised, and further that the promises made by the plaintiff, through its representatives, were made without any intention on their part to keep and perform the same, and were fraudulently made for the purpose of securing the notes and chattel and crop mortgages mentioned in the opening statement. The opening statement of the appellants, in relation to the indebtedness of the mortgages, is in the following words and figures (after providing that the \$6,000 worth of lettuce seed should be turned over to the appellants [Respondents] as security for the indebtedness), to wit: "That a new note was to be executed for the bal-

ance of the indebtedness above the \$20,000.00 originally secured by the trust deed, and that the chattel mortgage was to secure not only this indebtedness above the \$20,000.00, but was to cover the whole thing, \$20,000.00 plus the balance of the indebtedness which at that time was about \$14,750.00." And further: "That this chattel and crop mortgage be executed by Mr. Pendergrass; that a new note in the sum of \$4,753.00 be executed by Mr. Pendergrass, to be credited on a note that they already had of \$14,753.00, that is, the balance due on it was \$14,753.00; that those notes were to be secured by the chattel mortgage, by the pledge of the warehouse receipt of 6500 pounds of lettuce seed on hand, and by the assurance that the sales of the 1932 crop of seed would pass through the bank, and the moneys from the sales of the 1932 crop should all go to the bank in payment," etc.

The opening statement further shows that the mortgages referred to were executed by the defendants, and that the plaintiff failed to keep its promises, and within a short time after the execution of the mortgages proceeded to seize all the property covered thereby.

[2-4] The answer as well as the opening statement alleges that the note sued upon in this action was and is secured by a chattel mortgage. Under the provisions of section 726 of the Code of Civil Procedure, if the allegations referred to set forth the true status, then and in that case the plaintiff's cause of action should have been abated. That section provides for only one form of action, specifying the procedure, to wit, the foreclosure of the mortgage, which was not followed in this case. The respondent seeks to avoid the force of this contention on the part of the appellants by referring to the mortgage itself, and contending that the note sued upon is not secured, basing its argument upon the fact that the answer of the defendants alleges that the note is secured by mortgage of a certain date, and recorded at a certain place in the official records of Stanislaus county. However, such a reference does not make the mortgage a part of the answer, and it was not made a part of the answer in this case; consequently, the contention of the respondent and the reply of the appellants in relation thereto constitute no part of the record of which this court can take notice. It does establish, however, the

error of the court in disregarding this portion of the defendants' opening statement, because whether the note sued upon was or was not in fact secured by a chattel mortgage or a crop mortgage could only be determined by the introduction of the mortgage in evidence, which was not done. Both the appellants and the respondent lay down the premise that upon the consideration of this appeal, everything set forth in the opening statement must be considered as true. Therefore, it must be held upon this appeal that the note sued upon in this action was and is secured by a chattel mortgage.

[5-7] Inasmuch as the cause must go back to the trial court for further proceedings therein, it becomes necessary for us to determine whether oral testimony may be introduced to establish the alleged promise of respondent that if appellants executed the note and mortgage and did the other things mentioned, they would not be required "to make any payments on their indebtedness, either interest or principal, until this money came in from the 1932 crop of lettuce seed, and that the bank would permit them to go ahead and operate and produce this 1932 crop." While we have quoted the exact language used in the opening statement of appellants, it is manifest that the promise which it is claimed they relied upon was, as pleaded by them, that the respondent would "extend" or "postpone" all payments for the period of one year. This promise is in direct contravention of the unconditional promise contained in the note to pay the money on demand. The question then is: Is such a promise the subject of parol proof for the purpose of establishing fraud as a defense to the action or by way of cancelling the note, assuming, of course, that it can be properly coupled with proof that it was made without any intention of performing it? Our conception of the rule which permits parol evidence of fraud to establish the invalidity of the instrument is that it must tend to establish some independent fact or representation, some fraud in the procurement of the instrument, or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing. We find apt language in *Towner v. Lucas' Ex'r*, 54 Va. (13 Grat.) 705, 716, in which to express our conviction: "It is reasoning in a circle, to argue that fraud is made out, when it is shown by

oral testimony that the obligee cotemporaneously with the execution of a bond promised not to enforce it. Such a principle would nullify the rule: for conceding that such an agreement is proved, or any other contradicting the written instrument, the party seeking to enforce the written agreement according to its terms, would always be guilty of fraud. The true question is, Was there any such agreement? And this can only be established by legitimate testimony. For reasons founded in wisdom and to prevent frauds and perjuries, the rules of the common law exclude such oral testimony of the alleged agreement; and as it cannot be proved by legal evidence, the agreement itself in legal contemplation cannot be regarded as existing in fact. Neither a court of law or of equity can act upon the hypothesis of fraud where there is no legal proof of it." The rule referred to in the quotation has found expression in sections 1625 and 1698 of the Civil Code and section 1856 of the Code of Civil Procedure and, according to our authorities, is one not only of evidence but also of substantive law. *Harding v. Robinson*, 175 Cal. 534, 166 P. 808; *Lindemann v. Coryell*, 59 Cal. App. 788, 212 P. 47, 48. The last-cited case confirms the opinion we entertain, for while it is said no question of fraud was raised, yet the effort was made to prove that the note was executed upon the understanding that the payee would not enforce payment until the payor had sold sufficient real property to enable him to pay. It was there said, after citing a pertinent section of Wigmore on Evidence, that fraud may not be established by parol evidence to contradict the terms of the writing "when the statements relate to rights depending upon contracts yet to be made, to which the person complaining is a party, as under such circumstances he has it in his power to guard in advance against any and all consequences of a subsequent change of conduct by the person with whom he is dealing, and to admit evidence of extrinsic agreements would be to open the door to all evils that the parol evidence rule was designed to prevent." For further authorities involving a like principle, see *McArthur v. Johnson*, 216 Cal. 580, 15 P.(2d) 151; *Pierce v. Avakian*, 167 Cal. 330, 331, 139 P. 799; *Booth v. Hoskins*, 75 Cal. 271, 17 P. 225; and *In re Estate of Watterson*, 130 Cal. App. 741, 20 P.(2d) 772.

For the reasons stated the cause is reversed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; SEAWELL, J.



4 Cal.2d 319

**HARNISCHFEGER SALES CORPORATION
v. COATS.**

Sac. 4958.

**Supreme Court of California.
Sept. 3, 1935.**

Rehearing Denied Oct. 3, 1935.

1. Principal and agent ☞156

Provision in written contract between principal and third person that there were no prior agreements or representations between parties not expressed in writing *held* to limit authority of agent to make representations and to absolve principal from responsibility therefor.

2. Principal and agent ☞156

By stipulation in written contract between principal and third party that there were no representations or agreements between the parties not expressed in writing, innocent principal is protected against liability in tort for fraud and deceit of agent in inducing third party to enter into contract, but not against rescission for fraud of agent.

3. Principal and agent ☞156

In action on conditional sale contract entered into after negotiations between defendant and plaintiff's agent, defendant's counterclaim for damages for false representations of agent *held* not maintainable, where contract contained provision that there were no prior agreements or representations between parties not expressed in writing.

4. Principal and agent ☞156

Buyer has right to rescind for fraudulent representations of seller's agent, regardless of which party initiates proceeding on contract.

5. Principal and agent ☞156

In seller's action on conditional sale contract which contained provision that there were no prior agreements or representations between parties not expressed in writing, buyer's defensive relief for fraudulent representations of seller's agent must not be such as to subject seller to affirmative liability for damages and cannot include award of damag-

es to offset buyer's liability for balance of purchase price.

6. Principal and agent ⇨156

In seller's action on conditional sale contract, buyer *held* entitled, because of fraudulent representations of seller's agent, to be placed in statu quo, by restoration of consideration or its equivalent by both parties.

7. Principal and agent ⇨156

In action for balance due on conditional sale contract, failure of defendant to demand specific remedy of rescission for fraudulent representations of seller's agent *held* not fatal to right of rescission, since fraud, rather than remedy therefor, constitutes cause of action for rescission.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the Harnischfeger Sales Corporation against E. C. Coats. Judgment for plaintiff notwithstanding the verdict, and defendant appeals.

Reversed.

For prior opinion, see 40 P.(2d) 875.

Gerald M. Desmond and Ralph H. Lewis, both of Sacramento, for appellant.

Clyde C. Sherwood, of Oakland, and Albert E. Sheets, of Sacramento, for respondent.

LANGDON, Justice.

This is an action by plaintiff to recover the balance due on a conditional sale contract for the sale of a power shovel. Defendant answered and counterclaimed, setting up the defense of fraud. The jury brought in a verdict in favor of defendant on his counterclaim, in the sum of \$2,500. The court, however, gave judgment for plaintiff notwithstanding the verdict, for the entire balance due on the contract. Defendant appealed.

[1,2] The contract in this case was entered into after negotiations by defendant with plaintiff's agent, and it is the false representations of this agent which constitute the defense of fraud. After being signed by defendant and plaintiff's agent, the contract was sent to the eastern office of plaintiff, where it was approved, executed, and a copy returned to defendant. The contract contained the following provision: "This agreement shall not be considered as executed, and shall not become effective until accepted by the vendee, and

executed and approved by the president, or vice-president, or secretary of the vendor, and it is hereby further declared, agreed and understood that there are no prior writing, verbal negotiations, understandings, representations or agreements between the parties, not herein expressed."

It seems clear that this stipulation limits the authority of the agent to make representations, and purports to absolve the principal from all responsibility therefor. The question is whether such a stipulation may be given effect.

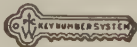
This problem was the subject of conflicting decisions in California until recently, when this court, in *Speck v. Wylie*, 1 Cal. (2d) 625, 36 P.(2d) 618, 95 A. L. R. 760, announced the governing rule. It was there held that an innocent principal might by such a stipulation *protect himself* from liability in a tort action for damages for fraud and deceit, but that the third party would nevertheless be entitled to *rescind the contract*. This is the rule declared in the Restatement of the Law of Agency, §§ 259 and 260. See, also, *Lozier v. Janss Investment Co.*, 1 Cal. (2d) 666, 36 P.(2d) 620; *Greenberg v. Du Bain Realty Corporation* (Cal. Sup.) 42 P.(2d) 628; *Graham v. Los Angeles First Nat. T. & S. Bank* (Cal. Sup.) 45 P.(2d) 543. The distinction between the two situations is a sound one. The principal would normally be liable in tort for misrepresentations by an agent acting within the scope of his actual or ostensible authority, and by stipulating in the contract that the agent has no such authority, the principal has done all that is reasonably possible to give notice thereof to the third party. Under such circumstances the innocent principal may justly be relieved of liability for the agent's wrong. But where the principal sues to recover on the contract, he is seeking to benefit through the agent's fraud. This he cannot be permitted to do. His personal liability may be avoided, but the fraudulently procured contract is subject to rescission.

[3-7] In the instant case, the counterclaim, which seeks the affirmative relief of damages, is objectionable for the same reason that an independent tort action would be. However, the principle followed in *Speck v. Wylie*, *supra*, warrants relief for fraud whether the injured party sets it up in an affirmative action for rescission, or as defensive relief in an ac-

tion by the other party to enforce the contract; that is to say, the right of the aggrieved buyer to rescission exists regardless of which party initiates the proceeding on the contract. That the buyer may set up a claim for rescission in the seller's action has recently been held by the District Court of Appeal. *California Mutual Co. v. Voigt* (Cal. App.) 42 P.(2d) 353. The defensive relief must not be such as to subject the plaintiff to affirmative liability for damages; nor would it be proper, under the rule just discussed, to permit an award of damages to offset liability for the balance of the purchase price. The defendant's relief is limited to rescission of the contract. Hence the affirmative verdict in favor of defendant on his counterclaim for damages is improper; but defendant may be entitled, because of the fraud, to be placed in statu quo, by restoration of the consideration or its equivalent by both parties. See *Curtis v. Title Guarantee & Trust Co.*, 3 Cal. App. (2d) 612, 40 P.(2d) 562, 42 P.(2d) 323. The failure to demand the specific remedy of rescission is not, of course, fatal to the right, where the facts pleaded justify it. The fraud, and not the remedy therefore, constitutes the cause of action. The present judgment must be reversed and the case retried, with amended pleadings if defendant desires to offer them, to set forth such facts as may warrant rescission. If, upon a retrial of the cause, it appears that the requirements of rescission are satisfied, defendant should have judgment.

The judgment is reversed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; THOMPSON, J.



4 Cal.2d 238

WILLIAMS et al. v. MERCED IRR. DIST.

Sac. 4848.

Supreme Court of California,

Aug. 26, 1935.

Rehearing Denied Sept. 28, 1935.

1. Waters and water courses $\Leftrightarrow$ 224

Irrigation district duly formed and existing under California laws held a "public

corporation" for municipal purposes with right to take and distribute water for public use.

[Ed. Note.—For other definitions of "Public Corporation," see Words & Phrases.]

2. Eminent domain $\Leftrightarrow$ 271

In case of lawful entry upon land by irrigation district, fact that right to compensation, as condition precedent to entry, was not demanded does not deprive owners of land of their right thereto, but merely deprives them of right to maintain ejectment against district; hence they may resort to action for value of land so taken and damages, if any, arising therefrom.

3. Remainders $\Leftrightarrow$ 13

Right of remaindermen to damages for flooding of their land by irrigation district could not be affected or defeated by any act of life tenant in consenting to entry on the land by district.

4. Venue $\Leftrightarrow$ 5(5)

Flooding of land by irrigation district held an "injury to real property," as respects persons having remainder interest in property and who had not consented to entry by district; hence action by remaindermen for damages, or, in alternative, an injunction and restitution of premises, was triable in county wherein property was situated as required by statute in case of an action for "injury to real property" (Code Civ. Proc. § 392).

[Ed. Note.—For other definitions of "Injury to Property," see Words & Phrases.]

5. Eminent domain $\Leftrightarrow$ 287

Action against irrigation district by remaindermen for damages caused by trespass committed by flooding of land without consent of remaindermen, or, in alternative, for injunction and restitution of premises, held triable in county wherein property was situated on theory that district could take possession of land without consent of owners only under its power of eminent domain, and that such an action was triable where property was situated even if action resulted in inverse condemnation in nature of an action against district for damages (Code Civ. Proc. § 392).

In Bank.

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by Thomas Williams and others against the Merced Irrigation District. From an order granting defendant's motion for a change of venue, plaintiffs appeal.

Reversed.

Louis T. Milburn, of Mariposa, and Preston & Braucht, of Merced, for appellants.

H. K. Landram and C. Ray Robinson, both of Merced, for respondent.

WASTE, Chief Justice.

The question presented by this appeal may be stated as presented by the respondent: "Where a public agency has taken possession of real property, and devoted it to a public use, is an action by the landowner for compensation for the land so taken one based on contract and transitory, or one for injuries to real property and therefore local?" The trial court held the action to be transitory, and granted the motion of defendant for a change of place of trial from Mariposa county, wherein the land of plaintiffs is situated, to Merced county, the place of residence of the defendant irrigation district. The appeal is from that order.

[1] The defendant is a duly formed and existing irrigation district under the laws of the state of California—a public corporation for municipal purposes with the right to take and distribute water for public use. In *re Madera Irr. Dist.*, 92 Cal. 296, 28 P. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; *Turlock Irr. Dist. v. White*, 186 Cal. 183, 198 P. 1060, 17 A. L. R. 72; *Whiteman v. Anderson-Cottonwood Irr. Dist.*, 60 Cal. App. 234, 212 P. 706. In the exercise of this right the district constructed a dam in the Merced river, thereby creating an artificial lake the water in which "backed up," flowed over, and covered a portion of the appellants' land. By this action, it is alleged in the complaint, the district has wrongfully and unlawfully trespassed upon the land, and greatly and permanently injured and damaged it, and is about to take the whole thereof "for an alleged public use without first making just compensation therefor * * * all to plaintiffs' injury and damage in the sum of \$10,000.00." The prayer is for damages in that amount, and that, in the event the damages are not paid, the district be enjoined from asserting any right to possession of the land, and that plaintiffs have restitution thereof.

[2] The respondent contends that it is not a trespasser on the land. From the allegations of the complaint it appears that entry on the land for the construction of the dam was made by the district under and

with the consent and permission of Mary Williams, the owner of an undivided one-half interest in the real property and of a life estate in the other undivided one-half interest, and, at the time of the entry, in entire possession of all of the land. The undivided one-half interest in which she held a life estate was owned by and vested in the plaintiffs. Respondent contends that by such entry it was neither a trespasser nor a tort-feasor, in the absence of some act of negligence committed in the prosecution of the work of constructing the dam. *Crescent Wharf & Warehouse Co. v. Los Angeles*, 207 Cal. 430, 435, 278 P. 1028. In case of lawful entry, the fact that the right to compensation, as a condition precedent to the entry, was not demanded does not deprive the owners of the land of their right thereto, but merely deprives them of their right to maintain ejectment against the district. *Gurnsey v. Northern Calif. Power Co.*, 160 Cal. 699, 710, 117 P. 906, 36 L. R. A. (N. S.) 185; *Crescent Canal Co. v. Montgomery et al.*, 143 Cal. 248, 76 P. 1032, 65 L. R. A. 940. They may resort to their action for the value of the land so taken, and damages, if any, arising therefrom. *Southern Calif. Ry. v. Slauson*, 138 Cal. 342, 344, 71 P. 352, 94 Am. St. Rep. 58. In other words, their remedy is an action to recover compensation. *Fresno St. R. R. Co. v. Southern Pac. Co.*, 135 Cal. 202, 207, 67 P. 773.

[3-5] But in this case, the plaintiffs, as remaindermen, did not consent to the entry by respondent; and the backing up of the water, and the consequent flooding of plaintiffs' land, constitute a trespass and an injury to their real property. The remaindermen (plaintiffs) could not in any way be affected or defeated by any act of their mother, the life tenant, in consenting to entry on the land by the respondent. *Pryor v. Winter*, 147 Cal. 554, 559, 82 P. 202, 109 Am. St. Rep. 162; *Newport v. Hatton*, 195 Cal. 132, 144, 231 P. 987. They have brought this action for damages caused by reason of the trespass, or for an injunction, in the event such damages are not paid, and for restitution of the premises. Section 392 of the Code of Civil Procedure provides that an action for injury to real property must be tried in the county in which the property is situated. *People v. Selby Smelting, etc., Co.*, 163 Cal. 84, 124 P. 692, 1135, Ann. Cas. 1913E, 1267; *McClatchy v. Laguna Lands, Ltd.*, 32 Cal. App. 718, 164 P. 41. Again,

the only legal right of the district to take possession of land without consent of the owners is under its power of eminent domain, and whether an eminent domain action be a direct condemnation or, as in the instant case, results in an inverse condemnation, the action must be tried where the real property is situated. Section 392, Code Civ. Proc. Since this is so, the existence or nonexistence of a public use is a false quantity. This action is purely local, in our opinion, and the order of the trial court granting the motion of the defendant district for a change of place of trial from Mariposa to Merced county lacks legal support.

The case of *Gallup v. Sacramento, etc.*, 171 Cal. 71, 151 P. 1142, cited by respondent, is predicated upon the fact that the public corporation and the landowner expressly agreed to the entry and taking for a public use. The matter, therefore, became simply a suit upon contract, as held in that case.

The order appealed from is reversed.

We concur: CURTIS, J.; PRESTON, J.; SHENK, J.; LANGDON, J.



4 Cal.2d 249

L. MINI ESTATE CO. et al. v. WALSH et al.
Sac. 4904.

Supreme Court of California.
Aug. 29, 1935.

Rehearing Denied Sept. 26, 1935.

1. Waters and water courses ☞87

In action to enjoin alleged wrongful diversion of waters of creek, findings that amount of natural flow in season was not sufficient, even if allowed to pass into channel, in course of nature, to reach plaintiffs' lands, and that drying up of stream was not due to any acts of defendants, held to sustain judgment for defendants, notwithstanding finding that some of natural flow of stream during season was diverted by defendants.

2. Waters and water courses ☞78

Landowners were entitled to retake from channel of stream flowing through their lands any water developed by them and which would not constitute any part of natural flow of stream.

3. Waters and water courses ☞40

Landowners upon whose lands was located a spring or marsh from which waters of creek originated had only riparian rights in waters of such creek.

4. Waters and water courses ☞78

Water diverted by landowners from marsh located upon their lands and forming head of stream originating on such lands by means of cutting large hole in marsh held properly found to be developed water which would not in course of nature have reached lands of lower riparian owners.

5. Waters and water courses ☞87

Where, in suit to determine water rights, plaintiff tendered only issue of wrongful diversion and prayed for an injunction and damages, court was not required to find specific amount of water developed by defendants and to which they were entitled, and proportion of natural flow of stream to which plaintiffs were entitled.

6. Pleading ☞127(1)

That landowners sued for wrongful diversion of waters of stream alleged prescriptive right as a separate defense did not constitute an admission of wrongful diversion, since the law permits inconsistent defenses.

7. Waters and water courses ☞87

That landowners sued for wrongful diversion of waters of stream by cross-complaint sought to have their title quieted did not entitle plaintiffs to have an adjudication thereon where issue was not pressed by landowners.

In Bank.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by the L. Mini Estate Company and another against Thomas Walsh and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Dunnell, Van Der Zee & Wollenberg, of San Francisco, and Harlow V. Greenwood, of Vallejo, for appellants.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, and Thomas C. Anglim, of Napa, for respondents.

SHENK, Justice.

The plaintiffs appeal on the judgment roll alone from a judgment for the defendants in an action to enjoin the alleged wrongful diversion of the waters of American Canyon creek and Wilson Ranch creek. The grounds of the appeal are that

the findings are indefinite, contradictory, and inconsistent and do not support the judgment, and that the court should have found the amount of the usual and customary flow of the streams to which the parties were respectively entitled.

American Canyon creek is a natural stream in Napa county which rises in and is fed partly by drainage and partly by springs issuing from the north side of the watershed known as Sulphur Mountain block. The stream flows westerly through the defendants' and others' lands in a meandering course and reaches the lands of the plaintiffs. The waters of Wilson Ranch creek head in a small marsh in the hollow of a hill on the easterly portion of the defendants' lands and are fed by leakages through springs and marshes moistened by a vast underground reservoir of water which, due to the porous nature of the soil, has accumulated through the ages within the mountain adjoining the defendants' lands on the east. From this head the channel of Wilson Ranch creek flows along the western base of the mountain through the lands of the defendants and thence into the lands of the plaintiff. The distance from the marsh at the head of Wilson Ranch creek to the easterly boundary of the plaintiffs' lands is about 400 yards. The streams have their confluence on the plaintiffs' lands and thence continue in one channel to Napa Bay.

The plaintiffs' lands, consisting of several hundred acres, are used for the raising of live stock and the plaintiffs require water for their stock and for domestic use. Twenty acres of the defendants' lands are devoted to the raising of vegetables under a cropping lease.

Prior to 1919 a hole had been dug in the marsh on the defendants' lands for the development and collection of water and water flowed from it into the channel of Wilson Ranch creek, but it had since filled up and returned to marsh. In 1926 the defendants dug another hole about 35 feet away in the side of the mountain and began the development of water to be used for irrigating their lands and crops. When water from that source was not used for irrigating, it was allowed to run into Wilson Ranch creek by means of a channel cut through the marsh for that purpose. In May, 1933, the defendants cut in the marsh a hole or sump 18 feet long, 6 feet wide, and 8 or 10 feet deep, and through a drain cut in the channel of Wilson Ranch creek collected the water

developed from the side of the mountain. The water thus collected in the sump was raised into wooden tanks by electric pumps and stored for use in irrigating the vegetable crops.

Prior to May 20, 1933, the defendants also developed water from the American Canyon creek by inserting into the bank a piece of corrugated iron pipe and pumping the water into storage tanks.

The plaintiffs brought the present action on May 31, 1933. They alleged in their complaint that by the use of said pipes, pumps, and drains, the channels of the streams became dry and the defendants deprived the plaintiffs of the use of the usual and customary flow of the water. The plaintiffs sought an injunction and damages, which were denied them by the judgment of the court.

The court found that the lands of both the plaintiffs and the defendants described in the complaint and claimed by them respectively were riparian to both streams; that formerly the level of the water in the vast mountain reservoir was very high but that the underground water supply was greatly depleted in 1929 by the operations of a mining company which opened a great hole in the base and that this excavation tapped the underground reservoir; that later the hole was closed, and since then the level of water has steadily risen and will continue to rise under natural conditions to the full capacity of the mountain reservoir; that the lowering of the water level dried many of the springs high on the mountain which were the partial source of supply of water in American Canyon creek and which would flow again when the reservoir reached its full capacity in future seasons. The court found that the acts of the defendants had no effect upon the level of water in the mountain, since the quantity of water thus taken was not appreciable in amount compared with the steady rise of water in the vast reservoir, and further that none of the water developed from the bank of American Canyon creek would ever reach the plaintiffs' lands even if it were not pumped from said hole but were allowed to run into and down the channel; and "that it is not true that by reason of said acts of said defendants the waters of American Canyon creek do not now reach or flow in said creek upon the plaintiffs' lands"; and that "it is not true that by reason of said acts" of the defendants, American Canyon creek has become dry,

but that said creek became dry as far up as the defendants' lands commencing in the latter part of May or early June in each year until late fall by reason of the destruction or diversion of a spring, known as Rindler spring, lying farther up the watershed of American Canyon creek, and by reason of the lowering of the subsurface water level; "that the drying up of said American Canyon creek has been due to shortage in rainfall and to the drying up of springs on the headwaters of American Canyon creek, due both to years of shortage in rainfall and to works of men with which none of the defendants has been connected."

As to Wilson Ranch creek the court found that the course of its channel from the marsh to the plaintiffs' lands "is tortuous and in many places shallow and of considerable width and for many years last past has been choked with reeds, grasses and tules and has been of such character that during the late spring and throughout the summer months, the small amounts of water originating in said marsh would not and cannot flow down to the lands" of the plaintiff; "that from time immemorial said marsh has exuded a very small amount of water at the lower end thereof into the channel of said Wilson Ranch creek during the late spring and throughout the summer months, and until the heavy rains begin in the fall of the year." The court found specifically that the water developed by the defendants is entirely in addition to any water that would otherwise flow in Wilson Ranch creek from the marsh and that the development of water from the side of the mountain and the collection of that water in the sump has not reduced the quantity of water which would otherwise exude from the marsh into the channel of Wilson Ranch creek. The findings state: "It is not true that by reason of said acts of said defendants the waters of said Wilson Ranch creek do not now reach or flow in said creek upon the plaintiffs' lands" and "that it is not true that by reason of said acts of defendants the channels of Wilson Ranch creek * * * have become dry and no water flows therein." It is further stated in the findings that the causes of shortage of water in Wilson Ranch creek are shortage in rainfall and the drying up of springs, and is "due to conditions arising in the channel of said creek with which none of the defendants has had anything to do." The court further found

that such diversion of the waters by the defendants was without the consent of the plaintiffs and that the defendants threaten to and will continue to divert waters from the channels of the respective streams but only in the manner described in the findings; that such acts of the defendants have not caused any damage to the plaintiffs.

The court found against the defendants on the issue raised by an alleged affirmative defense of a prescriptive right to the use of the waters hereinabove mentioned.

[1] The foregoing summary of the facts found is sufficient to demonstrate that there is no merit to the contentions of the plaintiffs that the findings are uncertain or contradictory or insufficient to support the judgment. It may be assumed from the record that some of the natural flow of the streams during the season of 1933 was diverted by the defendants. Nevertheless the findings show clearly and sufficiently that the amount of the natural flow in that season was not sufficient, even if allowed to pass into the channel, in the course of nature, to reach the plaintiffs' lands. Furthermore, the findings are sufficiently specific that the drying up of the stream commencing in May of the year 1933 was not due to any acts of the defendants. Reliance upon the case of *Morris v. Bean* (C. C.) 146 F. 423, 436, can avail the plaintiffs nothing. The investigation there was whether the evidence supported the finding that the waters diverted by the defendants would not in the course of nature reach the plaintiffs' land, and it was held that the finding was not supported because the evidence showed that the drying up of the creek was coincidental with the defendant's diversion. In the present case the question whether the findings are unsupported is not before us.

[2,3] The plaintiffs concede that the defendants were entitled to retake from the channel of the streams any water developed by them and which would not constitute any part of the natural flow of the stream. That concession is consonant with the decisions in *E. Clemens Horst Co. v. New Blue Point Min. Co.*, 177 Cal. 631, 171 P. 417; *Churchill v. Rose*, 136 Cal. 576, 69 P. 416, and similar cases. The court concluded in conformity with the case of *Gutierrez v. Wege*, 145 Cal. 730, 79 P. 449, that the defendant had only riparian rights in the waters of Wilson

Ranch creek, although the waters headed from a spring or marsh on the defendants' lands.

[4] The probative facts found do not indicate that the court erred in its finding of the ultimate facts, viz., that the water diverted by the defendants was developed water and that such water in the course of nature would not reach the plaintiffs' lands. The question whether the taking of the developed water in the manner in which it was taken depleted the natural and customary flow which would otherwise reach the plaintiffs' lands in the season of 1933 was also before the court and decided adversely to the plaintiffs. In this respect likewise findings of the probative facts appear sufficiently to support the court's finding on the ultimate facts. The plaintiffs urge that if a continuous flow in Wilson Ranch creek would reach their lands were the débris and other obstructions removed, they would be entitled to a decree accordingly apportioning to them a specific amount of such flow. But the court found further that other conditions, including the shortage of rainfall and the drying up of springs, with which the defendants had nothing to do, caused the drying of Wilson Ranch creek in May, 1933.

[5-7] The plaintiff contends that pursuant to such cases as *Riverside Water Co. v. Sargent*, 112 Cal. 230, 44 P. 560; *Steinberger v. Meyer*, 130 Cal. 156, 62 P. 483; and *Watson v. Lawson*, 166 Cal. 235, 135 P. 961, the court should have found the specific amount of the water developed by the defendants and to which they were found to be entitled, and the proportion of the natural flow of the stream to which the plaintiffs are entitled, and that the failure so to find has unnecessarily postponed the determination of these questions to future litigation. The answer to this contention is found in the state of the judgment roll. By its complaint the plaintiff tendered only the issue of wrongful diversion and prayed for an injunction and damages. On this issue the defendants joined. Findings on the issue were against the plaintiffs and judgment entered accordingly. The plaintiffs could not require more. The fact that the defendants alleged a prescriptive right as a separate defense did not constitute an admission of wrongful diversion. The law permits inconsistent defenses. The further fact that

the defendants, by cross-complaint, sought to have their title quieted, did not entitle the plaintiffs to have an adjudication thereon; since this issue apparently was not pressed by the defendants, the court made no determination thereof. The defendants and not the plaintiffs are the ones aggrieved, if at all, by this omission, and they are not complaining, and the issue of a prescriptive right was resolved against them.

We conclude that the judgment roll here presented is not subject to the objections made to it by the plaintiffs.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.



4 Cal.2d 289

G. R. HOLCOMB ESTATE CO. v. BURKE

et al.

Sac. 4893.

Supreme Court of California.

Sept. 3, 1935.

1. Deeds ⚡118

In action to quiet title to property allegedly conveyed to corporation by individuals who organized it and conveyed to it certain property from an estate, the deed containing description of certain property and general clause stating that conveyance included all property later found belonging to estate wherever situated, evidence held sufficient to sustain finding that only property conveyed was that specifically described.

2. Deeds ⚡38(1)

A general description in deed is generally sufficient to pass title to all lands belonging to grantors.

3. Evidence ⚡450(3)

In action by corporation to quiet title to certain property, deed given by beneficiaries of estate to corporation which was formed to take over estate, which recited grant of all parcels of estate land in certain county, describing parcels and then granting in general terms all property grantors might acquire from the estate, held sufficiently ambiguous to justify admission of extrinsic evidence to explain deed.

4. Quietting title ⇨10(2)

Action to quiet title will not lie in favor of holder of equitable title as against holder of legal title.

5. Quietting title ⇨10(2)

Action to quiet title by corporation which could be no more than equitable owner *held* not maintainable against party in whom pleadings and evidence disclosed legal title was vested.

6. Trusts ⇨89(2)

In action by corporation, which had been formed to take over a family estate and whose stock later was transferred to its debtors, which sought to have court declare trust in favor of corporation in land purchased by members of corporation, evidence *held* sufficient to sustain finding that purchases by members of corporation, paid for by checks drawn on corporation, were made with purchasers' own money, and not that of corporation.

7. Trusts ⇨89(5)

Where legal title rests in one person, to establish resulting trust for another's benefit against presumption in favor of legal title, evidence must be clear and convincing, especially where attempt is made to establish resulting trust after lapse of years or where parol evidence alone is relied on.

8. Trusts ⇨365(4)

Action by corporation, controlled by committee which was successor to corporation's creditor, to have declared in its favor trust in land transferred to individual members of corporation and allegedly paid for by corporate funds, *held* barred by laches, where transfers took place years before and creditor bank at that time was thoroughly familiar with financial affairs of corporation and checks drawn in payment of several tracts involved were drawn upon that bank, since those in control of bank's affairs were bound by previous acts or nonaction of former officials of bank.

—◆—
In Bank.

Appeal from Superior Court, Sierra County; Henry B. Neville, Judge.

Action by the G. R. Holcomb Estate Company against Lucy A. Burke and others. From a judgment for the defendants, the plaintiff appeals.

Judgment affirmed.

Thatcher & Woodburn and Forman & Forman, all of Reno, Nev., and J. M. McMahon, of Downieville, for appellant.

Hawkins, Mayotte & Hawkins, of Reno, Nev., and C. M. Hawkins, of Oakland, for respondents.

CURTIS, Justice.

This action involves six separate parcels of real property. One of said parcels, which will be referred to as parcel 1, was owned by Grove R. Holcomb at the time of his death. The other five parcels were acquired by certain of his heirs, predecessors of the defendants herein, subsequent to his death at the times and in the manner hereinafter more fully set out. Plaintiff seeks to quiet its title to all of said six parcels, and in addition thereto, in case its title cannot be quieted to the five parcels acquired since the death of said Grove R. Holcomb, plaintiff asks to have it adjudged that the defendants hold said five parcels of land in trust for the plaintiff. Said parcels of land are all situated in the county of Sierra in this state. While plaintiff has filed a complaint, an amended complaint, and an amendment to its amended complaint, we will refer to plaintiff's pleadings upon which this action was tried as the complaint. Plaintiff's complaint contains five separate causes of action. The first cause of action is one to quiet title to all of the six parcels of land involved herein, and in the other four causes of action plaintiff seeks to have imposed a trust upon the five parcels of land which were acquired by defendants' predecessors after the death of said Grove R. Holcomb.

During his lifetime Grove R. Holcomb was extensively engaged in general ranching and stock raising in the state of Nevada; and at the time of his death was possessed of a large amount of real property, consisting of many separate and distinct parcels of land, stock, equipment, and other personal property used by him in carrying on said business during his lifetime. These lands were situated in the state of Nevada with the exception of one parcel thereof, which was situated in the county of Sierra, which is the same parcel of land hereinbefore referred to and described in the first cause of action as parcel 1. Prior to his death, the said Grove R. Holcomb requested that his Nevada lands and properties be held together and not divided as they would be more valuable together than separated. On his death in December, 1905, he left surviving him, his widow, Sarah A. Hol-

comb, and nine children, as his heirs at law. In the following month of June, his widow and children caused the plaintiff corporation to be organized, and on September 18, 1906, they conveyed to said corporation by specific description the numerous tracts of land acquired by them as heirs of Grove R. Holcomb, deceased, situated in the state of Nevada, except the homestead, which had been previously set aside to the widow of the deceased; also all water rights owned by said deceased at the time of his death, and all cattle, horses, and other stock, all machinery and all other personal property belonging to the estate of Grove R. Holcomb, deceased; and "also all the right, title and interest which the parties of the first part now have, or which they may hereafter acquire, as heirs at law of Grove R. Holcomb, deceased, in any and all other real property of the estate of the said Grove R. Holcomb, deceased, including all property which may hereafter be found belonging to said estate, wherever the same may be situated." It will be observed that the deed makes no specific reference to the property of said estate situated in the county of Sierra in this state. The deed was on October 2, 1906, recorded in the office of the county recorder of the county in the state of Nevada in which the real property specifically described therein was situated, but it was never recorded in California. In January, 1908, all of the children of said Grove R. Holcomb, deceased, conveyed to their mother, Sarah A. Holcomb, the real property referred to as parcel 1 situated in Sierra county and owned by said Grove R. Holcomb at the time of his death, and in response to a request contained in the petition for distribution, the superior court of the county of Sierra on November 18, 1908, distributed said real property to said Sarah A. Holcomb. The deed from the children to their mother was duly recorded on August 7, 1908, in the office of the county recorder of Sierra county. Upon the heirs of Grove R. Holcomb, deceased, conveying to the corporation the real and personal property described in said deed of September 18, 1906, the capital stock thereof was issued to Mrs. Holcomb and her children. They conducted the corporation thereafter as a family affair. Members of the family were the sole owners of its capital stock and served as its directors and officers. No salaries or wages were paid to the

officers or directors, nor was any dividend paid to the stockholders. On the other hand, there were paid from the funds of the corporation the living expenses of all members of the family with the possible exception of Mrs. Burke. In this manner not only the general living expenses of the several members of the family were paid by checks drawn on the corporate funds, but there were also paid in the same manner, doctors' bills, premiums on life insurance policies, furniture, cemetery lots, and even lands and homes for the different families represented in the corporation. The affairs of the corporation were thus carried on without any objection or hindrance by any member of the family or by anybody else until September, 1929. In the meantime the corporation became involved in financial difficulties. At the time of its incorporation it became indebted to the Washoe County Bank of Reno, Nev., in the sum of \$20,000 borrowed money, and in September, 1929, its indebtedness to the bank was something over \$400,000. On September 12, 1929, about 87 per cent. of the stock of said corporation was transferred to Messrs. Thatcher, Wiegand, and Turritin, as trustees representing a corporation known as the Realization Corporation, a successor in interest to the then defunct Washoe County Bank. A change in the officers and directors of the corporation immediately took place, and its management passed from the control of the Holcomb family to the new interests represented by Messrs. Thatcher, Wiegand, and Turritin. Shortly thereafter the institution of this action followed. The defendants in this action, with the exception of T. C. Kiely, administrator of the estate of Sarah A. Holcomb, deceased, are the heirs at law, or their successors in interest, of Grove R. Holcomb, deceased. Sarah A. Holcomb died intestate on August 31, 1921, and her estate was subsequently distributed to her heirs at law.

Regarding the five parcels of land involved herein, and which were acquired by certain of the heirs of Grove R. Holcomb, deceased, since his death, four of said parcels were conveyed to Sarah A. Holcomb by third persons prior to her death. One of such conveyances was made in the year 1909, one in the year 1917, and the two others in the year 1919. These parcels of land were after the death of Sarah A. Holcomb distributed to her heirs at law at the time the real property

referred to as parcel one was distributed to said heirs. The fifth parcel of real property was conveyed by a third person to W. T. Holcomb in 1911. Since then W. T. Holcomb has died and certain of the defendants herein have succeeded to his interest in said parcel.

The theory upon which the plaintiff prosecutes this action is as to parcel 1 that the plaintiff corporation acquired the title to said parcel through the deed executed in the corporation's favor by the heirs of Grove R. Holcomb, deceased, which bears date the 18th of September, 1906, and is hereinbefore referred to. This deed, as we have seen, while not specifically describing the Sierra county property, contained a general provision, hereinbefore quoted in full, whereby the grantors therein purported to convey all real property of the estate of Grove R. Holcomb, deceased, "wherever the same may be situated." As to the remaining parcels of real property concerning which the plaintiff seeks a decree either that its title be quieted or that they are held in trust for the plaintiff, the contention of the plaintiff is that they were purchased entirely by funds of the plaintiff corporation and the title thereto taken as to four parcels in the name of Sarah A. Holcomb and one thereof in the name of W. T. Holcomb upon the express understanding that the grantee in each deed would hold the lands conveyed thereby in trust for the plaintiff. The answer of the defendants consists of denials of the material allegations of the complaint, and also contains affirmative defenses, which will be referred to later when reference to any of them is necessary in order to present the questions under discussion. Upon the trial the court found in favor of the defendants upon practically all controverted issues, and rendered judgment in accordance with such findings from which the plaintiff has appealed.

[1-3] We will first discuss the judgment in so far as it relates to the cause of action to quiet title to parcel 1, the real property owned by the deceased, Grove R. Holcomb, at the time of his death and situated in the county of Sierra. As to this parcel of real property, the plaintiff corporation contends that by the deed of the heirs of Grove R. Holcomb, deceased, to the G. R. Holcomb Estate Company of date September 18, 1906, and hereinbefore referred to, the said heirs of Grove

R. Holcomb conveyed this parcel of land to the corporation, although it was not specifically described in said deed. Reliance is placed by plaintiff upon the omnibus paragraph in said deed hereinbefore set out in full which purported to include in said conveyance all property belonging to the estate of Grove R. Holcomb, deceased, "wherever the same may be situated," and the position of the plaintiff corporation is that as the heirs of said deceased had conveyed the Sierra county land belonging to said deceased to the corporation, the subsequent deed from the children of said Grove R. Holcomb to their mother of this same land was of no legal effect whatever. As a special defense to the cause of action to quiet title to this specific parcel of land, the defendants, after quoting said omnibus paragraph in said deed of September 18, 1906, allege: "That it was not the intention or purpose of either said grantors or said grantee, that such deed would or should affect in any manner, property located otherwise or elsewhere than in said Washoe county, Nev." Upon the issue made by this special defense, the court after referring to the deed of Mrs. Holcomb and her children to the plaintiff corporation, dated September 18, 1906, found: "That it was the intention, understanding and purpose of said heirs at law and next of kin, being the grantors in said deed, and of plaintiff corporation, being the grantee therein, that the only lands and property conveyed by said deed were those situate in said Washoe county, Nev.; that at said time it was not the purpose or intention of either said grantors or said grantee, that said deed would or should apply to or affect, in any manner, property located otherwise or elsewhere than in said Washoe county, Nev." That there is ample evidence in the record to support this finding cannot be questioned. This deed was never recorded except in Washoe county, Nev. After the present officers of the corporation gained control in 1929, a certified copy of said deed was recorded in Sierra county. Slightly over a year after the execution of the said deed to the corporation, the children of Grove R. Holcomb conveyed their interest in the Sierra county lands to their mother, and subsequently the property was distributed by the superior court of that county to Mrs. Holcomb. It will thus be seen that the grantors in said deed, who owned all the

stock of the grantee therein, pursued a course regarding said Sierra county land utterly inconsistent with their deed of September 18, 1906, if said deed be construed to include the Sierra county land. There is also evidence that the same attorneys who prepared the deed of September 18, 1906, also prepared the later deed. The same attorneys participated in the settlement of the estate of Grove R. Holcomb, deceased, in Washoe county, who subsequently settled the estate of said deceased in Sierra county. Furthermore, all descendants of Grove R. Holcomb, deceased, who were living at the time of the trial of the action, testified that it never was the intention of the heirs of said deceased to convey the Sierra county property to the corporation. Plaintiff does not seriously question the sufficiency of the evidence to support said finding, but contends that the general or omnibus clause in the deed of September 18, 1906, is a valid disposition of all property belonging to the estate of Grove R. Holcomb, deceased, wheresoever situated, and that the trial court erred in admitting oral evidence to vary the plain and unambiguous terms of said instrument. It may be conceded that, generally speaking, a general description in a deed is sufficient to pass title to all lands belonging to the grantors. To a certain extent, this was the holding in the following well-considered cases: *Frey v. Clifford*, 44 Cal. 335; *Pettigrew v. Dobbelaar*, 63 Cal. 396; *McCulloh v. Price*, 14 Mont. 320, 36 P. 194, 43 Am. St. Rep. 637; *Mays v. Morrell*, 65 Or. 558, 132 P. 714; *Chicago Great Western Railroad Co. v. McCaffery*, 178 Iowa, 1147, 160 N. W. 818; *Brown v. Warren*, 16 Nev. 228. While agreeing with plaintiff as to the effect of a general description in a deed, we are not in accord with its contention that the deed in question was so plain and unambiguous that the court committed reversible error in admitting extrinsic evidence to explain its terms. In the first part of the deed, it is recited that the grantors grant to the grantee all those certain pieces and parcels of land, "situated in the County of Washoe, State of Nevada, and described as follows:" Here follows a description of all of the land conveyed, the description ending with the general or omnibus paragraph quoted above. We think it questionable when reading the deed as a whole whether it was the intention of the parties to said

deed to include any property situated outside of the county of Washoe, Nev. There is at least a sufficient ambiguity in the language of the deed to justify the admission of extrinsic evidence to explain its terms. In our opinion the trial court was not in error in admitting such evidence at the trial of this action.

[4,5] The title to the five other parcels of land involved in this action is controlled by an entirely different state of facts. Plaintiff, as we have noted above, seeks to quiet its title to these lands, and also seeks to have it declared that they are held by the defendants in trust for the plaintiff. Both the pleadings and the evidence disclose the fact that the legal title to these lands stands in the name of the defendants. At most the plaintiff claims to be the equitable owner of said lands. It has been repeatedly held in this state that an action to quiet title will not lie in favor of the holder of an equitable title as against the holder of a legal title. *Buchner v. Malloy*, 155 Cal. 253, 100 P. 687, 688. Under this doctrine, plaintiff's action to quiet title to said lands must fail.

[6,7] In support of its claim that said lands are held by defendants in trust for the plaintiff, it is alleged in the complaint that plaintiff purchased said lands and paid the consideration therefor and that the deeds transferring the title to said lands were taken in the name of the defendants' predecessors (four of said parcels being conveyed to Sarah A. Holcomb and one to W. T. Holcomb) and such transfers of title were made for the purpose of and with the understanding that said grantees should hold said lands in trust for plaintiff. This allegation is denied by defendants, except that they admitted that the deeds to said lands were made to defendants' said predecessors. Upon the issue thus made by these pleadings, the court found that Sarah A. Holcomb, as to four of said parcels of land, and W. T. Holcomb, as to one of said parcels, purchased for their "own and sole account, use, and purposes" the parcels of land so conveyed to them; that the plaintiff corporation furnished and gave to Sarah A. Holcomb and W. T. Holcomb, respectively, "certain moneys from the treasury of said plaintiff corporation as, and which was used as, their own money about, for and in said purchases, respectively, by drawing its checks payable to

the grantors who conveyed said land," respectively, to Sarah A. Holcomb and W. T. Holcomb; and "that it was not the intention of the plaintiff corporation, when it drew its check for the payment of said lands and premises, and each thereof, or of Sarah A. Holcomb or W. T. Holcomb when they, respectively, purchased the lands mentioned, that the title should be taken in the name of Sarah A. Holcomb, or in the name of W. T. Holcomb, for the use and benefit of plaintiff corporation, but said purchases were, and each of same was, made by said Sarah A. Holcomb and said W. T. Holcomb with their own money and for their own use and benefit." It will be seen from the reading of the findings that the trial court held against the plaintiff on its claim that said real parcels of land were conveyed to Sarah A. Holcomb and W. T. Holcomb "for the purpose of and with the understanding that said grantees should hold said lands in trust for the plaintiff" and further found that said purchases were made by Sarah A. Holcomb and W. T. Holcomb "with their own money and for their own use and benefit." The only question that may arise as to the sufficiency of the evidence to support these findings is as to the manner in which these grantees acquired the money from plaintiff corporation to make these purchases. As we have seen, the plaintiff corporation as originally organized and conducted up to the time when a majority of the stock therein was transferred to Messrs. Thatcher, Wiegand, and Turritin, was a family affair. The members of the Holcomb family had conveyed to the corporation practically all their property. They carried on the affairs of the corporation without salary or wages. No dividends were paid directly, but by common consent of all stockholders in the corporation various sums of money were from time to time paid to or advanced for the use of the several members of the family. In fact, not only their entire living expenses were paid in this manner, but homes and other purchases of real property were made as the needs of the different members of the family required. In this way the several parcels of real property involved in the second, third, fourth, and fifth causes of action were acquired. No objection was ever made by any member of the corporation nor by any creditor thereof, to any of such purchases. This statement includes the

Washoe County Bank, representatives of which now own the majority of the corporate stock of the plaintiff. No showing has been made that at the time these several transfers were made the capital stock of plaintiff was in any way impaired by the advancements made on account thereof, nor that the rights of the creditors of plaintiff were at the time in any way impaired. Some of these transfers were made to defendants' predecessors more than twenty years, and all more than ten years, before any question as to their validity was raised by any creditor, or any person whatever. In view of this state of the evidence, we are not able to say that the findings of the court to the effect that the purchases of said parcels of land by Sarah A. Holcomb and W. T. Holcomb were made with their own money and for their own use and benefit do not find substantial support in the evidence. "Where the legal title rests in one person, to establish a resulting trust for the benefit of another against a presumption in favor of the legal title, the evidence must be clear and convincing, especially when an attempt is made to establish a resulting trust after the lapse of many years or where parol evidence alone is relied upon." *Ency. of Evidence*, vol. 13, pp. 150, 151. "It is also true that evidence to establish a trust must be clear, convincing, and satisfactory and practically free from doubt. When is the evidence of that character? The answer must be that if it has satisfied the conscience of the chancellor before whom the trial was had, and this court cannot say that the evidence clearly preponderates against the finding the requirement must be held to be satisfied." *McQuay v. McQuay*, 81 Mont. 311, 263 P. 683, 686. Authorities similar to the above might be multiplied, but we deem the above sufficient for our present purpose. The trial judge, the chancellor before whom the trial was had, was not satisfied that the character of the evidence before him was such that it would justify him in the conscientious discharge of his duty in holding that a trust in the disputed lands had been established in favor of the plaintiff. Our consideration, after a careful study of the record and the law applicable to the facts of the case, coincides with that reached by the trial court.

[8] The defense of laches is also relied upon, the same having been set up in one

of defendants' affirmative defenses. We think this defense should also be sustained. As we have already stated, all of these transfers took place more than ten years, and some of them twenty years, prior to the present attack upon them. During this time, the Washoe County Bank, the predecessor of the present committee controlling the affairs of the plaintiff, undoubtedly had notice of these transactions. The checks drawn in payment of the several tracts of land involved were drawn upon that bank, and in other respects the evidence indicates that the bank was thoroughly familiar with the financial affairs of the corporation including those now in question. No action was taken, nor was any protest made against the transfers, or against any of them, until the institution of the present action. Those in control of the bank's affairs are bound by the previous acts, or nonaction, of the former officials of the bank. If laches ran against the latter, and in our opinion it did, the effect is the same as to their successors. For this added reason, therefore, we are of the opinion that plaintiff should not succeed in this action.

In view of these conclusions, a discussion of other questions considered by counsel in their briefs becomes unnecessary.

The judgment is affirmed.

We concur: LANGDON, J.; PRESTON, J.; SHENK, J.



4 Cal.2d 223

In re LEVY'S ESTATE.
S. F. 15396.

Supreme Court of California.
Aug. 20, 1935.

1. Executors and administrators ☞314(12)

Written opposition to order of partial distribution *held* unnecessary to constitute person who appeals from such order "party" with right of appeal from proceedings in which order was entered (Code Civ. Proc. § 938; Probate Code, § 1000).

[Ed. Note.—For other definitions of "Party," see Words & Phrases.]

2. Courts ☞202(5)

Rule that record must affirmatively show interest of person appealing if such person is not party to case is not strictly applicable to probate proceedings wherein heirs, devisees, legatees, or creditors who are aggrieved by court's action may appeal from appealable order, although such persons are not nominally privy to record (Code Civ. Proc. § 938; Probate Code, § 1000).

3. Executors and administrators ☞314(12)

Where person, bearing same name as appellant appealing from order of partial distribution, was named in will as specific legatee, and counsel for person so named appeared and objected at hearing on petition for partial distribution, and was served with and receipted for copy of order and subsequently noticed appeal therefrom, fact that person named in will and appellant from order were same person would be presumed in absence of affirmative assertion that she was an interloper and not legatee named in will (Code Civ. Proc. § 1963, subd. 25).

In Bank.

Appeal from Superior Court, City and County of San Francisco.

Proceedings in the matter of the estate of Isaac Levy, deceased, wherein Abe Lip-ton and others filed petition for partial distribution, to which Eyrle R. Levy, individually and as executor, objected. From an order for partial distribution entered after hearing upon such motion, Alvira Davis appeals. On motion of petitioners to dismiss appeal.

Motion denied.

G. C. Ringole, of San Francisco, for appellant.

David D. Oliphant, Jr., of Oakland, for respondents.

WASTE, Chief Justice.

Motion to dismiss appeal from an order of partial distribution upon the ground that the appellant is not a party to the proceeding nor aggrieved by the order.

The will of the decedent was admitted to probate on June 14, 1932. It bequeathed the respondents \$5,000 to be equally divided among them. A person bearing the same name as the appellant was also named as a specific legatee. During the course of the probate proceeding the respondents petitioned for distribution of their legacy. The executor filed written objections thereto. Thereafter the probate court made its

order granting the petition and ordering distribution to the respondents. It is this order from which the appeal has been taken.

The affidavit of the county clerk filed in connection with the respondents' motion to dismiss avers that at the time of the hearing upon the petition for partial distribution the pleadings consisted solely of the petition and the written objections of the executor, nothing having been filed, by way of objection or otherwise, by the appellant. However, it appears from the affidavit of counsel filed in support of the motion to dismiss that at the time of the hearing of the respondents' petition for distribution, counsel appeared for and on behalf of Alvira Davis and orally objected to the granting of the petition. It also appears from the latter affidavit that the order granting the petition recites that Alvira Davis appeared by counsel.

[1] Under the circumstances, we cannot accept respondents' conclusion that the appellant is not a party to the proceeding and therefore not entitled to appeal from the order. In our opinion, written opposition was not indispensable to constitute the appellant a party within the meaning of section 938 of the Code of Civil Procedure so as to afford her a right of appeal. Section 1000 of the Probate Code, which provides for partial distribution and gives "any person interested in the estate" the right to resist any application therefor, is silent as to any requirement of written opposition by such "interested" person. In *re Estate of Murphy*, 145 Cal. 464, 468, 78 P. 960, and *In re Estate of Kearney*, 13 Cal. App. 92, 95, 109 P. 37, contain language tending to indicate that any form of opposition, oral or written, by or on behalf of such "interested" person will suffice. In *Re Estate of Benner*, 155 Cal. 153, 154, 99 P. 715, 716, a sister of the decedent, who had not appeared at the hearing of the petition for distribution, appealed from the order distributing certain undisposed of property to the father of decedent as heir at law. The opinion states: "It is first urged by respondent that upon this appeal appellant is not entitled to a bill of exceptions, and that the bill of exceptions actually settled by the court should not here be considered. In this respect an analogy is sought to be drawn between the case of a devisee, heir at law, or distributee who fails to make personal appearance upon such a hearing and that of a defaulting defendant in a

civil action. * * * We hold, however, that in cases of this character an appellant in every proper case is entitled to his bill of exceptions, and that without the necessity of first appearing in person in advocacy of, or opposition to, the matter pending for determination."

The authorities relied on by the respondents in support of their motion to dismiss are distinguishable. In *re Estate of Ryer*, 110 Cal. 556, 42 P. 1082, presented a situation wherein the complaining beneficiary offered no opposition, either orally or in writing. In *Re Estate of McDermott*, 127 Cal. 450, 59 P. 783, no opposition of any kind had been offered in the trial court by the appellant surety whose appeal was dismissed. The remaining cases cited by respondents are distinguishable on their facts. We shall not pause to discuss them.

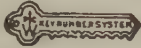
[2] In 2 Hayne on New Trial and Appeal, § 203, it is said: "In all of the above cases, however, it is essential that the record should show affirmatively the interest of the person who seeks, as a party aggrieved * * * to prosecute an appeal, if he is not a formal party thereto. 'One not a party to an action or proceeding may sometimes appeal, but in some way his interest must be made to appear in the record.' It may be doubted if the rule above stated is strictly applicable to probate proceedings. In probate matters several distinct classes of individuals are interested * * * in the various steps taken in the settlement of estates. Almost every important step affects one or another of these classes, either directly or indirectly, and although neither heirs, devisees, legatees or creditors may be otherwise than nominally privy to the record, they may be often aggrieved by the court's action. If so, it is well settled that they may prosecute an appeal therefrom; provided the particular order is one of those made appealable by statute. * * *"

[3] In conclusion, we find nothing of merit in the contention that the record is silent as to whether the appellant is the same Alvira Davis named in the will. The order appealed from and the moving papers disclose, as stated, that counsel acting for and on behalf of Alvira Davis appeared at the hearing upon the petition for partial distribution and orally opposed the same. Thereafter said counsel was served with and on behalf of Alvira Davis receipted for a copy of the order granting such distribution and subsequently noticed an ap-

peal therefrom. For present purposes, it will be presumed that appellant is the Alvira Davis named in the will. Section 1963, subd. 25, Code Civ. Proc. No attempt is made to affirmatively assert that she is an interloper and not the legatee named in the will.

The motion is denied.

We concur: SEAWELL, J.; LANGDON, J.; PRESTON, J.; SHENK, J.; CURTIS, J.



4 Cal.2d 227

DUPONT v. DUPONT.

S. F. 15341.

Supreme Court of California.

Aug. 21, 1935.

1. Divorce ☞ 164, 165(1)

When an interlocutory decree has become final, in the sense that it is no longer subject to the right of appeal or motion for new trial, or any right to relief by order within statutory provisions, trial court is without jurisdiction to vacate or modify such decree except as to payment of alimony (Code Civ. Proc. § 473).

2. Divorce ☞ 164

Order modifying interlocutory decree of divorce as to property, attorney fees, and costs *held* beyond jurisdiction of trial court where not made on motion for a new trial, or on appeal, and not made in response to a motion under statute providing relief, in some instances, from judgments or orders (Code Civ. Proc. § 473).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Violet Tearney Dupont against Alfred Dupont, in which the defendant filed a cross-complaint. From an order modifying an interlocutory decree of divorce which had been awarded to the plaintiff, plaintiff appeals.

Reversed.

Ralph L. Isaac and Jerome L. Schiller, both of San Francisco, for appellant.

Lombardi & Minnis, of San Francisco, for respondent.

WASTE, Chief Justice.

Plaintiff, to whom was awarded an interlocutory decree of divorce, appeals from an order modifying the provision of the decree relating to property, attorney fees, and costs.

It is the contention of appellant that the court acted in excess of its jurisdiction in granting the motion for modification, made on the papers in the case and affidavit of the defendant. No ground was stated in the notice and the order merely recites "that good cause exists therefor." The interlocutory decree awarded the plaintiff a lump sum of \$1,000 as her share of the community property, the sum of \$150 attorney's fee, and another sum as costs. The rest of the community property was awarded to the defendant; one piece of property, the home of the parties, being ordered sold and the sums ordered paid to plaintiff to be paid out of the proceeds of sale. No appeal was taken from the decree and no motion for a new trial was made.

[1,2] The affidavit of the defendant, on the motion to modify, alleged difficulty in making a satisfactory sale of the property, defendant's desire to keep the premises as "a home," and his inability to borrow money with which to pay plaintiff or otherwise to meet those obligations. On this showing, which was traversed by plaintiff, the trial court made the order modifying the decree with respect to the time and manner of payment. The attorney's fee was ordered paid on a defined date. Three hundred dollars was directed to be paid on the property award and costs, "the balance of said judgment remaining at the rate of thirty dollars per month" commencing on a fixed future date. "It is well-established law that, when an interlocutory decree has become final, in the sense that it is no longer subject to the right of appeal or motion for new trial, or any right to relief by order within the provisions of section 473, Code of Civil Procedure, the trial court is without jurisdiction to vacate such decree or modify the same. There is, of course, the continuing authority of the court to modify its orders relating to payment of alimony; but with respect to the right to a divorce and with respect to the de-

termination of property rights, the right to modify or vacate the decree no longer exists." *De Haven v. Superior Court*, 114 Cal. App. 253-255, 300 P. 95, 96; *Bancroft v. Bancroft*, 178 Cal. 367, 173 P. 582. The principal item in the decree here was the award to plaintiff of a lump sum, other than an allowance of alimony, of \$1,000 as plaintiff's share of the community property; "all the rest and residue of the community property of the parties" being awarded to the defendant. *Webster v. Webster*, 216 Cal. 485, 488, 14 P.(2d) 522. Provision was made for securing to plaintiff the payment of the amount. The modified order, not made on motion for a new trial, or on appeal, and not made in response to a motion under the provision of section 473, Code of Civil Procedure, was beyond the jurisdiction of the trial court and is therefore reversed.

We concur: SHENK, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.; CURTIS, J.



4 Cal.2d 313

SPENCER v. BEADLE S. S. CO., Limited,
et al.

S. F. 15384.

Supreme Court of California.

Sept. 3, 1935.

Rehearing Denied Oct. 3, 1935.

1. Trial ⇨260(8)

In seaman's action for injuries sustained when he fell through open hatch of vessel, where issues were whether plaintiff was furnished reasonably safe place to work and whether defendant was negligent in failing to provide such reasonably safe place, refusing instruction on assumption of risk *held* not prejudicial error where other instructions placed liability on defendant only if reasonably safe place was not provided (Merchant Marine Act of 1920, § 33, 46 USCA § 688).

2. Seamen ⇨29(4)

Doctrine of assumption of risk does not apply to seamen (Merchant Marine Act of 1920, § 33, 46 USCA § 688; Federal Employers' Liability Act § 4, 45 USCA § 54).

3. Master and servant ⇨226(1)

Employee does not assume risk of employer's negligent failure to provide safe place, since rule of assumption of risk presupposes that employer has performed duty of caution, care, and vigilance imposed upon him by law (Merchant Marine Act of 1920, § 33, 46 USCA § 688; Federal Employers' Liability Act § 4, 45 USCA § 54).

4. Seamen ⇨29(5)

In seaman's action for injuries sustained when he fell through open hatch of vessel, evidence that lumber was placed close and high so as to leave no space between lumber and hatch coamings, that hatch was unnecessarily open, that request that hatch covers be replaced was ignored by defendants, and that plaintiff lost his balance and fell into open hatch while unloading lumber, *held* to make question for jury as to whether defendant was negligent in failing to provide safe place for plaintiff to work (Merchant Marine Act of 1920, § 33, 46 USCA § 688).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Alfred Spencer against Beadle Steamship Company, Limited, and George S. Beadle, for damages for personal injuries sustained while unloading lumber from a ship. A nonsuit was granted to defendant steamship company. From a judgment for plaintiff, against defendant George S. Beadle, he appeals.

Affirmed.

For prior opinion, see 40 P.(2d) 273.

Sawyer & Cluff, Webster F. Street, and Daniel W. Evans, all of San Francisco, for appellant.

A. Don Duncan, of San Francisco, for respondent.

SHENK, Justice.

The plaintiff brought this action under the provisions of section 33 of the Merchant Marine Act of 1920 (46 USCA, § 688), called the Jones Act, against Beadle Steamship Company, Limited, and George S. Beadle, for damages for personal injuries sustained when he fell through an open hold of the steamer Fort Bragg. A judgment of nonsuit was entered as to the steamship company. The jury returned a verdict for the plaintiff in the sum of \$10,000 which, on denying the motion for a new trial, the court reduced to \$7,000.

From the judgment entered on the verdict, the defendant George S. Beadle has appealed.

The main contention on the appeal is that the court erred prejudicially in refusing to instruct the jury on the question of assumption of risk. The Fort Bragg was a single-ended vessel engaged in the coastwise trade. The plaintiff was employed as a seaman on the vessel. On the particular voyage in question timbers 52 feet long were piled lengthwise of the deck, on the port and starboard side, to a height of about 10 feet above the deck. Between this lumber and the hatch coamings there was a space about 40 inches wide, and about 45 feet in length, the 45 feet being the distance between two large tanks fore and aft of the hatch. At Coos Bay a quantity of 1x12's and 2x3's was loaded into the spaces so left on the port and starboard sides of the hatch and between the two tanks, up to the top of the long timbers. No space was left between the load and the hatch coamings.

When the ship docked at Vallejo to take off cargo the plaintiff was ordered to assist in unloading the lumber piled between the large timbers and tanks and the hatch coamings. While this lumber was being unloaded the hatch covers were off. The plaintiff and another were preparing a load of lumber to be swung ashore, about 6 or 8 feet above the hatch coamings. While the plaintiff was attempting to place a cargo sling around a slingload of lumber, he fell into the hold, a distance of about 18 feet, and was seriously injured.

The plaintiff alleged the defendants' negligence in the manner of loading the lumber between the long timbers and the hatch coamings, and the negligent failure of the defendants in furnishing to the plaintiff a reasonably safe place to work. The defendants pleaded affirmatively assumption of risk and contributory negligence.

The trial court refused to give the instructions requested by the defendant on the question of assumption of risk. The question is whether under the facts this defense was available to the defendant and the failure to instruct the jury thereon constituted prejudicial error.

It is contended that the plaintiff, an experienced seaman, assumed any risk incident to the work of unloading under the circumstances involved. The Jones Act incorporates by reference the provisions of

the Federal Employers' Liability Act (45 USCA § 54). By the provisions of the latter act the defense of assumption of risk, if applicable under the facts, is a bar to recovery. The appellant contends that if that defense is not available in the case of a seaman suing under the Jones Act, nevertheless the plaintiff is not a seaman but is rather in the class of longshoremen and stevedores who live on shore and are not subject to the discipline of the ship and may quit at will. This argument is predicated on the showing that the vessel was engaged only in the coastwise trade, and was never any great distance from a port, and that the plaintiff was not under any necessity of subjecting himself to unsafe employment, but could quit at will. The cases relied upon by the defendant, however, do not indicate that the mere engagement in coastwise trade alone is sufficient to create the exception. In such cases as *Skolar v. Lehigh Valley R. Co.* (C. C. A.) 60 F.(2d) 893; *The Scandinavia* (D. C.) 156 F. 403 [see, also, *Scheffler v. Moran Towing & Trans. Co.* (C. C. A.) 68 F.(2d) 11], the plaintiff lived on shore and otherwise was not strictly a seaman subject to orders and discipline as such. We think the rule of those cases was not intended to be extended to the case of a seaman simply because he was employed on a vessel which touched port frequently.

We may assume that the plaintiff, as is stated in some cases [*Chamberlin & Co. v. Rylander* (C. C. A.) 68 F.(2d) 362; *Scheffler v. Moran Towing & Trans. Co.*, supra; *States S. S. Co. v. Berglann* (C. C. A.) 41 F.(2d) 456], assumed the risks ordinarily incident to the employment. One of the principal issues upon which evidence was introduced in this case was whether the plaintiff was furnished a reasonably safe place to work while unloading the lumber next to the hatch coamings. The accident occurred at 9 o'clock on the morning of May 4, 1931. The hatch covers had been taken off the night before. There was undisputed evidence that the lumber, at least from a distance of about 4 feet from the deck, had been "landed" rather than stowed, that is, placed in slingloads just as it came from the dock, rather than hand-piled piece by piece with laths at stated distances to make a solid packing, and that a portion of the landed lumber toppled with the plaintiff, causing him to fall into the hold. It further appeared that a request had been made to replace the hatch covers, but that the plaintiff was or-

dered to work with the hatch uncovered. It was undisputed that there was no necessity for the hatch to be open, as no unloading from the hold was being done that morning. There was also evidence that it was unusual to load the deck so close to the hatch.

[1] The question is not whether the plaintiff properly handled the slingload which he was preparing to be lifted off. That question is rather one of contributory negligence [see *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 503, 34 S. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; *McMyler Mfg. Co. v. Mehnke* (C. C. A.) 209 F. 5; *Devaney v. Atchison, etc., R. Co.*, 219 Cal. 487, 27 P.(2d) 635; *Engfors v. Nelson S. S. Co.*, 131 Or. 108, 280 P. 337; *Barker v. Kansas City, M. & O. R. Co.*, 88 Kan. 767, 129 P. 1151, 43 L. R. A. (N. S.) 1121], and is not otherwise involved in a consideration of the matter before us. The important issue was whether the plaintiff was furnished a reasonably safe place to work and whether there was evidence that the defendant was negligent in failing to provide such a reasonably safe place. The question was submitted to the jury on that basis, and we see no prejudicial error in the refusal of the court specifically to instruct the jury as to whether the plaintiff had assumed the risk. The effect of the instructions as given was to place liability on the defendant only if a reasonably safe place was not provided, and there was negligence in failing to make such provision.

[2-4] It has become well recognized, both before and since the incorporation into the Jones Act of the Federal Employers' Liability Act (45 USCA § 51 et seq.), that the entire doctrine of assumption of risk is not applicable to seamen. The reasons underlying this policy are stated in the cases recognizing the exception. *La-fourche Packet Co. v. Henderson* (C. C. A.) 94 F. 871; *The Colusa* (C. C. A.) 248 F. 21; *Cricket S. S. Co. v. Parry* (C. C. A.) 263 F. 523; *Ziegler v. Alaska Portland Packers' Ass'n*, 135 Or. 359, 296 P. 38; *Lejeune v. General Pet. Corporation*, 128 Cal. App. 404, 18 P.(2d) 429; 56 Cor. Jur. 1198 et seq.; *McGeorge v. Charles Nelson Co.*, 107 Cal. App. 148, 290 P. 75.

It is also well settled that under the federal statutes an employee does not assume the risk of the defendant's negligent failure to provide a safe place to work. *Seaboard Air Line Ry. v. Horton*, supra; *States S. S. Co. v. Berglann*, supra; *Ziegler v. Alaska Portland Packers' Ass'n*, supra; *The Kongosan Maru* (D. C.) 282 F. 666; *Engfors v. Nelson S. S. Co.*, supra. The rule of assumption of risk presupposes that the employer has performed the duty of caution, care and vigilance which the law casts upon him. *Cincinnati, N. O. & T. P. Ry. Co. v. Hall* (C. C. A.) 243 F. 76, 81. The reliance upon the statement in *The Gladiolus* (D. C.) 21 F. 417, that leaving open a common between-deck hatchway while the vessel is lying in port is not presumptive evidence of negligence, is insufficient to require a reversal of the judgment in the present case. There was no contention made in this case that merely leaving the hatch open constituted negligence. There is involved the additional element of the negligence of the defendant in furnishing to the plaintiff an unsafe place to work. The record supplies sufficient evidence to go to the jury on that issue and to support its implied finding thereon. Upon the record presented the submission to the jury of the instructions requested would be the practical equivalent of directing a verdict for the defendant. The facts do not present such a case as, without question, entitles the defendant to the instructions on the question of assumption of risk and the withholding of instruction on that question, if error, was not prejudicial to him. There was no failure to instruct the jury on the defendant's theory of the case. The submission of the case to the jury on the issue considered by it was as favorable as the defendant could expect under the authorities herein cited.

We have examined the other specifications of error with reference to the refusal to give certain requested instructions and to the admission and exclusion of certain evidence, and find nothing in the rulings of the trial court which would justify a reversal.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

4 Cal.2d 268

HIBERNIA SAVINGS & LOAN SOC. v.

BELCHER et al.

Sac. 4936.

Supreme Court of California.

Sept. 3, 1935.

As Modified on Denial of Rehearing
Oct. 4, 1935.

1. Mortgages ⚡473

Receiver appointed with authority to collect rents pending foreclosure had no right to receive rents which accrued subsequent to date of order revoking his appointment (Code Civ. Proc. § 564, subd. 2).

2. Executors and administrators ⚡35(17)

Guardian and ward ⚡25

Receivers ⚡62

Order removing executor, administrator, guardian, or receiver is self-executing (Code Civ. Proc. § 564, subd. 2).

3. Executors and administrators ⚡35(19)

Appeal taken from order revoking appointment of receiver who had been appointed to collect rents pending foreclosure did not restore powers of such receiver (Code Civ. Proc. § 564, subd. 2).

4. Fraudulent conveyances ⚡77

Mortgagor's assignment of rentals due and uncollected which would realize between \$2,000 and \$3,000 to attorney who had represented mortgagor in extensive foreclosure litigation, which involved three proceedings before appellate court, *held* valid as good-faith payment of reasonable fee for attorney's services, as against contention of mortgagor's judgment creditor that assignment was without consideration and made with intent to hinder, delay, and defraud creditors.

5. Fraudulent conveyances ⚡115(1)

Debtor's good-faith preferences of one creditor to another *held* not subject to attack in action to set aside such preferential payment on ground of lack of consideration or for intent to hinder, delay, and defraud creditors (Civ. Code, § 3432).

6. Assignments for benefit of creditors ⚡4

Absolute assignment of accrued rents in payment for legal services rendered by attorney to assignor *held* not assignment in trust for benefit of creditor of debtor, and hence not governed by rules pertaining to assignments in trust for benefit of creditors (Civ. Code, § 3432).

7. Fraudulent conveyances ⚡220

In action by secured creditor to set aside alleged fraudulent conveyance, creditor must show that indebtedness due him is not fully secured, and mere showing that mortgaged property was purchased at foreclosure sale for amount inadequate to discharge indebtedness is insufficient.

8. Corporations ⚡404(2)

Assignment of accrued rents due corporation by resolution at meeting of corporation's board of directors at which president of corporation was one of two board members present *held* valid as act in usual course of business within authority of president without concurrence of other board members, under provision of corporation's by-laws that president had direction of corporation's affairs.

9. Corporations ⚡426(7)

Subsequent acquiescence of director of corporation in assignment of accrued rents due corporation *held* implied ratification of such assignment, although director was not present at meeting of board of directors at which resolution of assignment was adopted, had not been notified of such meeting, and had not formally waived such notice.

In Bank.

Appeal from Superior Court, Yuba County; J. O. Moncur, Judge.

Action by the Hibernia Savings & Loan Society against Richard Belcher and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Tobin & Tobin and George A. Clough, all of San Francisco, and Rich, Weis & Carlin and F. E. Carlin, all of Marysville, for appellant.

Richard Belcher, of Marysville, for respondents.

SEAWELL, Justice.

This is an action to set aside an assignment of accrued rents made by defendant Ellis Estate Company, to defendant Richard Belcher, on the ground that said assignment was without consideration and made with intent to hinder, delay, and defraud plaintiff Hibernia Savings & Loan Society, a creditor of defendant Ellis Estate Company upon a deficiency judgment

held by it against said company. Plaintiff prosecutes this appeal from a judgment that it takes nothing by its complaint.

The evidence adduced upon the trial established, and the court found, that the assignment of rents had been given in payment for legal services rendered by Belcher for the Ellis Estate Company in connection with the foreclosure of the mortgage upon which plaintiff now holds a deficiency judgment. Said mortgage was executed on June 18, 1930, to secure payment of two promissory notes for a total principal sum of \$64,000, and covered property in the city of Marysville, Yuba county, on which is located a building containing stores, offices, and apartments.

On October 30, 1931, the Hibernia Savings & Loan Society filed suit to foreclose said mortgage and upon its ex parte application the court on the same day appointed a receiver to take possession of the property pending foreclosure and to collect the rents thereof. The Ellis Estate Company, represented by Mr. Belcher, moved to vacate the order appointing the receiver, and the court on November 27, 1931, vacated the receivership appointment. From the order of November 27, the Hibernia Savings & Loan Society appealed to this court. The Ellis Estate Company, represented by Mr. Belcher, moved to dismiss the appeal on the ground that the order was not appealable. This court thereafter held the order appealable. [Hibernia Sav. & Loan Society v. Ellis Estate Co., 216 Cal. 280, 13 P.(2d) 929], one member of the court dissenting. The appeal was transferred to the District Court of Appeal, Third Appellate District, which rendered its decision on June 2, 1933, affirming the order of the trial court setting aside the order appointing a receiver. *Hibernia Sav. & Loan Society v. Ellis Estate Co.*, 132 Cal. App. 408, 22 P.(2d) 806. The Hibernia Savings & Loan Society had procured appointment of a receiver ex parte upon its affidavit alleging on information and belief "that the mortgaged property was of a value less than the amount secured by the mortgage." Appointment of a receiver with authority to collect rents pending foreclosure is authorized only where the mortgage security is insufficient. Section 564, subd. 2, Code Civ. Proc.; *Title Ins. & Trust Co., v. California Dev. Co.*, 164 Cal. 58, 127 P. 502; *Bank of*

Woodland v. Stephens, 144 Cal. 659, 79 P. 379; *Baker v. Varney*, 129 Cal. 564, 62 P. 100, 79 Am. St. Rep. 140; 18 Cal. Jur. pp. 296, 302. Upon the motion before the trial court to vacate the receivership appointment, Mr. Belcher, representing the Ellis Estate Company, produced witnesses whose testimony the trial court accepted as establishing that the mortgage property exceeded in value the indebtedness secured, and was of a value in excess of \$100,000, and the District Court of Appeal upheld the action of the trial court.

Prior to the commencement of the mortgage foreclosure suit by the Hibernia Savings & Loan Society, that corporation, on September 24, 1931, filed notice of its intention to cause the mortgaged property to be sold under a power of sale contained in the mortgage. The Ellis Estate Company, on January 15, 1932, sought an injunction from the superior court of Yuba county, where the mortgage foreclosure action was pending, restraining exercise of the power of sale, and that court granted a preliminary restraining order pending hearing of the injunction suit. Thereupon the Hibernia Savings & Loan Society applied to the District Court of Appeal, Third Appellate District, for a writ of prohibition to restrain the superior court from further proceeding in the action for an injunction. The District Court of Appeal denied the writ [*Hibernia Savings & Loan Society v. Superior Court*, 126 Cal. App. 397, 14 P.(2d) 872], and in its opinion indicated that as the Hibernia Savings & Loan Society had invoked the jurisdiction of the superior court to foreclose the mortgage, it could not oust that court of jurisdiction by pursuing an inconsistent course and attempting to exercise a power of sale contained in the mortgage. Mr. Belcher, defendant in the instant action, successfully represented the Ellis Estate Company in procuring the restraining order, in resisting the application of the Hibernia Savings & Loan Society for an original writ of prohibition.

In the principal action, which was the suit for foreclosure brought by the Hibernia Savings & Loan Society, the court found that \$77,351.34 was due plaintiff, including principal, interest, and taxes advanced, and ordered that the property be sold on foreclosure. The sale was held on January 17, 1933, and the property bought

in by the Hibernia Savings & Loan Society for \$64,246.83, which left a balance due it of \$13,510.60, for which a deficiency judgment was entered.

Throughout the litigation outlined above, the Ellis Estate Company was represented by Mr. Belcher. The assignment of rents to Mr. Belcher in payment for his services was made on January 16, 1933, the day preceding the foreclosure sale, but the matter had been discussed and agreed upon prior thereto. The Ellis Estate Company was without cash or other property with which to pay Mr. Belcher. The assignment was made by resolution of the board of directors on January 16, 1933, and embodied in the corporate minutes for that date. No other written assignment was ever executed. Appellant's contention that the assignment by corporate resolution was not valid for the reason that the special meeting at which said resolution was adopted was held without notice to one of the three directors, who was not present, and did not sign a written waiver or consent either before or after the meeting, will be noticed hereafter. At this point we will merely state that it appears that the absent director by subsequently acquiescing in the assignment impliedly ratified it.

[1-3] By the terms of the assignment, the Ellis Estate Company transferred to Richard Belcher "all of its right, title, claim, interest and estate in and to all moneys collected by C. F. Aron, alleged receiver in the above-entitled action, and to all moneys, rents, etc., uncollected by said alleged receiver and now due and payable from tenants of the property." Appellant contends that under said assignment of rents, Mr. Belcher may receive as much as \$8,461.45, which sum is so grossly disproportionate to the value of the services rendered by him as to indicate that the assignment was not made in good faith. Ellis, as president of the Ellis Estate Company, testified that between the commencement of the foreclosure action on October 31, 1931, and the foreclosure sale on January 17, 1933, rents in the total sum of \$8,461.45 accrued. But Mr. Belcher will not receive this amount under his assignment. It appears from the evidence in the case herein that during this period both Mr. Aron and the Ellis Estate Company received rents. The receiver (Mr. Aron) had no legal right to receive rents which

accrued after November 27, 1931, the date of the order revoking his appointment as receiver. An order removing an executor, administrator, guardian, or receiver is self-executing. The appeal taken from such order in the instant case did not restore his powers. *More v. More*, 127 Cal. 460, 59 P. 823; *In re Van Loan*, 142 Cal. 429, 76 P. 39; 2 Cal. Jur. 411, 438. Nevertheless the receiver collected some of the rents, while Ellis collected other rentals. The assignment is only of rents collected by Mr. Aron and of uncollected rents due at the time of the assignment. It does not include rents collected by the Ellis Estate Company, the amount of which does not appear from the evidence herein.

[4] The court found in the instant action that the receiver had collected a total of \$2,830.75, which figure it evidently took from the account filed by said receiver with the court. The amount of rentals due and uncollected at the time of the assignment, and which also passed thereunder, does not appear. No doubt the full amount of such rentals is not collectible, and there will be expenses of collection which will further substantially reduce the amount Mr. Belcher will realize under the assignment. W. T. Ellis, president of the Ellis Estate Company, testified that at the time of the assignment, he believed that Belcher might realize between \$2,000 and \$3,000 therefrom, and that the services rendered by Belcher were well worth such a fee. The extensive services rendered by Mr. Belcher appear from our statement of facts above. As there appears, the litigation involved three proceedings before appellate courts. *Hibernia Sav. & Loan Society v. Ellis Estate Co.*, 216 Cal. 280, 13 P.(2d) 929; *Hibernia Sav. & Loan Society v. Superior Court of Yuba County*, 126 Cal. App. 397, 14 P.(2d) 872; *Hibernia Savings & Loan Society v. Ellis Estate Co.*, 132 Cal. App. 408, 22 P.(2d) 806. The trial court concluded that the fee for the services was not excessive, and that the assignment had been made in good faith as a bona fide payment for said services. With its conclusions we are in accord.

[5,6] While the Ellis Estate Company may have been insolvent in the sense that it could not pay its debts as they fell due, section 3432, Civil Code, provides that "a debtor may pay one creditor in preference

to another, or may give to one creditor security for the payment of his demand in preference to another." Such preferences may be set aside in a bankruptcy proceeding in the manner prescribed by the statutes relating to such proceedings, but they are not subject to attack in an action such as that prosecuted by plaintiff herein. In *re Muller & Kennedy*, 118 Cal. 432, 50 P. 660; *Roberts v. Burr*, 135 Cal. 156, 67 P. 46; *Joint Pole Ass'n v. Steele*, 213 Cal. 233, 235, 2 P.(2d) 335; *Merced Bank v. Ivett*, 127 Cal. 134, 59 P. 393; *Welch v. Sargent*, 127 Cal. 72, 59 P. 319; *Security Trust Co. v. Silverman*, 210 Cal. 578, 292 P. 636; *Bradley v. Butchart*, 217 Cal. 731, 744, 20 P.(2d) 693; *Foster v. Foster*, 123 Cal. App. 1, 10 P.(2d) 796. The absolute assignment of accrued rents in the case herein was made to Mr. Belcher in payment for legal services rendered by him for his assignor. Such payment is not an assignment in trust for the benefit of a creditor or creditors of the debtor, and is not governed by the rules pertaining to such assignments in trust for the benefit of creditors, but, rather, section 3432, Civil Code, quoted above, is applicable thereto. See *Sabichi v. Chase*, 108 Cal. 81, 41 P. 29; 3 Cal. Jur. 312; 12 Cal. Jur. 1009-1016.

[7] There is a further reason why plaintiff must fail in the case herein. It is held in the recent case of *Norton v. Blenkiron*, 138 Cal. App. 66, 31 P.(2d) 807, that in an action by a secured creditor to set aside alleged fraudulent conveyances, he must show that the indebtedness due him is not fully secured, and the mere showing that he purchased the mortgaged property at foreclosure sale for an amount inadequate to discharge the indebtedness is insufficient. In the case herein the order of the court revoking the receivership appointment was based on evidence that the value of the mortgaged property was in excess of \$100,000. *Hibernia Sav. & Loan Society v. Ellis Estate Co.*, 132 Cal. App. 408, 22 P.(2d) 806. Plaintiff introduced no evidence to show that at the time the assignment was made, or at the time of the action herein, its value had declined to the extent that it was worth less than the indebtedness to plaintiff.

[8,9] As noted above, plaintiff makes the point on this appeal that in legal effect there is no assignment to Belcher for

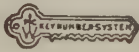
the reason that the resolution of assignment was adopted at a special meeting at which only two of the three directors were present, and no notice was given to the remaining director, who was the sister of W. T. Ellis, president of the corporation, and said sister did not waive notice of the meeting either prior or subsequent thereto. A copy of the resolution of assignment, certified by the secretary of the corporation and bearing the seal of the corporation, was introduced in evidence. Plaintiff contends that the presumption of validity arising from the presence of the seal has been overcome by evidence that, in fact, the contract of assignment was not authorized at a valid corporation meeting. Although the certificate of the secretary recited that the resolution was adopted at a regular meeting of the board, the by-laws did not provide for regular meetings. There is no evidence that the absent director ever signed a written waiver of notice, or an approval of the minutes of the meeting, as provided by section 307b, Civil Code.

Respondents contend that the assignment of accrued rents in payment for legal services performed by Belcher was an act in the usual course of business, which Ellis, as president of the corporation, was authorized to perform without the concurrence of the other two directors, and that if the resolution does not represent the action of the board of directors it is nevertheless valid as the contract of the corporation made by Ellis as its president. By provision of the by-laws he "had direction of the affairs of the corporation," although subject to advice of the other directors, and acted as general manager of the corporation. The principal assets of the corporation consisted of property inherited by Ellis and his sister from the estate of their father. The other director was the stenographer employed by Ellis for the company, and she acted as secretary. Although the corporate minutes were not signed by Ellis, but by the secretary of the corporation, there can be no doubt that it was the purpose of Ellis to effect an assignment by said resolution. Accrued rents are a chose in action, ordinarily assignable orally, and hence it was not necessary that an assignment thereof by Ellis be made by writing executed by him as president of the corporation. If it should be conceded, for argument, that Ellis as president of the corporation did not have authority to make the assignment, it nevertheless appears from

the whole evidence that there has been an implied ratification by the absent director of the acts of the other two directors and officers of the corporation. This implied ratification arises from the subsequent acquiescence of said absent director in the assignment to Belcher. Although the testimony of Ellis was to the effect that his sister never expressly ratified the proceedings at the meeting of January 16, 1933, by signing the minutes or a waiver of the notice, or by other writing, upon the whole evidence it appears that her subsequent acquiescence was tantamount to an implied ratification. *Wood Estate Co. v. Chanslor*, 209 Cal. 241, 286 P. 1001; *Bradley v. Butchart*, 217 Cal. 731, 744, 20 P.(2d) 693; *Blood v. La Serena L. & W. Co.*, 134 Cal. 361, 66 P. 317; *Brown v. Crown Gold Milling Co.*, 150 Cal. 376, 387, 89 P. 86.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; THOMPSON, J.; SHENK, J.



4 Cal.2d 235

BAKER v. BAKER.

Sac. 4907.

Supreme Court of California.

Aug. 23, 1935.

Adverse possession ⇨78

Decree of distribution giving undivided one-third interests in intestate's residence property to three brothers constituted color of title, making constructive possession sufficient to establish title by prescription in plaintiff, to whom one-third interest had been conveyed, as against defendant brother who, seven years after administration and distribution of estate, produced and claimed title under eighteen-year old deed by decedent conveying property to him, where possession under decree was clearly adverse and had lasted required period of time to perfect title; taxes having been paid by agreement out of estate or rents and profits (Code Civ. Proc. §§ 323, 325; Civ. Code, § 1007).

In Bank.

Appeal from Superior Court, Tehama County; Albert F. Ross, Judge.

Action by Mattie Alice Baker against E. J. Baker, also known as Edward J. Baker. From a judgment in favor of the plaintiff, defendant appeals.

Affirmed.

Fred C. Pugh and Pugh & Pugh, all of Red Bluff, for appellant.

Wetter & Rankin, of Red Bluff, and Jesse W. Carter, of Redding (Dallas L. Barratt, of Redding, of counsel), for respondent.

PRESTON, Justice.

This is an action to establish and quiet title in plaintiff, against the claims of defendant, to an undivided one-third interest in a residence property in Red Bluff, Tehama county, Cal., and to have an accounting of certain rents, issues, and profits thereof. The amended complaint herein was filed May 24, 1933, and is cast in three causes of action: First, to deraign title from Sarah E. Baker, deceased, through probate proceedings in her estate and decree of distribution therein awarding said undivided one-third interest in said property to the husband and predecessor of plaintiff. The statement of this count is coupled with a long recital of facts intended to show an estoppel in pais against the claims of defendant under an unrecorded deed from said decedent. The second cause of action is the general and conventional one to quiet title. The third is for an accounting as to one-third of the rentals collected by defendant subsequent to September 29, 1932. The answer may be deemed a traverse of all the material allegations of the amended complaint, and it specifically sets up the deed from the decedent, Sarah E. Baker, to defendant, under which he claims title to the whole estate in the property.

The court below gave judgment for plaintiff on the theory that adverse possession, within the meaning of sections 322 and 325 of the Code of Civil Procedure had been established. The findings support the judgment as to adverse possession but negative the claim of estoppel. The judgment quiets title in plaintiff and awards her \$100 as her share of the rentals erroneously retained by defendant. Defendant has appealed.

The facts necessary to a determination of the cause are not in doubt. They are: Sarah E. Baker died intestate on July 3,

1923, leaving considerable estate; the residence here in suit being listed as one of the assets thereof. Three brothers survived her: E. J. Baker, defendant here, Stephen P. Baker, and William A. Baker, husband and predecessor in interest of plaintiff. The three brothers jointly nominated administrators of the sister's estate. The property here in suit was inventoried as a part thereof. Its value was also included as a part of the base sum upon which inheritance taxes, attorneys' fees, and commissions were calculated. The administrators took charge of the property, kept it in repair, and paid the taxes upon it from the corpus of the estate. Later, and on June 30, 1924, said property was regularly distributed as part of said estate, to said three brothers in equal undivided one-third interests. For some eight years thereafter the property was kept intact by the brothers. They nominated one of the former administrators as their agent, and until January 5, 1931, he kept the place in repair, paid taxes from rentals, and turned in the net avails for equal distribution between the three brothers. From the above date until December, 1931, defendant handled the property himself, paying one-third of the net rentals to each of his brothers. Shortly after the date of filing said decree of distribution, plaintiff's husband painted the house and moved the woodshed from one side to the other. On February 6, 1930, he conveyed his one-third interest to plaintiff.

Trouble began to brew when, on November 10, 1931, defendant produced a deed of decedent conveying the property to him, bearing date of July 21, 1913, and caused same to be recorded. It thus appeared that at the death of Sarah E. Baker, defendant had had possession of said deed for some ten years. Likewise that he had held same during administration of her estate and for some seven years thereafter before plaintiff knew anything at all of its existence. The explanation offered was that the deed was not to be recorded during the life of Sarah E. Baker and subsequently defendant deemed it, he says, in the interest of peace in the family not to mention it. However, in 1932, some nineteen years after making of the deed, de-

fendant made bold to assert complete ownership of, and dominion over, this property, collecting and retaining rents and profits thereof from and after said September 29, 1932. Hence this litigation.

We confess a complete lack of sympathy for the claims of defendant, and we think the position taken by the court below as to title by adverse possession is correct. The record fully establishes title in plaintiff by prescription. No contention is made that one may not become a cotenant with another by prescription. The decree of distribution constituted color of title, and as such made constructive possession of the property sufficient. Section 323, Code Civ. Proc. It was clearly adverse from every standpoint. In fact, the right of plaintiff and her predecessor under said decree was especially conceded. The right asserted was exclusive of every other right; that is, it was under the decree alone and not in subordination to any acknowledged right under defendant or in subordination to his title.

The required period of time elapsed to make the title perfect in plaintiff. Section 1007, Civ. Code. The taxes were paid by the express acquiescence of all, either from the estate or from the rents, issues, and profits of the property. We are pointed to no reason why this does not satisfy the statute. Section 325, Code Civ. Proc.

It is unnecessary to discuss the further contention that the record shows, by uncontradicted evidence, that defendant, by acts in pais, estopped himself to assert title under his deed or in any other manner, except in subordination to the decree of distribution. Nor is it necessary to interpret the holding of this court in *Treat v. Treat*, 170 Cal. 329, 150 P. 53, 57. Nor need we discuss the further question of whether the deed is void as against this decree of distribution because of the express provision found in section 1214, Civil Code, pertaining to recordation of instruments.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

4 Cal.2d 215

**LEONARD et al. v. SUPERIOR COURT IN
AND FOR CITY AND COUNTY OF
SAN FRANCISCO et al.**

S. F. 15429.

Supreme Court of California.

Aug. 12, 1935.

1. Indictment and information ☞159(1)

Under Penal Code authorizing amendment of indictment or information for any defect or insufficiency, grand jury, upon order of court permitting it, *held* authorized to amend indictment charging perjury under Building and Loan Association Act, provided offense was not changed or substantial rights of defendants prejudiced (St. 1931, p. 525, § 10.04; Pen. Code, § 1008).

2. Building and loan associations ☞23(5)

Essence of perjury contemplated by Building and Loan Association Act *held* to be the verifying under oath of a false report and statement of financial condition of association and the filing of such with the building and loan commissioner (St. 1931, p. 525, § 10.04).

3. Building and loan associations ☞23(5)

Indictment charging officers of building and loan association with knowingly making and causing to be made a verified false report of financial condition of association, and causing such report to be filed with building and loan commissioner, *held* to sufficiently charge offense of perjury as contemplated by Building and Loan Association Act, as clear implication was that acts were done willfully, hence amendment to indictment charging defendants with willfully making and filing report was properly allowed, since it did not change offense or prejudice rights of defendants (St. 1931, p. 525, § 10.04; Pen. Code, §§ 952, 958, 1008.)

In Bank.

Petition by George L. Leonard and another for a writ of mandate compelling the Superior Court of the State of California, in and for the City and County of San Francisco, and another, to dismiss an indictment and to discharge the defendants.

Petition denied.

J. H. Morris, of San Francisco, for petitioners.

U. S. Webb, Atty. Gen., Wm. F. Cleary, Deputy Atty. Gen., and Matthew Brady, Dist. Atty., and August L. Fourtner, and John R. Golden, Asst. Dist. Attys., all of San Francisco, for respondents.

THOMPSON, Justice.

This is a petition for a writ of mandate compelling the superior court of the city and county of San Francisco, and Honorable I. L. Harris, judge presiding therein, to dismiss an indictment pending therein and to discharge the defendants.

On August 21, 1931, the grand jury of the city and county of San Francisco presented and returned to the superior court and to the judge presiding in Department Twelve thereof, a true bill and indictment charging the petitioners, George L. Leonard and Joseph A. Leonard, with perjury as defined by section 10.04 of the Building and Loan Association Act (St. 1931, p. 525) in that on October 14, 1931, as required by law, they filed with the building and loan commissioner of the state of California a statement under oath of the condition as of September 30, 1931, of the Union Building & Loan Association, of which petitioner George L. Leonard was president and petitioner Joseph A. Leonard was secretary, they having sworn before a notary public that said statement and report and the items contained therein were true and correct, whereas in fact and in truth certain material statements therein contained were false and known to the defendants to be false. The indictment was demurred to both generally and specially, and on December 3, 1934, the demurrer was sustained on the ground there was no allegation of "willfulness" therein. The trial court referred the indictment back to the grand jury for amendment. On December 20, 1934, an amended indictment was filed alleging that the defendants "willfully, fraudulently and falsely" made and filed such report and statement. The petitioners filed a motion to quash and set aside the amended indictment on the ground that the same was a new indictment and not an amended indictment, and that on the face of the indictment it appeared that the statute of limitations had run against it. The motion to set aside and quash was denied, and thereupon the petitioners filed a demurrer, which was overruled, and the defendants ordered to plead to the amended indictment. The defendants entered pleas of "Not Guilty," together with a further plea of "former acquittal" therein. Trial was set for May 13, 1935, and it is alleged that it is the intention of the trial court to proceed with the trial of the defendants and petitioners herein unless a

writ of mandate be granted ordering the superior court to dismiss the amended indictment and to discharge the defendants, it being their contention that neither the original nor the amended indictment returned state a public offense; that both indictments lack in material allegations and matters in that the oath alleged to have been taken by defendants is not the form of oath prescribed by law, and that perjury may not be predicated thereon; and that the original indictment does not state, nor is it alleged therein that the defendants "willfully" swore falsely to the report and statement filed or willfully committed the offense of perjury charged; that the so-called amended indictment of December 20, 1934, is, in fact, a new indictment and not an amended indictment; that it affirmatively appears on the face of the amended indictment that the offense charged therein, and the prosecution thereof, is barred by the statute of limitations; that by reason thereof the respondent court and judge thereof have no right, authority, or discretion to try the petitioners thereon, or to try them for the commission of the crime of perjury, and that it is the duty of the said judge to quash, dismiss, and set aside the amended indictment and to discharge the defendants; that petitioners have no plain, speedy, or adequate remedy in the ordinary course of law and are compelled to ask for an alternative writ of mandate commanding the superior court and the judge presiding therein to dismiss the indictment and discharge the petitioners.

[1] If the indictment was properly amended the petition for a writ of mandate should be denied. Under the provisions of section 1008 of the Penal Code, which section has modernized the rule of refined certainty in criminal indictments and informations by permitting amendment thereof either by the district attorney or the grand jury, the district attorney, with leave of court, might have amended the indictment without resubmission of the indictment to the grand jury, provided the offense charged was not changed and the amendment made without prejudice to the substantial rights of the defendant. *People v. Seitz*, 209 Cal. 199, 202, 286 P. 697; *People v. Dempster*, 96 Cal. App. 358, 360, 274 P. 592. We see no reason why the grand jury, upon order of the court permitting it, may do likewise.

[2,3] A comparison of the indictment as originally returned with the indictment as amended and filed shows that both documents charge the commission of one and the same offense, both in law and in fact. The amended indictment did not mislead the defendants and did not prejudice them in relation to any substantial right or at all as to the particular offense with which they were charged, or which they would have to meet by any defenses they might have. See *People v. Ennis*, 137 Cal. 263, 267, 70 P. 84. The essence of the perjury contemplated by section 10.04 of the Building and Loan Association Act is the verifying under oath of a false report and statement and in filing the same with the building and loan commissioner, and there can be no question but that the indictments attempted, at least, to state the offense of perjury as so contemplated by section 10.04 and the amended indictment as filed did not charge an offense different from that attempted imperfectly to be stated in the original indictment. This gave the trial court jurisdiction to either permit or sanction an amendment to the original indictment in informal matters not of substance, by the district attorney under the provisions of section 1008 of the Penal Code, or to refer the indictment back to the grand jury for correction and amendment, provided the amended indictment to be filed did not charge an offense different from that attempted to be pleaded by the original indictment however imperfectly.

While it appears that the word "willfully" was not used in the original indictment returned and was used in the amended indictment, it is clear there were allegations of component facts of like import in the original indictment which charged that a false oath was taken willfully. Pen. Code, §§ 952, 958. The original indictment charged that the defendants "made and caused to be made" the report in question; and that they "caused" it to be filed with the building and loan commissioner "after they had verified it." This imported a voluntary act intentionally done, and it was held in *People v. Davenport*, 13 Cal. App. 632, 643, 110 P. 318, 322, that "when it is alleged that a person does an act it implies willfulness." Furthermore, the original indictment pleaded knowledge on the part of the defendants of the falsity of the statements contained in the report of condition of the Union Building &

Loan Association, and knowledge of the falsity of a statement is implied in "willfully." Deliberation, another ingredient of "willfully", may also be assumed from the fact that false statements were verified under oath and subsequently filed with the building and loan commissioner, which in itself showed a continuing purpose. That the offense of perjury was imperfectly charged in the original indictment may be assumed, although not admitted by the prosecution, but that is precisely what section 1008 of the Penal Code was designed to meet, and the only requirement is that however imperfectly pleaded, some offense be pleaded, which in substance may not be changed by amendment.

We are satisfied that an offense of perjury was pleaded, although imperfectly, and that no miscarriage of justice has or can result to the petitioners by the amended indictment, and that the same is not a new indictment of an offense barred by the statute of limitations.

The petition for a writ of mandate is denied.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.



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BABU v. PETERSEN et al.

Sac. 4933.

Supreme Court of California.

Sept. 3, 1935.

1. Aliens ⇨16

Evidence held to show that 17 year old girl, eligible to own agricultural lands, to whom conveyance of agricultural lands actually owned by alien ineligible to citizenship and to own or exercise incidents of ownership in respect to agricultural lands was made, and who had executed notes and mortgages in execution of agreement for paying off of indebtedness against land by another ineligible alien who was to be placed in position of mortgagee, had consciously participated in conspiracy to evade Alien Land Act and was in pari delicto with the aliens (Gen. Laws 1931, Act 261, §§ 1, 2, 9, 10).

2. Infants ⇨65

Seventeen year old girl, eligible to own agricultural lands, who by accepting conveyance of agricultural lands and in executing mortgages and notes had knowingly participated in conspiracy to violate Alien Land Act, prohibiting aliens ineligible to citizenship from owning or exercising incidents of ownership in respect to agricultural lands, held responsible for her conduct, notwithstanding her youth, and subject to statute making it criminal offense to conspire to violate provisions of Alien Land Act (Gen. Laws 1931, Act 261, §§ 1, 2, 9, 10; Pen. Code, § 26, subd. 1).

3. Action ⇨5

Civil right cannot be predicated upon violation of a criminal statute.

4. Action ⇨5

Quieting title ⇨10(2)

Person eligible to own agricultural lands, who in accepting conveyance of such lands and in executing notes and mortgages had participated in conspiracy to violate statute prohibiting ownership or exercising of incidents of ownership of agricultural lands by aliens ineligible to citizenship, violation of which statute was a criminal offense, held not entitled in suit to foreclose mortgage given by her upon such lands to decree quieting title in her because of illegality of transaction, since no civil right could be predicated upon violation of a criminal statute, and since title could not be based solely on weakness of adversary's title (Gen. Laws 1931, Act 261, §§ 1, 2, 7, 9, 10; Pen. Code, § 26, subd. 1).

5. Equity ⇨65(1)

In suit by alien ineligible to citizenship to foreclose mortgage upon agricultural lands, title to which nominal holder, a citizen, sought to have quieted in herself on ground that transaction was in violation of statute prohibiting ownership or exercising of incidents of ownership of agricultural lands by aliens ineligible to citizenship, where it appeared that all parties to action were in pari delicto, court would not aid any of parties, although it would undo that which was done by erroneous judgment of lower court (Gen. Laws 1931, Act 261, §§ 1, 2, 7, 9, 10; Pen. Code, § 26, subd. 1).

In Bank.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by one Babu, also known as Baboo, against Helen McDaniel Petersen, formerly Helen McDaniel, and others, in which Helen McDaniel Petersen filed a cross-complaint against Babu, also known

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as Baboo, and others, and in which cross-defendant Memill Singh also filed a cross-complaint and counterclaim. Judgment for Helen McDaniel Petersen, formerly Helen McDaniel, and plaintiff appeals.

Judgment in accordance with opinion.

Ray Manwell, of Marysville, for appellant.

King & King, of Gridley, for respondents.

SEAWELL, Justice.

This appeal involves the ownership of a 20-acre tract of highly improved agricultural land situate in the fruit and agricultural district of the county of Butte. All of the parties to this action are, except one American and one Spaniard, members of the Hindu native races of India, and are admittedly ineligible to citizenship under the laws of the United States, and therefore are inhibited from exercising or enjoying the right to acquire, possess, enjoy, use, cultivate, transfer, transmit, and [or] inherit real property, or any interest therein in this state and [or] have in whole or in part the beneficial use thereof, as provided by sections 1 and 2, initiative measure, effective December 9, 1920. Stats. 1921, p. lxxxiii, as amended by St. 1923, pp. 1020, 1021, §§ 1, 2; Deering's Gen. Laws 1931, Act 261, vol. 1, p. 105 et seq.

The plaintiff Babu, sometimes known as Baboo, a resident of the county of Colusa, but a native of India, and therefore ineligible to citizenship, filed an action on January 19, 1932, praying for the foreclosure of a mortgage of said land made and executed to him by one Helen McDaniel, who afterwards by marriage became Helen McDaniel Petersen, to secure her promissory note in the sum of \$10,000, made, executed and delivered by her to said Babu on January 26, 1927.

Babu alleged that there had been paid on account of principal and interest on said note the sum of \$2,628, leaving due and unpaid the sum of \$7,372. Julius Gomez, the Spaniard above referred to, was made a party by reason of a grant deed executed and delivered by said Helen McDaniel to him on February 23, 1927, less than a month after she had executed the Babu note and mortgage. In the deed to Gomez she made reference to the Babu mortgage, and also to a mortgage of the prune crop growing on the premises exe-

cuted by her to Babu on the same day, in the sum of \$3,000, and made both mortgages subject to said mortgages to Babu. On the same day that he received said deed from Helen McDaniel, to wit, February 23, 1927, Gomez executed a mortgage of said real property to Lale Singh and Rala Singh, both natives of India and ineligible to become citizens of the United States.

Helen McDaniel Petersen answered plaintiff's first amended complaint and admitted that she made, executed, and delivered the promissory note and mortgage as alleged, but set up as defenses to the action a want of consideration and her alleged nonage, claiming that at the time she executed said promissory note and mortgage, to wit, January 26, 1927, she was an unmarried minor under the age of eighteen years, to wit, of the age of seventeen years. She denied that the sums credited on said note on account of principal and interest, or any part thereof, had been paid by her or by anyone else or at all, or that any sum was due thereon, and that the promissory note and mortgage were void. She denied that Babu or her grantee, Gomez, or any other of the named parties had any right, title, claim, or interest in or to said real property. By way of cross-complaint she alleged that she was the owner in fee of said real property, admitted the execution of the note and mortgage made to Babu and the deed subsequently made to Gomez, and pleaded want of consideration and her minority as a defense in each case, and prayed for a cancellation of said note, and that the court adjudge the Babu mortgage and the Gomez deed to be void, and that she be decreed the owner of said real property and admitted to possession, and for general relief. Babu answered her cross-complaint and the cause came on for trial. Gomez and Lale and Rala Singh having failed to answer or appear their several defaults were entered. The cause was tried and submitted for decision. The court being thereafter of the opinion that Amar Singh and Memill Singh, the latter sometimes referred to as Memo, were necessary parties to the action, ordered the submission set aside and directed plaintiff to amend his amended complaint by making them party defendants and gave to the parties who had already appeared permission to raise by appropriate pleadings such further matters as might be proper. Plaintiff, complying with said order, filed a second amended complaint, bringing in Amar Singh and

Memill Singh as party defendants. Plaintiff reincorporated in his second amended complaint all of the material allegations contained in his amended complaint, and, as new matter, alleged that Amar Singh and Memill Singh were comakers of the Babu note jointly with Helen McDaniel. This allegation was doubtless made on the theory that Helen McDaniel was merely the representative or agent of Amar and Memill Singh and stood as a mere receptacle for holding the title of the real owners, Amar and Memill Singh. Helen McDaniel Petersen answered and cross-complained. She denied any participation on the part of said Singhs in the execution of said note and mortgage, but admitted that she signed the note and executed the mortgage, and again pleaded want of consideration and her minority. For the first time she pleaded the ineligibility of Babu, Amar Singh, and Memill Singh, whom she alleged "are each and every one of them Hindus, natives of India, and ineligible to citizenship," and that the real property described therein was agricultural land. She alleged that said persons last named conspired together to violate the Alien Land Law of this state by colorable transfers to prevent escheatment of said real property to the state of California, and in furtherance of said conspiracy they procured and caused said Helen McDaniel Petersen to sign the note and execute the mortgage sought to be foreclosed, but alleged that she did not assist in said conspiracy and that said note and mortgage were procured without her knowledge or consent. It is not necessary to notice all of the allegations set forth in her answer as several of them are not material and are of no probative importance. By way of cross-complaint she reincorporated much of the matter contained in her prior pleading. She pleaded as a defense to her participation in the transactions herein all of the matters already appearing and alleged that the making of the deed to her, the mortgage given by her and the other transactions in which she participated as the principal actor, were carried forward without her consent. Her final prayer is that all instruments executed by her and which are not to her gain be canceled or decreed void and that her title to the real property be quieted against all persons involved in this action.

Babu answered the cross-complaint by reaffirming all of the material portions of his amended complaint and alleged that

the note was given in the manner set forth in his amended complaint, and denied that Helen McDaniel was under the age of eighteen years; denied on information and belief the ineligibility of plaintiff and said Amar and Memill Singh; denied that said Hindus procured and caused said Helen McDaniel to sign said note and mortgage in the furtherance of a conspiracy to violate the Alien Land Law; alleged that he had no knowledge as to the transaction whereby defendant Helen McDaniel executed on February 23, 1927, a grant deed purporting to convey the title of said real property to Julius Gomez and therefore denied the same; admitted that he claimed to be the owner of and entitled to the possession of said real property.

Amar Singh, answering the cross-complaint of Helen McDaniel Petersen, denied that she was the owner in fee simple of said real property and alleged that it was conveyed in trust to her by George W. Kirkpatrick, a hardware merchant, and J. J. O'Rourke, both residents of Colusa county, pursuant to an understanding had between himself, Amar Singh, Memill Singh, Babu, and Helen McDaniel; that the execution of said deed to Helen McDaniel, and the execution of said note and mortgage by Helen McDaniel to Babu were done at the request of Amar and Memill Singh, owners of said property, and constituted but a part of one transaction, and said deed was not delivered to her as a gift; that she gave no consideration therefor and said property was conveyed to her in trust for Amar and Memill Singh. He prayed that the note and mortgage made to Babu be discharged and satisfied, and if there remained anything over and above said lien it be paid to Amar and Memill Singh.

Memill Singh answered the second amended complaint by admitting the execution of the note and mortgage as set forth therein; denied that no part of the principal sum or interest thereon had been paid except the sum of \$2,628, or that there was due on account thereof the sum of \$7,372; denied that Amar Singh was a party to the execution of said note and mortgage, or that the acts of Helen McDaniel in said transaction were done in the interest of or on behalf of Amar Singh; denied, for want of information, the Gomez transaction. By way of cross-complaint and counterclaim he alleges the execution and recordation of said note and mortgage

in the form alleged, and alleges that Helen McDaniel entered into the transaction at his request. He further alleges the farming and cultivation of said land by himself from 1927 to 1933, both inclusive; that the proceeds of the crops, as by the agreement of himself and Babu, were to be turned over to Babu and credited on said mortgage note. On information and belief he alleged that a sufficient sum had been received by Babu to entirely satisfy in full the obligation due by virtue of said promissory note and he asks that said mortgage be declared satisfied and that Babu be required to account for all moneys he has received by reason of said transaction. Babu answered by alleging that the only credits to which Memill was entitled were those indorsed on said note. Helen McDaniel answered Memill's cross-complaint by adopting the allegations already appearing, and making certain denials of certain allegations which cannot affect the main issues of the case. Memill filed a separate answer to the cross-complaint of Helen McDaniel, denying her alleged minority and the allegation that she received no consideration for executing said note and that it was void.

Some twenty-six days prior to the filing of findings and conclusions of law, and a month before judgment rendered, the court announced in a written opinion that it would find in favor of defendant and cross-complainant Helen McDaniel Petersen, and against defendant Memill Singh; Amar Singh having, at a stage of the proceedings, renounced any claim in or to said premises. Upon the strength of this announcement—the premises being in the possession of Memill Singh and Babu—said Helen McDaniel Petersen asked for the appointment of a receiver and that Babu and Memill Singh be restrained from interfering with the irrigation works, pumps, motor, crops, and other valuable property on the premises until further order of the court. No receiver appears to have been appointed by the court, but a restraining order was granted.

[1] The court found, upon evidence which clearly appears to us to be totally insufficient to support the material portions of the findings, that all of the allegations of the defendant and cross-complainant contained in her answers and cross-complaint are true and that she was the owner in fee of the real property described in the pleadings herein notwithstanding her ac-

tive participation in what appears to have been a conspiracy to violate the Alien Land Law of this state. The court found it was agreed that, in consummating the passing of title out of Kirkpatrick and O'Rourke, it should be placed in the name of some white citizen of the United States, in order to avoid escheating to the state and that Memill Singh procured and obtained Helen McDaniel as person to hold title; that she was a minor, unmarried, and had no notice or knowledge of any of the transactions to which she was a party; that Babu and Memill Singh, in furtherance of their common conspiracy to evade section 10 of said Alien Land Law, directed Kirkpatrick and O'Rourke to convey by deed said real property to Helen McDaniel and caused her to execute the note and mortgage as described in plaintiff's complaint. It was further found that Helen McDaniel signed said note and mortgage "without understanding their legal effect or comprehending the situation that they were intended to cover, and she acted without notice or knowledge of Memill Singh's rights or claim to the real property"; that Babu and Memill Singh had no intention of conferring any benefit upon Helen McDaniel, but it was their "purpose to make her a trustee of the legal title for the benefit of Memill Singh and Babu, and all without the knowledge or consent of said minor," and said conveyances were so made for the purpose of concealing Memill Singh's title. It was found that Amar Singh, Memill Singh, and Babu are all ineligible to become citizens of the United States; that ever since the making of said deed and mortgage Memill Singh and Babu have been continuously in the possession of said premises. It was further found that Helen McDaniel received no consideration for executing said note and had no notice that the property had been placed in her name until the foreclosure proceedings were commenced, some five years thereafter, and she had no knowledge of and did not join in said conspiracy to violate the Alien Land Law. The court further found that in furtherance of a conspiracy to evade the Alien Land Law said Babu and Memill Singh caused and procured the said Helen McDaniel to execute the Gomez deed for which she received no consideration. The court concluded that none of the parties named in the action except Helen McDaniel had any estate or interest in said premises; that the Babu note and mortgage, and the Gomez deed, were

void; and that Helen McDaniel is the owner in fee and entitled to the possession of said premises. Judgment was accordingly entered, with costs taxed in her favor against Babu and Memill Singh. A writ for the possession of said premises directed to the sheriff was ordered issued by the court.

To better understand the transaction it may be well to give the origin and the history and devolution of title of the land in controversy as it appears of record. Said Singhs, in 1920, purchased from A. F. Hansen and wife and O. C. Sweeney 40 acres of land, at the agreed price of \$24,000. \$12,000 of the purchase price was paid down and a mortgage given back for the balance and the Singhs went into possession. Memill Singh, and perhaps Amar Singh, met with reverses in the production of rice, and the interest remained unpaid. Hansen and Sweeney finally demanded their money or a conveyance back of said land. Memill Singh was well acquainted with Kirkpatrick and O'Rourke, and arrangements were made with them whereby the Hansen and Sweeney indebtedness was paid and they took a deed absolute in form from the Singhs of said premises. It was the understanding of the parties that the deed was in fact given as security for the money advanced by Kirkpatrick and O'Rourke, to wit, the sum of \$10,000, and would be treated as a mortgage. There is no dispute of the fact that the original 40 acres in the transaction was afterward divided and the \$10,000 mortgage was made on the acreage involved in this controversy which consists of 20 acres and was Memill Singh's half of said 40 acres. Finally Kirkpatrick and O'Rourke demanded their money and the Singhs being unable to meet the demand Memill Singh, in particular, sought out Babu and he agreed to come to their rescue. A deed made directly to Babu by Kirkpatrick and O'Rourke would, upon the face of the records, have given the transaction the appearance of a plain violation of the Alien Land Law. Helen McDaniel, whose mother was married to Bames, a native of India, was selected as the person who should act as the grantee of Kirkpatrick and O'Rourke. Both Helen and her mother are white persons but were associates of the race of persons commonly known as Hindoos. Memill Singh had lived at the same house occupied by Helen McDaniel, her mother, and Bames, and he had known Helen McDaniel since she was eight or nine years of age, and he regarded

both daughter and mother as his very good friends. At the time of the Babu-Singh transaction, Helen was living with her mother and stepfather Bames, who, it appears, was having some trouble growing out of another land transaction. It was agreed and understood by Memill and Amar Singh, Helen McDaniel and her mother beyond any reasonable doubt, that Babu was to pay off the Kirkpatrick and O'Rourke indebtedness and place himself in the position of a mortgagee, with Helen aiding as a shield of protection for Babu and Memill Singh. To accomplish this plan Helen McDaniel was selected as the nominal owner, grantee and mortgagor of the land. To evade the Alien Land Law Kirkpatrick and O'Rourke were instructed to make the deed to her, rather than to Memill Singh, who was conceded to be the real owner and whose ownership Babu was attempting to protect. The several claims of Babu, Memill Singh, and Helen McDaniel must prevail or fail accordingly as the interest of each was or was not procured through illegal channels or by and through the participation of such claimant in a conspiracy to violate the provisions of sections 1, 2, and 10 of the Alien Land Law (as amended by St. 1923, pp. 1021, 1024, §§ 1, 2, 9; Act 261, *supra*) which inhibits aliens ineligible to citizenship from acquiring, possessing, enjoying, using, cultivating, transferring, or transmitting agricultural lands and makes every person who conspires to violate said inhibitory provisions guilty of a crime and subjects the lands involved in the unlawful enterprise to escheatment to the state.

The story of the transaction as told by the witnesses and as evidenced by the solemn acts, such as the execution of notes, deeds, mortgages, real and personal, makes it certain that the provisions of said law were flagrantly violated by all the persons herein making claim to said lands. Helen McDaniel makes claim to the land, practically admitting that she has no moral right to it, but bases her claim on the invalidity of a transaction which she assisted in fabricating. Her motive is well illustrated by the position which she now boldly takes, having passed by a number of years her alleged minority. Her testimony was that she now affirms the deed which conveyed the property to her, but repudiates the note and mortgage which she executed to Babu and which remained recorded for several years. Her testimony is that she had no recollection of signing the prom-

issory note or executing or acknowledging the mortgage, or the crop mortgage, or executing a later deed made to another person of the same real property. She did not dispute her signature to the several instruments, doubtless for the reason that the physical facts would have refuted her denials on material matters. Her testimony is that the above-mentioned transactions were all consummated without her knowledge or consent. Not only this, but she claims that she had no knowledge of the above transactions in which she played a leading part until she was served by summons in the action brought by Babu against her some five years thereafter. She was then past twenty-two years of age. There is nothing in the evidence to indicate that she was mentally subnormal or mentally deficient. She had attended the Chico and West Gridley public schools in her girlhood years and was married at the age of nineteen years. To have acknowledged conscious participation in the acts she committed would have been an acknowledgment of conspiring to violate the Alien Land Law and therefore would have barred any claim to ownership of said real property. Her only possible chance to hold title was to repudiate participation in the transaction which was the origin of her title and set up the defense that she had not attained her majority and the persons who had made her grantee were both in *pari delicto* and therefore neither would be heard to question her title. This, in short, is the theory on which she hopes to own and possess said real property. That the execution of the deed to Helen and the making of the note and the execution of the mortgages by her to Babu were each a part of one transaction is beyond question. All were made on the same day and were parts of the same transaction and were executed in furtherance of a common object. It is not necessary, for the reason that Helen is barred by her participation in the transaction by the provisions of the Alien Land Law, to make comment upon the general rule of equity that "a party cannot apply to his own use that part of the transaction which may bring to him a benefit, and repudiate the other, which may not be to his interest to fulfill. Thus it has been held that an infant cannot avoid a mortgage and affirm a deed, when both are made at one and the same time, relate to the same property, and go to make up one transaction. If the mortgage be avoided under the plea of infancy, the deed

becomes of no effect.' *Heath v. West*, 28 N. H. [101], 108. * * * But what the rules of equity would not permit them to do if they had attained their majority they cannot be permitted to do now through their guardian *ad litem*." *Peers v. McLaughlin*, 88 Cal. 294, 26 P. 119, 120, 22 Am. St. Rep. 306.

Her attempt to avoid the effect of her acts upon the ground that she had no recollection or knowledge that she had taken any part in the consummation of the illegal transaction herein set forth rests upon such questionable ground as to render it inherently improbable, unusual and unnatural, measured by the rules by which human motives, purpose, and conduct are to be interpreted. The claim of lapse of memory, or lack of knowledge of the purposes or motives of the parties engaged in the conspiracy, are so inherently improbable as to refute any claim of verity. Not only do the physical features of the transaction destroy the effect of her testimony, but she is flatly contradicted by other witnesses, whose testimony is not inconsistent with human experience in the transaction of ordinary business.

The attorney who drew the papers in question testified that Babu's only interest in the matter was to protect the loan which he desired to make to save Memill from a great loss which he would suffer if he failed to raise the money to pay Kirkpatrick and O'Rourke their demand. All of the parties had been at his office in consummation of the transaction at various times and Helen and her mother were present at the time the note was signed and the mortgage was executed. In fact, he took Helen's acknowledgment of the mortgage. He asked her mother in Helen's presence and hearing if Helen was past eighteen years of age and the mother replied that she was. Helen could not have helped hearing the interrogatory and the reply. She admitted that he had asked her age on one occasion, but said she did not recollect that it was at the time she executed the mortgage. Counsel for Helen asked said attorney if in his opinion Helen was aware of the act in which she was engaged, and his answer was that in his opinion she knew what she was doing and she knew that she was signing the mortgage. She had been in his office upon several occasions, as had Memill, and several of the other parties, arranging the form that the transactions would take. He was certain

that Helen and her mother were present and his recollection is Bames and Memill were also present. Memill testified that he had talked the whole matter over from time to time with Helen and her mother and Helen had agreed to take the deed. Babu significantly made the observation and inquiry when he was asked to make the loan: "This is an Alien Land Law. Maybe too much trouble. Who you give the deed to?" However, the whole situation was talked over in the lawyer's office, and the deed was made to Helen for the very definite purpose of circumventing the following provision of the Alien Land Act: "Every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed or sought to be conveyed shall escheat to the state as of the date of such transfer" if the property interest involved is of such a character that an alien is inhibited from acquiring, possessing it, etc., as therein provided. A prima facie case is made out upon proof that the taking of the property in the name of a person other than the persons inhibited by said act if the consideration is paid or agreed or understood to be paid by an alien ineligible to citizenship; or the execution of a mortgage in favor of an alien ineligible to citizenship if such mortgagee is given possession, control, or management of said property. Section 9, Alien Land Act (as amended by St. 1923, p. 1024, § 8; Act 261, supra). Memill continued by virtue of said transaction to "possess, enjoy, use, cultivate" and deal with said property as the absolute owner thereof, in violation of the express provisions of law. The testimony of said attorney, Memill, Babu, and even Helen and her mother, cannot be read and reconciled with any other rational conclusion than that Helen and her mother who were identified with the Hindu colony, were guilty participants in the transaction which placed Babu and Memill in the occupancy and possession of said agricultural lands.

[2,3] The question of Helen's age is not material except to the extent that it was admitted that she was past seventeen years of age and was therefore legally responsible for her conduct involving the commission of a conspiracy to defraud. All persons are capable of committing crimes except children under the age of fourteen, in the absence of clear proof that at the time of committing the act charged against

them they knew its wrongfulness. Pen. Code § 26, subd. 1. That defendant and cross-complainant who was past seventeen years of age at the time she accepted said deed and executed said mortgage, comes within the provisions of section 10 of said Alien Land Act (as amended by St. 1923, p. 1024, § 9), there can be no doubt. Said section provides: "If two or more persons conspire to violate any of the provisions of this act they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years or by a fine not exceeding five thousand dollars, or both." No civil right can be predicated upon the violation of a criminal statute.

[4] Defendant and cross-complainant has no title to quiet. She is barred also by the maxim of equity that a claimant cannot prevail on the weakness of his adversary's title but must stand or fall upon the strength of his or her title.

[5] It seems very clear upon the case presented that all of the parties to this action are in *pari delicto*, and the court will not aid any of them to consummate their illegal design. It is a cardinal rule of equity that in such a case the law will leave them where it found them. The court did aid defendant and cross-complainant in acquiring possession of the real property in suit. It will undo what it has wrongfully done and restore as near as practicable the parties to the position which they occupied at the time the law intervened.

That portion of the judgment adjudging Helen McDaniel Petersen to be the owner in fee and entitled to the possession of the real property described in the judgment and quieting her title thereto and allowing her costs in the trial court is reversed. The writ of possession is annulled. Neither side is granted any relief by reason of the action filed herein. Each side will bear its own costs on appeal.

The state in a special proceeding is the only party that may maintain an escheat proceeding. Section 7 of said act (as amended by St. 1923, p. 1022, § 6) provides: "The attorney general or district attorney of the proper county shall institute proceedings to have the escheat of such real property adjudged and enforced in the manner provided by section four hundred seventy-four of the Political Code and title eight, part three of the Code of Civil Procedure. Upon the entry of final judgment in such proceedings, the title to such

real property shall pass to the state of California, as of the date of such acquisition in violation of the provisions of this act."

Let proceedings be taken not inconsistent herewith.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SHENK, J.



4 Cal.2d 255

RABLIN v. GREINER.

Sac. 4903.

Supreme Court of California.

Aug. 30, 1935.

Jury ☞ 13(15)

Where plaintiff brought action to annul sale under trust deed and to cancel deed executed pursuant to sale, and defendant filed cross-complaint in nature of action to quiet title, claiming right to possession and damages for plaintiff's refusal thereof, and defendant later withdrew claim for damages and opposed plaintiff's demand for jury trial, plaintiff held not entitled to jury trial, since equitable character of action could not be overthrown by defendant's claim of right to title and possession (St. 1933, p. 795; Civ. Code, § 3412).

In Bank.

Appeal from Superior Court, Yolo County; Neal Chambers, Judge.

Action by Viola M. Rablin, a widow, against O. J. Greiner, who filed a cross-complaint. From a judgment for defendant, plaintiff appeals.

Affirmed.

Busick & Busick, of Sacramento, for appellant.

Huston, Huston & Huston, of Woodland, for respondent.

CURTIS, Justice,

Plaintiff commenced an action against defendant to obtain a judgment annulling a sale under a certain deed of trust, and to cancel of record the deed executed in pursuance of said sale. Said action was brought pursuant to the provisions of sec-

tion 3412 of the Civil Code, which provides that, "A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." The action was brought upon the theory that the sale had been made in contravention of the provisions of the Mortgage Moratorium Act of 1933, chapter 263. Stats. 1933, p. 795. The defendant filed an answer and cross-complaint. The cross-complaint contained the usual allegations of a quiet title action to the effect that the defendant was the owner and entitled to the possession of the property, describing it; that plaintiff claimed an interest or estate therein adverse to defendant; that said claim was without right; that plaintiff refused to surrender possession of said premises to defendant; that defendant was damaged to the extent of \$500 by such refusal. The prayer of said cross-complaint sought to have the adverse claims of the parties adjudged in said action; that the plaintiff be declared to have no interest in said property; that plaintiff be enjoined from thereafter asserting any claim thereto; that defendant recover from the plaintiff \$500; that defendant have a writ of possession of said land and premises; and for such other relief as to the court might seem meet and equitable.

Plaintiff served and filed a written demand for a trial by jury. At the trial, defendant withdrew his demand for damages, and opposed a trial by jury. The court denied a trial by jury and proceeded to hear the case. As its termination, a judgment was rendered in favor of the defendant.

The sole question presented on this appeal is whether or not the plaintiff, by virtue of the filing of the cross-complaint by the defendant, was entitled to a trial by jury. Plaintiff argues that the cross-complaint of the defendant, in that it set up the fact that defendant was out of possession and asked for a writ of possession, was in fact an action in ejectment, and that it necessarily follows that the issues framed thereby were legal issues which plaintiff was entitled to have tried by a jury.

There is no merit in this contention. It is to be noted that the issues tendered by plaintiff in her suit under section 3412 of

the Civil Code were equitable, and that plaintiff is relying upon the issues tendered by defendant as the basis of her right to a trial by jury, although defendant was opposed to a trial by jury. It was held in *Angus v. Craven*, 132 Cal. 691, 64 P. 1091, that where plaintiffs are in possession and it appears that the defendant has never been in possession nor ousted therefrom, the equitable character of the action, under either section 738 of the Code of Civil Procedure, or section 3412 of the Civil Code, cannot be overthrown by the defendant's claim of title and prayer to be let into possession, either by answer or by cross-complaint. The defendant is not entitled to a jury trial of the action by reason of such claim of title and possession. It would seem that if in such a situation the defendant is not entitled to a jury trial, with much less reason can it be said that a plaintiff, who has herself tendered only equitable issues, is entitled to a jury trial. This case is in our opinion controlling. It was followed in the case of *Johnson v. Peterson*, 90 Minn. 503, 97 N. W. 384, and is in accord with the great weight of authority. *McNeil v. Morgan*, 157 Cal. 373, 108 P. 69. See note, 89 A. L. R. page 1391.

Judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; LANGDON, J.



9 Cal.App.2d 47

COELHO v. TRUCKELL et al.

Civ. 1932.

District Court of Appeal, Fourth District
California.

Aug. 29, 1935.

Hearing Denied by Supreme Court
Oct. 28, 1935.

1. Constitutional law ⇨212

Provision in Federal Constitution guaranteeing equal protection of laws does not prohibit state or political subdivision thereof, in exercise of its police powers and in protection of public life, health, morals or safety, from passing law affecting property rights of individuals and even destroying their property if law equally affects all within given class (Const. U. S. Amend. 14)

2. Health ⇨20

Measure adopted to promote public health or safety is an exercise of police powers of state.

3. Eminent domain ⇨2(1)

State, in exercise of its police power, can destroy private property without compensation where such property is dangerous to life, health, or property.

4. Animals ⇨32

Constitutional law ⇨205(2), 237

County ordinance making county a voluntary tuberculosis control area, and providing for destruction of all tubercular dairy cattle in county without compensation held not unconstitutional as denying equal protection of laws or as granting special privileges and immunities to one class of citizens, since prevention and eradication in dairy herd of bovine tuberculosis, which was dangerous to health of humans and was communicable to other cattle, was within police powers of county (Const. U. S. Amend. 14; Const. Cal. art. 1, § 21; St. 1933, p. 97, §§ 221-254).

5. Eminent domain ⇨2(5)

Under police power, tubercular cattle can be destroyed without compensation to owners.

6. Counties ⇨55

County ordinance is only effective within boundaries of county.

7. Counties ⇨55

County ordinance which applies equally to class within county is not unconstitutional because it does not affect others of like class outside county (Const. art. 11, § 11).

8. Animals ⇨32

County ordinance making county which had not been established as tuberculosis control area by state a voluntary tuberculosis control area, and providing for eradication of bovine tuberculosis, held not in conflict with provisions of Agricultural Code relating to eradication of bovine tuberculosis by state officials, since such provisions were applicable only in counties established as tuberculosis control areas by state officials (St. 1933, p. 97, §§ 221-254).

9. Animals ⇨32

County ordinance making county which had not been established as tuberculosis control area by state a voluntary tuberculosis control area, and providing for eradication of bovine tuberculosis by slaughter of all infected dairy cattle without compensation, held not in conflict with provisions of Agricultural Code for tuberculin testing of cattle by state in tuberculosis control areas organized by state and for slaughter of infected cattle with

compensation, since provisions of Code did not apply to county (St. 1933, p. 97, §§ 221-254).

10. Animals ☞32

Provisions of Agricultural Code relating to eradication of bovine tuberculosis prohibit slaughter of infected cattle in tuberculosis control areas established by state if state and federal funds are not available to pay indemnity to owners, but do not prohibit slaughter of infected cattle in voluntary tuberculosis control areas operating under county ordinances, even though no funds are available to pay indemnity to owners (St. 1933, p. 99, § 234.25; p. 101, § 238).

11. Animals ☞32

County ordinance making county a voluntary tuberculosis control area and providing for eradication of bovine tuberculosis was not invalidated by provision authorizing employees of federal bureau of animal industry to make tuberculin tests, notwithstanding that such employees were not residents or electors of county and were therefore not qualified to become county officials or deputies (St. 1933, p. 97, §§ 221-254).

12. Animals ☞32

County ordinance making county a voluntary tuberculosis control area and providing for eradication of bovine tuberculosis and section of Agricultural Code authorizing ordinance held not void as against objection that provision in ordinance and Code section making it duty of designated veterinarians to determine when tuberculin test should be administered was legislative act which could not be delegated (St. 1933, p. 99, § 234.25).

13. Animals ☞32

Under provision of Agricultural Code authorizing board of supervisors of county not established as tuberculosis control area to declare "any portion" of county a voluntary tuberculosis control area, board could establish all of county into voluntary tuberculosis control area, word "any" being construed as "all" (St. 1933, p. 99, § 234.25).

[Ed. Note.—For other definitions of "All" and "Any," see Words & Phrases.]

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by M. F. Coelho, individually and on behalf of Kings Dairymen's Protective Association, against William C. Truckell and others. From the judgment, the plaintiff appeals.

Affirmed.

Thomas F. Lopez, Louis J. Coelho, and G. L. Mynesworth, all of Fresno, for appellant.

Whitehurst & Logan, of Patterson, and Hawkins & Hawkins, of Modesto, amici curiæ, for appellant.

Roger R. Walch, Dist. Atty., of Hanford, for respondents.

MARKS, Acting Presiding Justice.

This is an action to enjoin defendants from enforcing the provisions of an ordinance of the county of Kings making all of that county a voluntary tuberculosis control area, providing for the giving of the tuberculin test to all dairy cattle, and for the branding and slaughtering of reactors. Plaintiff is a dairyman who sues for himself and for more than ninety fellow members of the Kings Dairymen's Protective Association. Defendant William C. Truckell is the livestock inspector of Kings county and a resident and elector thereof. Defendant M. G. Smith is a duly qualified veterinarian and an employee of the Bureau of Animal Industry of the United States, as is W. W. Worcester, both of whom are empowered to enforce the provisions of the ordinance in question. Neither are residents nor electors of Kings county.

In 1933 the Legislature adopted an Agricultural Code for this state (St. 1933, p. 60). Article 3, containing sections 221 to 254, inclusive, provides in detail for the control of bovine tuberculosis in California under the general direction of the department of agriculture of the state. It is only necessary for us to give a general summary of some of the provisions of this portion of the Code. It is provided that the department of agriculture, which we will refer to as the department, may establish and maintain tuberculosis control areas. Each area shall consist of one or more counties. The director of the department may order cattle in a tuberculosis control area to be tuberculin tested whenever he considers it necessary. Those found to be reactors are to be branded and slaughtered after their value has been fixed by appraisal. It is contemplated that the state and federal governments will contribute towards compensating the owner for the loss suffered by him through the slaughtering of his cattle. It is provided by section 238 that "No animal shall be tested or slaughtered under the provisions of this article unless: (a) Funds are available from an appropriation of the Unit-

ed States to assist in the eradication of tuberculosis in cattle in California. (b) Funds are available from an appropriation of this State for payment of the indemnity by the State under the provisions of this article." When state funds are not available for administration purposes, and to pay owners indemnity for slaughtered cattle, the director of agriculture may withdraw one or more counties from tuberculosis control areas. A county thus withdrawn forms a provisional control area and no indemnity can be paid in such county to owners of reactors to the tuberculin test. In such areas the test is to be given only upon written requests of owners and it is provided that reactors shall be removed within thirty days after being tested. Provision is also made for the formation of calf segregation areas and regulation of the same.

Section 234.25 of the Agricultural Code provides as follows: "In any county which has not been established by the department as a tuberculosis control area as provided in the preceding section, the board of supervisors of such county may, by ordinance, declare any portion of said county a voluntary tuberculosis control area, for the purpose of eradicating bovine tuberculosis therein; the same to continue, as such, only until the department shall establish such county as a tuberculosis control area.

"The county live stock inspector shall, subject to the supervision of the director, examine and tuberculin test all dairy cattle within such voluntary tuberculosis control area, as often as may be deemed necessary, in order to determine which animals are affected with tuberculosis.

"The board of supervisors of such county shall provide by ordinance for the formation, regulation, and operation of all such voluntary tuberculosis control areas, as may be so established within such county, necessary to accomplish the object of this section. The provisions in this code for payment of indemnity shall not apply to any voluntary tuberculosis control area established by authority of this section."

Kings county was not formed into a tuberculosis control area.

On November 5, 1934, the board of supervisors formed all of Kings county into a voluntary tuberculosis control area. The provisions of this ordinance follow quite closely the provisions of the Agricultural Code which provide for the government and regulation of tuberculosis control areas by the state. It is provided that the testing of cattle for tuberculosis shall be done by

"a bureau veterinary inspector, a co-operating regularly employed state or county veterinary inspector or an accredited veterinarian." The definitions of the terms of the ordinance as contained therein follow quite closely the definitions contained in section 221 of the Agricultural Code.

It is admitted that Kings county has provided no money to pay owners anything to recompense them for loss occasioned by the slaughtering of reactors and that no state funds can be used for that purpose. The ordinance under attack here contemplates that such owners will receive their sole compensation from federal funds available for the purpose of stamping out bovine tuberculosis in California. Counsel agree that if any money is to be paid to Kings county owners of slaughtered animals, the amount per animal of equal grade will be considerably less than that paid owners in tuberculosis control areas administered by the state. While it is admitted that a large sum of federal money is available for the purpose of paying for reactors slaughtered in tuberculosis control areas where the state contributes towards compensation for the loss to owners, counsel cannot agree upon the question of whether or not any of the federal funds can be used to compensate owners for loss in a voluntary tuberculosis control area such as Kings county where neither the state nor the county pays any portion of the loss. From the view we take of the case we regard this question as unimportant and will therefore assume that no compensation will be paid any owner for reactors slaughtered in Kings county.

The most serious attack on the Kings county ordinance is made upon the ground that it denies to the owners of bovine reactors in Kings county the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution and those provisions of section 21 of article 1 of the State Constitution which prohibit the granting of special privileges and immunities to one citizen or class of citizens that are not granted to all citizens or classes of citizens. It is argued that because the owners of bovine reactors in Kings county, a voluntary tuberculosis control area, will receive no compensation for their slaughtered cattle and the owners of bovine reactors in tuberculosis control areas of the state will receive substantial compensation for the cattle slaughtered, this amounts to denying the owners in Kings county the equal protection of the laws and constitutes the grant of a privilege to owners of infected cattle in

tuberculosis control areas outside of Kings county which is not given to owners of the same class of cattle in Kings county, a voluntary tuberculosis control area.

[1] It is well established that the provisions of the Fourteenth Amendment to the Federal Constitution do not prohibit a state or one of its political subdivisions, in the exercise of its police powers and in the protection of public life, health, morals, or safety from passing a law affecting the property rights of individuals and even destroying their property if the law equally affects all within a given class. In *Barbier v. Connolly*, 113 U. S. 27, 5 S. Ct. 357, 359, 28 L. Ed. 923, it is said: "The fourteenth amendment, in declaring that no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.

"But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." See, also, *Soon Hing v. Crowley*, 113 U. S. 703, 5 S. Ct. 730, 28 L. Ed. 1145; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220, 221; *Crowley v. Christensen*, 137 U. S. 86, 11 S. Ct. 13, 34 L. Ed. 620; *Murphy v. California*, 225 U. S. 623, 32 S. Ct. 697, 56 L. Ed. 1229,

41 L. R. A. (N. S.) 153; *Adams v. Milwaukee*, 228 U. S. 572, 33 S. Ct. 610, 57 L. Ed. 971; *Lawton v. Steele*, 152 U. S. 133, 14 S. Ct. 499, 500, 38 L. Ed. 385; *Northwestern Laundry v. Des Moines*, 239 U. S. 486, 36 S. Ct. 206, 60 L. Ed. 396.

The provisions of section 21 of article 1 of the State Constitution have been similarly construed. In *Re Weisberg*, 215 Cal. 624, 12 P.(2d) 446, 449, it is said: "The classification created for the purpose of legislation must, of course, be a reasonable one. It must not be arbitrary. * * * It is not the rule that all laws shall be universal or general in their application. It is sufficient that laws of a general nature have 'a uniform operation.' A law is general and uniform and affords equal protection in its operation when it applies equally to all persons embraced within the class to which it is addressed, provided that such class is founded upon some natural or intrinsic or constitutional distinction between the persons composing it and others not embraced in it. In *re Sumida*, 177 Cal. 388, 391, 170 P. 823." See *In re Stoltenberg*, 21 Cal. App. 722, 132 P. 841; *Ex parte Stoltenberg*, 165 Cal. 789, 134 P. 971.

[2] Where a measure is adopted to promote the public health or safety it is conceded an exercise of the police powers of the state. In *re Johnson*, 40 Cal. App. 242, 180 P. 644; *Ex parte Yun Quong*, 159 Cal. 508, 114 P. 835, Ann. Cas. 1912C, 969. In *Lawton v. Steele*, supra, the Supreme Court of the United States said: "The extent and limits of what is known as the 'police power' have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order the destruction of a house falling to decay, or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars,

and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. *Barbier v. Connolly*, 113 U. S. 27, 5 S. Ct. 357 [28 L. Ed. 923]; *Kidd v. Pearson*, 128 U. S. 1, 9 S. Ct. 6 [32 L. Ed. 346]. To justify the state in thus interposing its authority in behalf of the public, it must appear—First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

[3] It is universally held that in the exercise of its police power the state may destroy private property without compensation where it is dangerous to life, health, or property. *Patrick v. Riley*, 209 Cal. 350, 287 P. 455; *Graham v. Kingwell*, 218 Cal. 658, 24 P.(2d) 488; *Adams v. Milwaukee*, supra; *Miller v. Schoene*, 276 U. S. 272, 48 S. Ct. 246, 72 L. Ed. 568; *North American Cold Storage Co. v. Chicago*, 211 U. S. 306, 29 S. Ct. 101, 53 L. Ed. 195, 15 Ann. Cas. 276; *Arbuckle v. Pfaeving*, 20 Wyo. 351, 123 P. 918; *Schulte v. Fitch*, 162 Minn. 184, 202 N. W. 719; *Knox County v. Kreis*, 145 Tenn. 340, 236 S. W. 1; *Carstens v. De Sellem*, 82 Wash. 643, 144 P. 934; *Hacker v. Barnes*, 166 Wash. 558, 7 P.(2d) 607, 80 A. L. R. 1212; *State v. Heldt*, 115 Neb. 435, 213 N. W. 578; *State v. Main*, 69 Conn. 123, 37 A. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30; *New Orleans v. Charouleau*, 121 La. 890, 46 So. 911, 18 L. R. A. (N. S.) 368, 126 Am. St. Rep. 332, 15 Ann. Cas. 46; *Durand v. Dyson*, 271 Ill. 382, 111 N. E. 143, Ann. Cas. 1917D, 84.

[4-7] In view of the foregoing well-established principles of law, it seems clear that the Kings county ordinance in question here does not violate any of the provisions of the Fourteenth Amendment to the Federal Constitution nor those of section 21 of article 1 of the state Constitution. Bovine tuberculosis is dangerous to the health of humans and it is regarded as communicable to other cattle. *Patrick v. Riley*, supra. The matter of its prevention and eradication in dairy herds is well within the police

powers of the state or county. Tubercular cattle in Kings county could be destroyed without compensation to the owners under the authorities already cited. The ordinance in question was applicable to every owner of dairy cows within that county. It was, therefore, a general law, uniform in its operation as it applied equally to all persons embraced in the class to which it was addressed, and that class was founded upon a natural, intrinsic, and constitutional distinction between the persons composing it and others not embraced in it. In *re Weisberg*, supra. That it applied only to dairy-men in Kings county and not to others in other counties is no objection to its constitutionality on the grounds we are now considering. A county ordinance is only effective within the boundaries of the county. If it applies equally to a class within the county, it is not unconstitutional because it does not affect others of a like class without the county. "Any county * * * may make and enforce within its limits all such * * * police, sanitary, and other regulations as are not in conflict with general laws." (Section 11, art. 11, Const.)

[8] Plaintiff urges that as the state has adopted a general plan for the eradication of bovine tuberculosis under its police powers, the Legislature cannot authorize boards of supervisors to pass, and such boards under the police powers given counties cannot pass, ordinances on the same subject or in conflict with the state law. In support of this argument he cites section 11 of article 11 of the Constitution; In *re Pfahler*, 150 Cal. 71, 88 P. 270, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911; In *re Mingo*, 190 Cal. 769, 214 P. 850.

This argument is not tenable, and the authorities cited are not applicable to the situation before us. The provisions of the Agricultural Code relating to the eradication of bovine tuberculosis by state officers are expressly made applicable only to those counties of the state organized into tuberculosis control areas by duly authorized state officers. We are informed that fifteen counties have been placed in such areas. Had the board of supervisors of any one of these counties attempted to pass an ordinance covering the same ground as the state law or contrary to its provisions, then plaintiff's argument would be sound and his authorities applicable. Kings county was never a tuberculosis control area. It was thus excluded from the operation of the general terms of the act as administered by

state authorities. It therefore appears that the county ordinance was neither in conflict with the state law nor covered a subject already covered by state legislation.

[9] Plaintiff urges that the state cannot pass a law providing that the owners of diseased cattle in some counties should be compensated for those slaughtered and deny like compensation to the owners of diseased cattle slaughtered in other counties. As we read the Agricultural Code it attempts no such thing. That Code is effective only in those counties established as tuberculosis control areas by state officers. Only in those counties can cattle be slaughtered under its terms. Owners in those counties receive similar compensation for slaughtered cattle. Section 234.25 of the Agricultural Code gives a county not established as a tuberculosis control area the option of organizing a voluntary tuberculosis control area. There is nothing in the act to compel any county to organize such an area, the action being left to the discretion of the board of supervisors, and, through the power of initiative and referendum, to the electors of the county. Kings county elected to avail itself of the privilege given it by the Agricultural Code of organizing a voluntary tuberculosis control area, and its board of supervisors passed the requisite ordinance which is now in effect. Its voluntary tuberculosis control area is organized under this ordinance and governed by its terms and not under the general provisions of the Agricultural Code. Section 234.25 of that Code is the only one applying to Kings county and then only as it authorizes the board of supervisors to organize the voluntary tuberculosis control district. District or area plans of eradication of bovine tuberculosis have been held valid in other states. See *Fevold v. Board of Supervisors*, 202 Iowa, 1019, 210 N. W. 139; *Schulte v. Fitch*, *supra*. As the state law for the tuberculin testing of cattle and the slaughtering of reactors with provisions for compensation to owners does not apply to Kings county, and as the Kings county ordinance is not effective outside that county, the two enactments are not conflicting.

[10] Plaintiff calls our attention to section 238 of the Agricultural Code which we have already quoted, and maintains that as this section prohibits the slaughtering of cattle "under the provisions of this article" unless there are both state and federal funds available to pay indemnity to the owners of the cattle, and it is admitted that no state funds are available to pay for any

cattle slaughtered in Kings county, the act prohibits the slaughtering of any cattle there.

It is true that section 234.25 of the Agricultural Code authorizing the formation of voluntary tuberculosis control areas is in the same Code article as section 238. The last sentence of section 234.25 provides that "the provisions in this code for payment of indemnity shall not apply to any voluntary tuberculosis control area established by authority of this section." We think the true meaning and fair construction to put upon section 238 is that it prohibits the slaughter of cattle in tuberculosis control areas unless the required funds are available, but has nothing to do with cattle slaughtered in voluntary tuberculosis control areas which are organized by ordinance which need not necessarily follow the other provisions of the Agricultural Code. The cattle in Kings county will be slaughtered under the provisions of its ordinance and not under those of the Agricultural Code. If the ordinance did not require the slaughtering of infected cattle, they could not be slaughtered because the general provisions of the Code have not been made applicable to that county. By holding that the provisions of section 238 of the Agricultural Code apply only to the slaughter of cattle in tuberculosis control areas operating under state law and not to voluntary tuberculosis control areas operating under county ordinances we may give full effect to the provisions of that section and those of the last sentence of section 234.25 of the same Code.

[11] Plaintiff urges that the ordinance is void as it attempts to vest authority to execute its terms in the representatives of the Federal Bureau of Animal Industry, none of whom are residents or electors of Kings county, and therefore not qualified to become officials or deputies of officials of that county. This argument cannot apply to defendant William C. Truckell, who is the livestock inspector and a resident and elector of the county of Kings. The Bureau of Animal Industry is willing to permit its employees to assist the state and county officials in eradicating bovine tuberculosis. The two mentioned in the agreed statement of facts, being the only federal employees with whom we are concerned, are regular veterinarians and qualified to administer tuberculin tests. We can see no good reason why they should not be permitted to assist the officials of Kings county in making such tests. It should be no more necessary for them to be officers or deputies of

officers of the county in order to enable them to administer tuberculin tests than it should be necessary for a duly licensed physician to be a health officer or a deputy in order that he may be permitted to diagnose the case of a patient and determine that he is suffering from a contagious disease and should be quarantined.

[12] *Amici curiæ* argue that the Kings county ordinance and section 234.25 of the Agricultural Code are void as they leave to the designated veterinarians the duty of determining when and how often the tuberculin test shall be administered. They maintain that this involves a legislative act that cannot be delegated by the board of supervisors. This contention is without merit. In *Gaylord v. City of Pasadena*, 175 Cal. 433, 166 P. 348, 349, in considering a similar question it was said: "Even a casual observer of governmental growth and development must have observed the ever-increasing multiplicity and complexity of administrative affairs—national, state, and municipal—and even the occasional reader of the law must have perceived that from necessity, if for no better grounded reason, it has become increasingly imperative that many quasi legislative and quasi judicial functions, which in smaller communities and under more primitive conditions were performed by the legislative or judicial branches of the government, are intrusted to departments, boards, commissions, and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done at all, and their doing, in a very real sense, makes for the safety of the republic and is thus sanctioned by the highest law. For, as the Supreme Court of the United States declares: 'Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be "to stop the wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business.' Union

Bridge Co. v. United States, 204 U. S. 364, 27 S. Ct. 367, 51 L. Ed. 523." See, also, *Hacker v. Barnes*, supra; *North American Cold Storage Co. v. Chicago*, supra; *Richter v. State*, 16 Wyo. 437, 95 P. 51; *Arbuckle v. Pflaeging*, supra; *New Orleans v. Charouleau*, supra.

[13] *Amici curiæ* urge that as section 234.25 of the Agricultural Code authorizes the board of supervisors of a county not a tuberculosis control area to "declare any portion of said county a voluntary tuberculosis control area" there is no authority to declare all of the county such an area. From this they argue that as the Kings county ordinance declares all of that county a voluntary tuberculosis control area, it is void.

In construing the words "any bonds" as used in section 30 of the Street Improvement Act of 1913 (St. 1913, pp. 954, 973), it was said: "The words 'any bonds,' as here used, undoubtedly mean 'all bonds' not disposed of at the advertised sale. There are instances, and this plainly is one of them, where the word 'any' is properly construed to mean 'all.' See note to *State v. Kansas City*, Ann. Cas. 1916E, page 8." *Powell v. Allan*, 70 Cal. App. 663, at page 668, 234 P. 339, 341. See, also, *Glen Alden Coal Co. v. City of Scranton*, 282 Pa. 45, 127 A. 307; *Harper v. Consolidated Rubber Co.*, 284 Pa. 444, 131 A. 356; *Matter of Schuster's Will*, 111 Misc. 534, 181 N. Y. S. 500; *Klotz v. First Nat. Bank*, 78 Ind. App. 679, 134 N. E. 220; *Harrington v. Inter-State Business Men's Acc. Ass'n of Des Moines*, 210 Mich. 327, 178 N. W. 19. We believe that the fair construction to be placed on the words "any portion" as used in this section of the Agricultural Code will permit the organization of all of a county into a voluntary tuberculosis control area should its board of supervisors so elect.

Judgment affirmed.

I concur: JENNINGS, J.

Mr. Presiding Justice BARNARD, being absent, has not participated herein.

9 Cal.App.2d 768

Ex parte JACINTO.

Cr. 288.

District Court of Appeal, Fourth District,
California.

Aug. 29, 1935.

Animals ⚡34

Arrest and detention of defendant under complaint charging him with violating ordinance making county a voluntary tuberculosis control area and providing for administering of tuberculin tests to dairy cattle therein held legal, since ordinance was valid.

Habeas corpus proceeding by Louis Jacinto to secure his release from custody.

Petitioner remanded and writ discharged.

See also (Cal. App.) 47 P.(2d) 300.

Thomas F. Lopez and G. L. Aynesworth, both of Fresno, for petitioner.

Whitehurst & Logan, of Patterson, and Hawkins & Hawkins, of Modesto, amici curiæ, for petitioner.

Roger R. Walch, Dist. Atty., of Hanford, for respondent.

MARKS, Acting Presiding Justice.

This is a petition for a writ of habeas corpus filed to test the legality of petitioner's arrest under a complaint charging him with violating the terms of an ordinance of Kings county providing for the organization of that county into a voluntary tuberculosis control area and for the administering of tuberculin tests to dairy cattle in that county. Petitioner urges the illegality of that ordinance upon the same grounds urged by the plaintiff and amici curiæ in the case of *Coelho v. Truckell* (Cal. App.) 48 P.(2d) 697. The opinion in that case disposes of all of the questions presented here, and upon the authorities there cited and for the reasons there given the arrest and detention of petitioner must be held legal.

Petitioner is remanded to the custody of the sheriff of Kings county. Writ discharged.

I concur: JENNINGS, J.

Mr. Presiding Justice BARNARD, being absent, does not participate herein.

PEOPLE v. BRITTON et al.*

Cr. 2634.

District Court of Appeal, Second District,
Division 1, California.

Aug. 31, 1935.

Hearing Granted by Supreme Court
Sept. 30, 1935.

Kidnapping ⚡5

In prosecution for kidnapping for robbery, evidence held to support judgment of imprisonment "without possibility of parole" under statute providing that, where victim of kidnapping for purpose of robbery suffers bodily harm in course of commission of crime, perpetrator of crime should suffer death or be punished by imprisonment for life without possibility of parole (Pen. Code, § 209, as amended by St. 1933, p. 2617).

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Floyd C. Britton pleaded guilty to kidnapping for the purpose of robbery, and, from judgment that he be punished by imprisonment without possibility of parole, he appeals.

Affirmed.

See, also, 45 P.(2d) 368; 48 P.(2d) 705, 706, 707.

Geo. E. Cloud, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

HOUSER, Justice.

Defendant Britton having pleaded guilty to a charge theretofore preferred against him of "kidnaping for the purpose of robbery in violation of section 209 of the Penal Code, as amended by St. 1933, p. 2617, a felony," in due course it was adjudged by the trial court that, in accordance with the provisions of said section 209 of the Penal Code, as amended by St. 1933, p. 2617, said defendant be punished by imprisonment in the state prison for the term prescribed by law "without possibility of parole." From such judgment defendant has appealed to this court.

In substance, the point presented by appellant on this appeal is that the evidence upon which the trial court acted was insufficient to authorize it to order that defendant be imprisoned "without possibility of parole." In that regard, the authority of the trial court to pronounce such a

sentence or judgment depends upon the provisions contained in section 209 of the Penal Code, as amended by St. 1933, p. 2617, to the effect that where, in the course of the commission of the crime the victim thereof suffers "bodily harm," the perpetrator of the crime "shall suffer death or shall be punished by imprisonment in the State prison for life without possibility of parole," etc. Appellant urges that the "bodily harm" to which the victim in the instant case was subjected was not of that severity which is contemplated by the language of the statute. However, since the briefs herein were filed, in the case of *People v. Tanner* (Cal. Sup.) 44 P.(2d) 324, it has been ruled that the provisions of the statute are and were applicable even in a situation where the "bodily harm" inflicted, especially upon the lesser of the victims of a "kidnaping for the purpose of robbery," was comparatively much less than that shown to have been suffered by the victim in the instant case. It follows that the appellant's point cannot be sustained.

Judgment affirmed.

We concur: CONREY, P. J.; EDMONDS, Justice pro tem.



PEOPLE v. BRITTON et al. *
Cr. 2635.

District Court of Appeal, Second District,
Division 1, California.
Aug. 31, 1935.

Hearing Granted by Supreme Court
Sept. 30, 1935.

Kidnapping ☞4

In prosecution for kidnapping for robbery, that indictment against defendants contained no allegation that in course of commission of crime victim suffered bodily harm held not sufficient to deprive court of authority to order imprisonment of defendants without possibility of parole.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Floyd C. Britton and C. R. Russell pleaded guilty to charge of kidnapping for

the purpose of robbery, and from judgment that they be imprisoned without possibility of parole, they appeal.

Affirmed.

See, also, 45 P.(2d) 368; 48 P.(2d) 704, 706, 707.

Frederic H. Vercoe, Public Defender, Ellery E. Cuff, Deputy Public Defender, and Geo. E. Cloud, all of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

HOUSER, Justice.

Following a plea of "guilty" by defendants to a charge of "kidnaping for the purpose of robbery," after hearing certain evidence adduced in connection with such accusation the trial court pronounced judgment against defendants in effect that they be imprisoned in the state prison for the term prescribed by law "without possibility of parole." From such judgment defendants have appealed to this court.

The first point suggested by appellants as affording a sufficient reason for reversal of the judgments, in substance is that the trial court had no authority to include within the judgments the requirement that defendants should be imprisoned "without possibility of parole," and in its effect is identical with the question presented by the appellants in the case of *People v. Britton* (Cal. App.) 48 P.(2d) 704, in which case an opinion this day has been filed.

It is considered unnecessary to herein recite the facts which formed the basis for the condition of the imprisonment of defendants of which they here complain. Suffice it to say that such facts do not place the question of the validity of the judgment rendered by the trial court on a footing different in principle from that which obtained in the case to which reference has been had; and, relying upon the authority of that case, as well as upon the authority of the case of *People v. Tanner* (Cal. Sup.) 44 P.(2d) 324, it is concluded that appellants' point is not well taken.

In substance it also is contended by appellants that, because the indictment returned by the grand jury against defendants contained no allegation that in

the course of the commission of the crime of "kidnaping for the purpose of robbery" the victim thereof suffered "bodily harm," the trial court was lacking in authority to order the imprisonment of defendants in the state prison "without possibility of parole." Appellants urge that the instant situation is analogous to that where, by reason of a prior conviction, etc., of a defendant, on his conviction of a subsequent felony he may be subjected to punishment greater than though he had not theretofore suffered a conviction; and in that connection directs attention to the rule that, in order that such prior conviction may result in an increased punishment as applied to a subsequent conviction, the indictment or the information wherein the defendant is charged with the commission of such later offense must not only contain an appropriate allegation with reference to the fact of the prior conviction of the defendant, but as well that he has "served a term therefor," etc., citing *People v. Dawson*, 210 Cal. 366, 292 P. 267; *People v. Arnest*, 133 Cal. App. 114, 23 P.(2d) 812.

Notwithstanding the force of persuasive argument presented in behalf of appellant, coupled with authority, including *Green v. State*, 66 Tex. Cr. R. 446, 147 S. W. 593, and *Farnum v. U. S.*, 1 Colo. 309, together with cogent expression of opinion by learned authors of text-book and digest alike (1 *Bishop on Criminal Law*, § 601; *Bishop's New Criminal Procedure*, §§ 77, 80, 84; 31 *Cor. Jur.* 738), and notwithstanding the fact that, as to certain closely related questions of law that are pertinent to the issue here involved, the several respective views expressed with reference thereto by the different appellate tribunals of this state are not entirely harmonious one with the other, the decisions rendered by the Supreme Court of this state in the two cases of *People v. Giacomella*, 71 Cal. 48, 12 P. 302, and *People v. Russell*, 81 Cal. 616, 23 P. 418, are so directly against the contention of appellants that any conclusion that might be reached by this court, whereby the point presented by appellants would be upheld, could be considered only as in direct conflict with the formerly expressed opinions rendered by the Supreme Court. See, also, *People v. Walsh*, 75 Cal. App. 434, 243 P. 31.

It follows that the judgments should be, and they are affirmed.

We concur: CONREY, P. J.; EDMONDS, Justice pro tem.



PEOPLE of the State of California, Plaintiff and Respondent, v. Floyd C. BRITTON et al., Defendants; C. R. Russell, Defendant and Appellant.*

Cr. 2636.

District Court of Appeal, Second District,
Division 1, California.

Aug. 31, 1935.

Hearing Granted by Supreme Court
Sept. 30, 1935.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.
See, also, 45 P.(2d) 368; 48 P.(2d) 705, 707.

Frederic H. Vercoe, Public Defender, and Ellery E. Cuff, Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

HOUSER, Justice.

Defendant appeals from a judgment of his conviction for the crime of "kidnaping for the purpose of robbery," and urges the identical points and presents the same argument thereon that were presented by him to this court in an appeal from another judgment that followed his conviction for a like offense committed under circumstances similar to those which were shown to have existed in the instant case.

For the reasons assigned in the appeal to which reference hereinbefore has been had, to wit, *People v. Britton* (Cal. App.) 48 P.(2d) 704, it is ordered that the judgment be, and it is, affirmed.

We concur: CONREY, P. J.; EDMONDS, Justice pro tem.

*For subsequent opinion see 56 P.2d 493.

PEOPLE v. BRITTON et al. *
Cr. 2674.

District Court of Appeal, Second District,
Division 1, California.

Aug. 31, 1935.

Hearing Granted by Supreme Court
Sept. 30, 1935.

1. Kidnapping ☞5

Evidence held sufficient to support conviction of kidnapping for purpose of robbery.

2. Criminal law ☞1130(2)

Defendant who failed to print in brief instructions given by court to jury bearing upon subjects covered by refused instruction held not entitled to consideration of contention that refusal of specified instruction was error (Rules of District Court of Appeal, rule 8, § 3).

3. Criminal law ☞1163(1)

On appeal from judgment, defendant has duty not only to specify error of which he complains, but also to establish to reasonable certainty that without such error result of trial would have been substantially different from that which was actually reached.

4. Criminal law ☞781(4)

Instruction that confessions were to be received with great caution and that their value as evidence depended on circumstances surrounding defendant at time, inclusive of all other testimony, held properly refused, since it attempted to direct jury to course to be pursued in determining genuineness of purported confession and exceeded statutory authorization of instruction, and evidence was such that jury would have returned verdict of guilty without consideration of purported confession, which was in fact merely an oral admission (Code Civ. Proc. § 2061, subd. 4).

5. Indictment and information ☞139

Motion to set aside indictment on ground that court was without jurisdiction because grand jury which had returned indictment was drawn and impaneled contrary to law, which was presented by defendant without first having moved to vacate plea of guilty which had been entered 33 days previously, held presented too late (Pen. Code, §§ 990, 995, 996).

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Floyd C. Britton was charged with an offense, and Rouland W. Mikesell was convicted of kidnapping for the purpose of robbery, and he appeals.

Affirmed.

See, also, 45 P.(2d) 368; 48 P.(2d) 704, 705, 706.

Joseph L. Fainer, Gladys Towles Root, and R. E. Parsons, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

HOUSER, Justice.

From each of several judgments which were rendered against him pursuant to respective verdicts that were returned by a jury, as well as from an order by which his motion for a new trial was denied, defendant Mikesell has appealed to this court.

The charges that were preferred against defendant arose from an alleged kidnapping of certain persons "for the purpose of robbery."

[1] Appellant complains that the evidence was insufficient to support the several verdicts or either of the judgments. Although it is clear that defendant was not personally present when the victims of the kidnaping were first unlawfully seized by his codefendants, with an "intent to hold or detain" such victims, from an examination of the evidence adduced on the trial of the action this court is convinced that it was sufficient to justify the conclusion on the part of the jury that not only before such kidnaping originally occurred did the defendant aid and abet or advise and encourage his codefendants in the nefarious enterprise, but as well that before the crime was completed defendant actively and with criminal intent participated with his codefendants in carrying the commission of the crime to its conclusion; from which it follows that in that regard the point presented by defendant is unavailing to him.

It is next contended that error prejudicial to the substantial rights of defendant was committed by the trial court in its refusal to grant defendant's request to give to the jury the following instruction: "The rule of law is that confessions are to be received with great caution. They may or may not constitute evidence of a satisfactory nature; their value depends not only upon whether they are deliberate and voluntary but upon every fact and circumstance surrounding the party at the time, inclusive of all the other testimony offered and introduced upon the trial."

[2-4] It should be noted that, in violation of section 3, of rule VIII, of this court, appellant has not printed in his brief the several other instructions, if any, that were given by the court to the jury "bearing upon the subjects covered by the refused instruction," and hence that appellant is not entitled to have his specification in regard to the alleged erroneous instruction considered by this court; but, notwithstanding that situation, it is clear that the proposed instruction was properly refused by the trial court. Even assuming that the opening sentence of such instruction is in harmony with the purpose of the provisions of subdivision 4 of section 2061 of the Code of Civil Procedure and disregarding the question of the constitutionality of the statute (*People v. Jones*, 87 Cal. App. 482, 491, 262 P. 361, and authorities there cited; *Hirshfeld v. Dana*, 193 Cal. 142, 155 to 165, 223 P. 451), it is apparent that the proposed instruction exceeds the statutory authorization in that it declares that "confessions, whether oral or written, are to be received with great caution," whereas the language of the statute in that regard is that "oral admissions of a party" should be viewed "with caution," thus inserting the word "oral" before the word "admissions" and omitting the word "great" as used in the proposed instruction, preceding the word "caution." As a matter of both fact and of law, it also may be said that defendant made neither an oral nor a written "confession," as such, of his guilt; but, according to the evidence, did make several general oral admissions, from which his guilt might have been inferred. For the distinction between a confession and an admission, see *People v. Ferdinand*, 194 Cal. 555, 568, 229 P. 341. In addition thereto, on reading the entire proposed instruction, it is clear that it is objectionable in that it purports to direct the attention of the jury to the course which should be pursued by it in determining the genuineness of a "confession." More than that, on appeal from a judgment it is a cardinal rule that the duty devolves upon the appellant not only to specify the error of which he complains, but also to establish to a reasonable certainty that, without such error having been committed, the result of the trial of the action would have been substantially different from that which was actually reached by the trial court. And in the latter connection, assuming that the trial court had given

to the jury the instruction in question, and that as a consequence, in reaching its verdict, the jury had disregarded, or left out of its consideration of the evidence, the whole of the purported "confession" of defendant, still the jury would have had a right to rely not only upon the testimony that was given by the accomplice of defendant, with the independent corroborative testimony that was given by other witnesses with reference thereto, but also upon the many incriminative facts which appeared in the admissions made by defendant as a witness in his own behalf. To this court, from a consideration of all such evidence, it is so improbable as to be nearly inconceivable, that any verdict other than one expressing guilt of defendant would have been returned by the jury. It is therefore concluded that in no event is the alleged error available as a sufficient reason for a reversal of the judgments or the order.

[5] Appellant further contends that for the asserted reason that the grand jury which returned the indictment against defendant "was drawn and empaneled contrary to law" the trial court was without jurisdiction in the case. In that regard the record shows that 33 days after defendant had been arraigned on the several charges preferred against him and he had pleaded "not guilty," without first having moved the trial court or having been granted leave by it to set aside or vacate such plea, he presented to such court his motion "to set aside and quash the purported indictment. * * *

Not only by the provisions of sections 990, 995, and 996 of the Penal Code, but as well by numerous decisions rendered by the Supreme and the appellate courts of this state, is it clearly indicated that in circumstances such as those present herein and hereinbefore set forth the motion made by defendant was presented too late. *People v. Bawden*, 90 Cal. 195, 200, 27 P. 204; *People v. Stacey*, 34 Cal. 307; *People v. Middleton*, 103 Cal. App. 135, 283 P. 976; *People v. Godfrey*, 100 Cal. App. 233, 234, 279 P. 1031; *People v. Magee*, 60 Cal. App. 459, 213 P. 513; *People v. Fritz*, 54 Cal. App. 137, 201 P. 348; *People v. Ronsse*, 26 Cal. App. 100, 146 P. 65.

The judgments and the order by which the motion for a new trial was denied are affirmed.

We concur: CONREY, P. J.; YORK, J.

8 Cal.App.2d 730

HAYDEL v. MORTON (two cases).
Civ. 9551.

District Court of Appeal, First District,
Division 2, California.

Aug. 12, 1935.

Hearing Denied by Supreme Court
Oct. 10, 1935.

1. Malicious prosecution §38

Malicious prosecution actions are not favored because of considerations of public policy.

2. Malicious prosecution §16

Plaintiff, to sustain action for malicious prosecution, must establish that defendant acted without probable cause and was actuated by malice.

"Probable cause" is suspicion founded on circumstances sufficiently strong to warrant reasonable man in belief that charge is true.

[Ed. Note.—For other definitions of "Probable Cause," see Words & Phrases.]

3. Malicious prosecution §64(2)

In action for malicious prosecution, existence of probable cause is not negated merely by showing that no crime was committed or that accused was innocent.

4. Malicious prosecution §34

Action for malicious prosecution is not maintainable in absence of showing that proceedings alleged to have been prosecuted maliciously and without probable cause have been terminated in favor of party claiming injury thereby.

5. Malicious prosecution §24(1)

Mere showing of favorable termination of proceedings, which are alleged to have been prosecuted maliciously and without probable cause in favor of party who claims to have been injured by proceedings, is insufficient to negative probable cause for institution of proceedings, or to create conflict on issue of probable cause.

6. Malicious prosecution §71(2)

Question of what facts and circumstances amount to probable cause is question of law for court, although jury may be called upon to determine whether such facts and circumstances exist, where there is substantial conflict in evidence.

7. Malicious prosecution §64(2)

Facts that defendant had been informed by accountant that checks which were payable to corporation of which plaintiff was manager had been deposited in his personal account, and proceeds had not been credited to corporation, that defendant had been ad-

vised by representative of bonding company to file claim on plaintiff's bond, and had been advised by his attorney that plaintiff had misappropriated funds, before causing arrest of plaintiff for alleged misappropriation of funds, and that plaintiff was held to answer by committing magistrate but acquitted on trial, held to establish probable cause for causing arrest of plaintiff.

8. Malicious prosecution §21(1)

Where checks payable to corporation by which plaintiff was employed and in which defendant was chief stockholder had been allegedly diverted into plaintiff's personal account and representative of bonding company had advised defendant to file claim on plaintiff's bond for misappropriation of corporation's funds, fact that defendant obtained advice of counsel before causing plaintiff's arrest held to conclusively establish probable cause for causing plaintiff's arrest for alleged misappropriation of funds.

9. Appeal and error §933(4)

Order granting new trial which was made in general terms is presumed not to have been made upon grounds of insufficiency of evidence (Code Civ. Proc. § 657).

10. Damages §87(2)

Where verdicts assess compensatory damages at "nothing" or "none," award of punitive or exemplary damages cannot be upheld.

11. Trial §333

Verdict for plaintiff in slander suit which assessed "compensatory damages in the sum of \$00" and exemplary damages at \$10,000 held to require new trial, as against contention that irregularity of verdict was in form rather than substance and result of inadvertence or mischance.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Action by Lionel H. Haydel against Andrew Wade Morton. From judgment for plaintiff on the first count of the action, defendant appeals, and from the portion of an order granting a new trial on the second and third counts of the action, plaintiff appeals.

Judgment for plaintiff reversed, and order granting new trial affirmed.

Hearing denied by Supreme Court; SEAWELL, J., dissenting.

Thomas C. Ryan and F. H. Dam, both of San Francisco, for plaintiff.

Sullivan, Roche, Johnson & Barry and Sullivan, Roche & Johnson, all of San Francisco, for defendant.

SPENCE, Justice.

When the above-entitled cause was submitted to the jury, it involved three counts. The first count was based upon alleged malicious prosecution. The second and third counts were based upon alleged slander. The jury returned three verdicts in favor of the plaintiff. The verdict upon the first count was for compensatory damages of \$14,000 and exemplary damages of \$25,000, making a total of \$39,000. The verdict on the second count was for the sum of \$10,000 and the verdict on the third count was also for the sum of \$10,000. The exact wording of the verdicts on the second and third counts will be hereinafter discussed. Defendant made a motion for a new trial which was granted as to the second and third counts. As to the first count, the trial court made a conditional order denying the motion in the event that plaintiff accepted a reduction of the verdict to the sum of \$14,500, otherwise granting the same "on the ground that excessive damages have been given under the influence of passion and prejudice." Plaintiff filed his consent to said reduction. Defendant has appealed from the judgment, while plaintiff has appealed from the portion of the order granting a new trial as to the second and third counts and also from the order taxing costs. Said appeals will be considered separately.

Defendant's Appeal.

This appeal involves the judgment based upon the first count for alleged malicious prosecution. It arose out of the prosecution of plaintiff for the alleged misappropriation of funds of the Morton Hospital, his employer. Plaintiff was held to answer by the committing magistrate, but was thereafter acquitted upon the trial of the cause. He then commenced this action. The facts set forth in the voluminous briefs are quite involved, but as the issue of probable cause appears to be determinative of this appeal, we believe that the statement of facts herein may be shortened by first setting forth certain general principles governing actions for malicious prosecution.

[1-6] It may be stated preliminarily that actions for malicious prosecution are not favored in the law. *Dunlap v. New Zealand F. & M. Ins. Co.*, 109 Cal. 365, 42 P. 29; *Lacey v. Porter*, 103 Cal. 597, 37 P. 635; *Ball v. Rawles*, 93 Cal. 222, 28 P. 937, 27 Am. St. Rep. 174; *Carpenter v. Ashley*,

15 Cal. App. 461, 115 P. 268; 16 Cal. Jur. p. 737, § 9. The reasons therefor are based on considerations of public policy and are set forth in the authorities cited. In order to sustain such an action it is well settled that the burden is upon the plaintiff to establish two indispensable elements, first, that the defendant acted without probable cause, and, second, that defendant was actuated by malice. *Griswold v. Griswold*, 143 Cal. 617, 77 P. 672; *Moore v. Durrer*, 127 Cal. App. 759, 16 P.(2d) 676; *Davis v. Pacific Tel. & Tel. Co.*, 127 Cal. 312, 57 P. 764, 59 P. 698; *Carpenter v. Ashley*, supra. Probable cause has been defined as, "a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true." *Johnson v. Southern Pac. Co.*, 157 Cal. 333, 337, 107 P. 611, 613; *Lee v. Levison*, 173 Cal. 166, 169, 159 P. 438; *Davis v. Pacific Tel. & Tel. Co.*, supra, 127 Cal. 312, 319, 57 P. 764, 59 P. 698; *Carpenter v. Ashley*, supra, 15 Cal. App. 461, 464, 115 P. 268; *Moore v. Durrer*, supra, 127 Cal. App. 759, 765, 16 P.(2d) 676; *Selvester v. Kennedy*, 137 Cal. App. 250, 258, 30 P.(2d) 63. It is also clear that existence of probable cause is not negatived merely by showing that no crime was committed or that the accused is innocent. *Selvester v. Kennedy*, supra; *Dunlap v. New Zealand F. & M. Ins. Co.*, supra; *Carpenter v. Ashley*, supra; *McKenna v. Heinlen*, 128 Cal. 97, 60 P. 668; 18 R. C. L., p. 36. And although an action for malicious prosecution may not be maintained unless it is shown that the proceedings alleged to have been prosecuted maliciously and without probable cause have been terminated in favor of the party claiming to be injured thereby (16 Cal. Jur. p. 734), a mere showing of such favorable termination is of course wholly insufficient under the authorities above cited. In fact, evidence of such favorable termination does not even create a conflict on the issue of probable cause. *Moore v. Durrer*, supra; *McKenna v. Heinlen*, supra.

The question of what facts or circumstances amount to probable cause has been held to be a pure question of law for the court. *Booraem v. Potter Hotel Co.*, 154 Cal. 99, 97 P. 65; *Holliday v. Holliday*, 123 Cal. 26, 55 P. 703; *Ball v. Rawles*, supra; *Moore v. Durrer*, supra. The jury may be called upon to determine whether such facts or circumstances exist when there is substantial conflict in the evidence bearing

upon this issue, but in the absence of any substantial conflict in such evidence it is the province of the court to determine whether such facts and circumstances do or do not establish a want of probable cause. *Moore v. Durrer*, supra. The trial courts and appellate courts have frequently been called upon to pass upon the question. *Lee v. Levison*, supra; *Johnson v. Southern Pac. Co.*, supra; *Booraem v. Potter Hotel Co.*, supra; *Davis v. Pacific Tel. & Tel. Co.*, supra; *Ball v. Rawles*, supra; *Fackrell v. McDonald*, 87 Cal. App. 418, 262 P. 431; *Gustason v. Speak*, 85 Cal. App. 18, 258 P. 725.

[7, 8] In the present case we find no substantial conflict in the evidence relating to the issue of probable cause. Plaintiff was the trusted manager and bookkeeper of the Morton Hospital, a corporation, in which defendant owned all of the stock other than a few qualifying shares. Plaintiff had been so employed for a long period of time. He was instructed to issue receipts for all money received for the corporation and to deposit said money, less any petty cash expenditures made therefrom, in the bank account of the corporation every second day. Defendant was the only person authorized to sign checks upon said bank account. Defendant was absent from the state of California during a portion of the month of June, 1929, and again during a portion of the month of October, 1929. During defendant's absence in the month of June, plaintiff received three checks from Dr. Fernandez representing money due to the corporation. At plaintiff's request, these checks were made payable to plaintiff rather than to the corporation upon plaintiff's statement that the money was needed for petty cash expenditures. There was one check dated June 3 for \$300, one dated June 12 for \$500 and one dated June 17 for \$250. Again in October plaintiff similarly obtained another check from Dr. Fernandez dated October 4 in the sum of \$500. No receipt was issued by plaintiff for any of said checks and there was nothing on the records of the corporation to show that the corporation or plaintiff ever received any of said checks from Dr. Fernandez. The proceeds of said checks were not deposited in the bank account of the corporation but in the personal account of plaintiff.

In April of the following year an accountant was engaged by defendant to make the periodic audit of the books of

the corporation. While engaged in this work the accountant reported to defendant that during defendant's absence in the previous year plaintiff had collected four checks from Dr. Fernandez and had deposited all or a portion of the proceeds of each of said checks in his personal bank account. He also reported that the records failed to show the receipt of any of said checks or the payment of any of the proceeds thereof to the account of the hospital. The accountant had sought an explanation from plaintiff, but while plaintiff claimed that the money was expended by him on behalf of the corporation, he admitted that the only record made by him was contained in personal memoranda and in his personal checks, all of which had been destroyed by him.

Defendant did not immediately cause the arrest of plaintiff, but waited a few days to obtain the results of further investigation by himself, by a representative of the bonding company and by his own attorney. The representative of the bonding company was called to investigate and, after lengthy conferences with the accountant and with plaintiff, he reported to defendant that he could obtain no satisfactory explanation regarding these checks. He told defendant that he would mail proof of loss blanks and advised defendant to file his claim with the bonding company immediately. Defendant's attorney, Mr. Edward I. Barry, was also called to the hospital to make an investigation. He also had conferences with both the accountant and plaintiff. Thereafter he advised defendant that in his opinion "Mr. Haydel had misappropriated his moneys." Thereupon defendant caused the arrest of plaintiff. As above stated, plaintiff was held to answer by the committing magistrate but was finally acquitted upon the trial.

From the foregoing summary of the undisputed evidence, we are convinced that defendant's contention that there was probable cause for the prosecution of plaintiff must be sustained. The admittedly irregular and unauthorized actions of plaintiff in handling the checks from Dr. Fernandez were in themselves sufficient to constitute probable cause as above defined. But, furthermore, the obtaining by defendant of the advice of counsel conclusively established probable cause under the circumstances disclosed by the record. *Sandell v. Sherman*, 107 Cal. 391, 40 P. 493; *Holliday v. Holliday*, supra; *Dunlap v.*

New Zealand F. & M. Ins. Co., *supra*; Jones v. Jones, 71 Cal. 89, 11 P. 817; 16 Cal. Jur. p. 741, § 11. As we are of the opinion that the undisputed evidence established probable cause for the prosecution of plaintiff without considering the fact that defendant took the precaution of having counsel investigate and advise him, we need not discuss plaintiff's contention that "the affirmative defense of advice of counsel failed." We may state, however, that we find no merit in said contention.

Defendant urges other grounds for a reversal of the judgment, but, in view of the conclusions that we have reached on the issue of probable cause, it appears unnecessary to consider the other points raised. It follows that the judgment should be reversed.

Plaintiff's Appeals.

[9] Plaintiff first appeals from the portion of the order of the trial court granting a new trial as to the two counts for alleged slander. The order was made in general terms and it is therefore presumed that it was not made upon the grounds of the insufficiency of the evidence. Code Civ. Proc. § 657. Plaintiff assumes that the trial court based its ruling upon the alleged invalidity of the verdicts, and as we believe that the trial court's order was justified upon that ground, we shall confine our discussion thereto.

[10,11] On the second count the jury brought in a verdict reading as follows: "Regarding the second count in the complaint, alleged slander on May 19th, 1930, we the jury find a verdict for the plaintiff and against the defendant on said count and assess the compensatory damages in the sum of \$00; we assess the exemplary damages at \$10,000; making a total verdict for the plaintiff in the sum of \$10,000." The verdict on the third count was in all respects similar except for the change in date from May 19 to June 5.

While both counsel for plaintiff and counsel for defendant have made an exhaustive review of the authorities on the general subject, no case involving a verdict precisely similar to the verdicts before us has been called to our attention. Numerous authorities have been cited in which verdicts for compensatory or actual damages have read "nothing" or "none." In such cases it has been uniformly held that the award of punitive or exemplary damages could not be upheld. *Gilham v.*

Devereaux, 67 Mont. 75, 214 P. 606, 33 A. L. R. 381; *Lindstrom v. Kansas City So. Ry. Co.*, 202 Mo. App. 399, 218 S. W. 936; *Carnes v. Thompson* (Mo. Sup.) 48 S.W. (2d) 903; *Shore v. Shore*, 111 Kan. 101, 205 P. 1027; *Anderson v. Alcus* (Tex. Civ. App.) 42 S.W.(2d) 294. But plaintiff cites and relies upon *Clark v. McClurg*, 215 Cal. 279, 9 P.(2d) 505, 81 A. L. R. 908, in which case the jury made no finding whatever regarding the compensatory or actual damages. There the Supreme Court took the view that under the circumstances the irregularity might be treated as one of form rather than substance and that the judgment might be affirmed under section 4½ of article 6 of the Constitution. It should be noted, however, that on page 285 of 215 Cal., page 507 of 9 P.(2d), 81 A. L. R. 908, it was said: "The cited case and the case at bar, in each of which the jury either inadvertently or by some mischance omitted to assess the compensatory damages, are clearly distinguishable from the cases of *Hoagland v. Forest Park Highlands Amusement Co.*, 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740, and *Gilham v. Devereaux*, 67 Mont. 75, 214 P. 606, 33 A. L. R. 381, for in the latter cases the jury, by its verdict, expressly found and determined that the respective plaintiffs had not suffered any actual damages."

In the present case we are of the opinion that the verdicts on the second and third counts cannot be supported under the authority of *Clark v. McClurg*, *supra*. When the jury returned verdicts assessing "compensatory damages in the sum of \$00," it did not "inadvertently or by some mischance omit to assess the compensatory damages," but it "expressly found and determined" that plaintiff "had *not* suffered any actual damages." If this be true, and we believe it impossible to place any other construction upon said verdicts, then under the rule of the above-mentioned authorities as recognized in *Clark v. McClurg*, *supra*, the trial court properly granted a new trial upon the second and third counts and its order should be affirmed.

Plaintiff also appeals from the order taxing costs, but in view of the conclusions we have reached with respect to the appeal from the judgment and the appeal from the order granting a new trial, the appeal from the order taxing costs should be dismissed.

The judgment in favor of plaintiff and against defendant is reversed; the portion

of the order granting a new trial as to the second and third counts is affirmed; the appeal from the order taxing costs is dismissed.

We concur: NOURSE, P. J.; STURTEVANT, J.



**GOLDEN GATE MOTOR TRANSPORT CO.
v. GREAT AMERICAN INDEMNITY
CO.**
Civ. 9704.

District Court of Appeal, First District,
Division 2, California.
Aug. 8, 1935.

Rehearing Denied Sept. 7, 1935.
Hearing Granted by Supreme Court
Oct. 10, 1935.

1. Insurance ⇨629(1)

Under automobile policy excluding liability for automobile registered in assured's name, assured's failure to allege that automobile was registered in employee's name, or that it was not registered in assured's name, *held* not to render complaint defective, since insurer's claim of breach of contract was matter of defense.

2. Insurance ⇨639

Assured's failure in action on automobile policy to set forth certain allegations in nature of anticipating defense *held* not to render complaint demurrable, where complaint was otherwise sufficient.

3. Insurance ⇨615

Where assured requested insurer to issue full coverage automobile policy to replace policy about to expire and insurer delivered policy which it represented covered request, assured's failure to read new policy *held* not to preclude recovery thereon, where assured did not make written application for such policy.

4. Insurance ⇨615

Where assured requested insurer to issue full coverage automobile policy to replace policy about to expire and insurer delivered policy which it represented covered request, and new policy excluded liability for automobile registered in assured's name, failure of assured, who was registered owner of automobile, to register certificate in name of buyer upon sale of automobile, *held* not to pre-

clude recovery for destruction of automobile, where sale was incomplete and assured was owner when it applied for new policy (St. 1929, p. 514, § 45(e)).

5. Insurance ⇨615

Assured *held* entitled to recover for damage to automobile which had been sold to employee though assured was still registered owner thereof, notwithstanding policy excluded liability for automobile registered in assured's name, since assured was entitled to coverage of liability which might be imposed upon it because of employee's accident while in assured's employment (St. 1929, p. 514, § 45(e)).

6. Insurance ⇨665(4)

Where assured requested insurer to issue full coverage automobile policy to replace policy about to expire and insurer delivered policy which it represented covered request, evidence *held* to support finding that insurer made such representations so as to entitle assured to recovery on policy.

7. Insurance ⇨665(4)

Evidence that assured informed representatives of insurer that he desired policy to replace full coverage policy about to expire and representatives told assured that such policy could be issued, and insurer issued policy which it represented covered request, *held* to show that representatives had authority to speak for insurer so as to entitle assured to recover on policy.

8. Insurance ⇨615

That assured, who was registered owner of automobile, seeking recovery on automobile policy excluding liability in such case, had failed to plead or prove waiver of condition, *held* no defense to action, since no duty rested on assured to plead waiver of affirmative warranty.

9. Insurance ⇨665(8)

Evidence that assured, who was registered owner of automobile which had been sold to employee, made no false representations concerning ownership of automobile, and that insurer did not call assured's attention to provision of policy excluding liability where automobile was registered in assured's name, *held* to show waiver of condition so as to entitle assured to recover on policy (St. 1929, p. 514, § 45(e)).

10. Insurance ⇨615

Where assured secured policy on automobile which had been sold to employee without recording certificate registered in assured's name, and policy excluded liability where automobile was registered in assured's name, assured's failure to inform insurer that it was registered owner of automobile *held* not to preclude recovery on ground that insurer

had no actual knowledge as to registration of automobile, where facts which were directly brought to insurer's attention cast on it duty to inquire into all facts pertinent to transaction (St. 1929, p. 514, § 45(e).

11. Insurance ☞384

Provision of automobile policy requiring waiver of any condition thereof to be in writing held not to preclude recovery on policy in absence of such writing, where policy was written by general agent of insurer who had authority to make contract.

12. Insurance ☞384, 385

Waivers of policy constituting new contract upon sufficient consideration need not be evidenced by writing and need not be endorsed on policy, no matter what limitations or conditions are expressed therein, provided waivers are made by agent having authority to make contract.

SPENCE, J., dissenting.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by the Golden Gate Motor Transport Company against the Great American Indemnity Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for appellant.

Johnson & Harmon, of San Francisco, for respondent.

STURTEVANT, Justice.

This is an appeal by the defendant from a judgment rendered in favor of plaintiff in an action to recover on an insurance policy.

The plaintiff is a corporation engaged in the transportation business. In California and Nevada it owns or operates from fifteen to twenty trucks, trailers, and automobiles. Prior to the 1st of July, 1930, it had insured each piece of its equipment. The insurance was written in three different policies. Each was pleaded in *hæc verba* by the plaintiff and they are designated in the record as Plaintiff's Exhibits 1, 2, and 3. In the early part of the year 1930 the plaintiff sold to Paul Colburn a car spoken of by the witnesses as a Hudson sedan. The sale was in the form of a conditional sales contract enumerating certain deferred payments. Before the 1st of May, 1930, all payments had been made. The

registration certificate was delivered to Colburn on July 1, 1930. Mr. G. T. McNeely was the secretary-treasurer of the plaintiff corporation. Mrs. Adams, his daughter, was an employee of the Great American Indemnity Company, hereinafter called the insurance company. In May or June of 1930 Mr. McNeely delivered to Mrs. Adams the policies above mentioned and asked her to inquire of her employer if it would be willing to take over the business and give to the plaintiff policies providing the same complete coverage as Plaintiff's 1, 2, and 3, which were about to expire. Mrs. Adams took the policies and exhibited them to Mr. Benner, the assistant manager of the insurance company, and repeated to him the inquiry made by Mr. McNeely. After examining the documents Mr. Benner expressed a hesitation on compensation, that is, as we understand it, he hesitated on liability for employer's compensation liability. Thereupon, seated at Mr. Benner's desk, Mrs. Adams called up Mr. McNeely and after certain conversations were had Mr. Benner stated that he would send a representative to the plaintiff to discuss the business. At that time and for some time previous thereto the insurance company had in its employment Miss Nielund, who was, as we understand the record, an expert in framing and writing insurance policies. A little later Mr. Benner directed Miss Nielund and Mrs. Adams to call on Mr. McNeely and discuss the business tendered by Mr. McNeely. When they arrived at his office, with the old policies before them, Mr. McNeely explained the change in ownership of the Hudson sedan and they discussed what changes were to be made in the policies. Miss Nielund told him her company could and would handle the business. She also stated that the Hudson sedan could be put in a nonownership policy and that such policy would be so written. After leaving the plaintiff's premises Miss Nielund telephoned to Mr. Kemper, superintendent of the casualty department of the Great American Indemnity Company, hereinafter called the indemnity company. Thereafter three new policies were written which the plaintiff pleaded in *hæc verba* and which are numbered Plaintiff's Exhibits 5, 6 and 7. A comparison of the documents shows that the Hudson sedan was covered by Plaintiff's 1 and 3. It was not covered by Plaintiff's 5 and 6, and as will presently appear, the sole question presented by this litigation is whether it was covered by Plaintiff's 7.

After the new policies were written, all were delivered, the premiums were paid, and are still retained. The new policies were so delivered some time in June. As we understand the record, Mrs. Adams delivered them in person. Be that as it may, the record is clear from the time Mr. McNeely had his conversation with Miss Nielund the plaintiff was not advised by any one representing either the insurance company or the indemnity company that the policies contained anything to the effect that the policies did not give to the plaintiff the full coverage for which it had contracted. No written application was requested or was executed. No inquiries except as we have stated were made by the defendant, neither is there any claim that at any time or at all the plaintiff made any misrepresentation. A short time after Plaintiff's 5, 6, and 7 had taken effect, Colburn drove the Hudson sedan into San Francisco. While here that car was stolen and while in the hands of the thief it met with a collision. When asked by the plaintiff to take over the litigation the defendant refused, and thereafter this action was commenced.

[1,2] The defendant contends that the complaint does not state a cause of action. Except as will hereinafter be noted it is not claimed that it did not contain every allegation necessary to recover on an insurance policy. Plaintiff's Exhibit 7 does not specifically designate any automobile but specifies the owners by name, the risks assumed, and the premium charged for each risk. One of its provisions is: "Exclusions * * * (c) This policy does not cover * * * (6) For any automobile and/or motorcycle registered in the name of the named assured. * * *" The plaintiff did not allege that the Hudson sedan was registered in the name of Colburn (the employee using it), nor that it was not registered in the name of the plaintiff. Pointing to the absence of those allegations the defendant makes its attack. No duty rested on plaintiff to insert any allegation on the subject. *Cowan v. Phenix Insurance Co.*, 78 Cal. 181, 185, 20 P. 408. As stated above, there is no claim that this plaintiff made any misrepresentations; hence *Goorberg v. Western Assurance Co.*, 150 Cal. 510, 89 P. 130, is not in point. 14 Cal. Jur. 498, 499. If the defendant claimed a breach of contract by the plaintiff that subject was a matter of defense. *Raulet v. Northwestern, etc., Ins. Co.*, 157 Cal. 213, 235, 107 P. 292. In its complaint the plaintiff did set forth certain allegations which were in the na-

ture of anticipating a defense, but by doing so it did not render its complaint, which was otherwise sufficient, subject to a general demurrer. *Kansaburo Ohsaki v. Ahern*, 61 Cal. App. 787, 215 P. 714.

[3] It is next asserted that the plaintiff having accepted and retained the policy is charged with knowledge of its terms, is bound by it, and is estopped from asserting that it did not know the terms of the policy. It cites and relies on *Madsen v. Maryland Casualty Co.*, 168 Cal. 204, 142 P. 51, and *Burch v. Hartford Fire Ins. Co.*, 85 Cal. App. 542, 259 P. 1108. Those cases involved statements made by the insured in their written applications. In neither one did it appear that there was no written application and that after the insured had made a request for full coverage the insured delivered a document which it represented covered the demand as made. If defendant contends that the plaintiff may not recover because it did not read the policy, such contention may not be sustained. In *Raulet v. Northwestern etc. Ins. Co.*, 157 Cal. 213, at page 229, 107 P. 292, 298, the court said:

"There was no written application for the insurance, and, as we have seen, no actual fraud and no intentional misrepresentation by plaintiff. She was ignorant of this provision in the policy, which was secured by her agent, and no inquiry was made by the company as to the existence of any chattel mortgage.

"It must be presumed, ordinarily, that persons are familiar with the terms of written contracts to which they are parties, and in the absence of fraud they are justly bound by the provisions therein, but the rule should not be strictly applied to insurance policies. It is a matter almost of common knowledge that a very small percentage of policy holders are actually cognizant of the provisions of their policies and many of them are ignorant of the names of the companies issuing the said policies. The policies are prepared by the experts of the companies, they are highly technical in their phraseology, they are complicated and voluminous—the one before us covering thirteen pages of the transcript—and in their numerous conditions and stipulations furnishing what sometimes may be veritable traps for the unwary. The insured usually confides implicitly in the agent securing the insurance, and it is only just and equitable that the company should be required to call specifically to the attention of the policy holder such provisions as the one before us.

"The courts, while zealous to uphold legal contracts, should not sacrifice the spirit to the letter nor should they be slow to aid the confiding and innocent. *The defendant should either have made inquiries in reference to the chattel mortgage, required a written application covering by question and answer all the material provisions of the policy, or have consulted the records in the recorder's office where it would have been apprized of the encumbrance.*

"Considering the nature of the contract and the relation of the parties, there should be no difficulty in reaching the conclusion that this provision was waived and it therefore constitutes no bar to recovery." (Italics ours.)

In *McElroy v. British America Assur. Co.* [C. C. A.] 94 F. 990, at page 1000, the court said: "It may be said that the insured should have ascertained the correctness of the policy upon receiving it. Barrington, who acted for the insured in the matter, testified that he did open the policy, and note the company insuring, and the amount of insurance, but nothing more. It would certainly have been an act of prudence on his part to read the entire policy, but his neglect to do so cannot excuse the company for the default of the agent in not writing the contract in accordance with the representations made by the insured. The insured had a right to rely upon the agent's performing his duty of making the contract in conformity with the information given; and the agent's failure to do so, whether the result of a mistake or of a deliberate fraud, cannot operate to the prejudice of the insured."

[4, 5] It is then asserted that the plaintiff was the owner and registered owner of the Hudson sedan because under the law, as it was in 1930, any attempted transfer was incomplete unless the certificate was registered. California Vehicle Act (St. 1923, p. 524) § 45 (e), as amended by St. 1929, p. 514. If the purchaser, Colburn, were maintaining this action, the point might have merit (*Morris v. Firemen's Ins. Co.*, 121 Kan. 482, 247 P. 852, 52 A. L. R. 696), because, under the assertion made, he would have had no insurable interest. But this action is being maintained by the seller and not the buyer. That this plaintiff formerly owned the Hudson sedan is beyond dispute. If its contract of sale was incomplete, it was still the owner when it applied for full coverage. *Sly v. American Indemnity Co.*, 127 Cal. App. 202,

15 P.(2d) 522. As to how that coverage should be written the plaintiff left the matter entirely in the hands of the insurer. Furthermore, whether the plaintiff or Colburn was the legal owner at the time the policy was written we need not decide. Colburn had been, down to that date, operating the Hudson sedan while transacting the business of the plaintiff. There is no evidence that his services were to be terminated. If, during the following year, he continued to serve the plaintiff and operate a motorcar owned by himself, in the event of an accident a peril would arise which might damnify the plaintiff and it was entitled to coverage thereon. *Sharman v. Continental Ins. Co.*, 167 Cal. 117, 121, 138 P. 708, 52 L. R. A. (N. S.) 670.

[6, 7] It is claimed that there is no evidence to support findings 3, 4, and 5. They contain findings on the representations alleged to have been made by the defendant. The attack is twofold. It is claimed that the persons claimed to have made the representations did not make them. It is also claimed that such persons had no authority to make representations. As to the first claim the most that can be said in favor of the defendant is that the evidence was conflicting. Be that as it may, it greatly preponderated in favor of the plaintiff. The old policies on which Miss Nielund made pencil notes strongly support the story as told by the witnesses for the plaintiff. As to the second claim—want of authority—the record is wholly in favor of the plaintiff. In its brief, giving page and line of the record, it says: "The companies are very similar in name (Great Western Insurance Company, New York; Great Western Indemnity Company, New York); they are affiliated together; they have offices in the same building and the same telephone number; the appellant writes the casualty end of insurance and the other writes straight insurance." But what is of more importance all policies are written in those offices. When new business comes into the office of the insurance company it takes out its line and sends to the indemnity company such as falls in its line. When the business falls within a line written by both companies then both companies join in writing it. See Plaintiff's Exhibit 5. When the relations between the insurance company and the indemnity company so stood, Mr. Benner, the assistant manager of the former, sent Miss Nielund and Mrs. Adams to take up the subject of the plaintiff's insurance with Mr. McNeely. They did so. Later they reported to Mr. Benner and also

to Mr. Kemper, superintendent of the indemnity company. Their reports were accepted and the policies were written. Under these facts we think Miss Nielund and Mrs. Adams had the right to speak for both companies.

[8-10] The defendant makes the further contention that the plaintiff neither pleaded nor proved facts sufficient in law to establish a waiver. As we have shown above, no duty rested on the plaintiff to plead a waiver of an affirmative warranty. As to the plaintiff's proof we think it may not be said that it was insufficient. There is no conflict in the evidence to the effect that the plaintiff had an insurable interest; that the defendant made no inquiry as to how the registration of the Hudson sedan stood; that it asked for no written application covering by question and answer the material provisions of the policy; and that it made no examination of the records of the Motor Vehicle Department. Nevertheless it rendered its bill for the premium, collected it, and still retains it. There is not a particle of a claim that the plaintiff made false representations, nor is there any claim that the defendant did in any manner call to the plaintiff's attention the registration clause. Such facts have been held sufficient to establish a waiver. *Raulet v. Northwestern, etc., Ins. Co., supra*; *Sam Wong v. Stuyvesant Ins. Co., 100 Cal. App. 109, 279 P. 1050; 5 Cooley's Briefs on Ins. 4226*. The only objection which the defendant specifically makes to the proof is that there was no showing that the defendant had actual knowledge as to the registration of the Hudson sedan. But it was not necessary that the plaintiff should show that the defendant had actual knowledge. It was bound both by its actual knowledge and by such knowledge as in law was imputed to it. This is so because the facts which were directly brought to its attention cast on it the duty to inquire into all facts pertinent to the transaction. *5 Cooley's Briefs on Ins. pp. 4204-4249; 14 Cal. Jur. 522; Sharp v. Scottish Union, etc., Co., 136 Cal. 542, 546, 547, 69 P. 253, 615; Foristiere v. Aetna Ins. Co., 209 Cal. 92, 94, 95, 285 P. 849*.

[11, 12] As to the point made that the waiver could only be in writing as provided in the policy, we think it has no merit. As appears from the facts hereinabove recited the business was taken and the policy was written by Mr. Kemper. After he had been advised of the facts by Miss Nielund, later he called on Mr. McNeely, and still later he signed the schedules as the agent of the

defendant. Under all of the facts he was clearly a general agent. In *Mackintosh v. Agricultural Fire Ins. Co., 150 Cal. 440*, at page 448, 89 P. 102, 106, 119 Am. St. Rep. 234, the court said: "And, as a general rule, a subsequent parol waiver by a general agent of conditions in a policy are valid, although the policy requires them to be in writing. [Citing cases.] Waivers such as that here made, constituting, as they do, a new contract upon a sufficient consideration, need not be evidenced by a writing, and need not be indorsed on the policy, no matter what limitations or conditions are expressed in the policy, provided, always, they are made by an agent who would otherwise have authority to make the contract. *3 Cooley's Briefs, p. 2695*."

The judgment appealed from is affirmed.

I concur: NOURSE, P. J.

SPENCE, Justice (dissenting).

I dissent. While respondent has submitted a voluminous brief, it does not appear to claim that it was covered for the accident in question under the terms of the policy as written. No such claim is made for the reason that the policy expressly excluded coverage on any car owned or registered in the name of the assured and it is conceded that the Hudson car was at all times registered in the name of the assured until after the accident happened.

The nonownership policy in question was one written primarily with relation to employees rather than automobiles. No particular cars were specified but certain employees were named therein. It stated: "The premium for this policy is based on employees as disclosed hereinafter." Several employees including Colburn were named in the policy and the premium rate covering public liability insurance with relation to each employee was set down after his name. The rate for Colburn was \$13.05. The protection extended only to the employer and the premium rate charged for such protection with relation to each employee was only about one-fourth the rate which would have been charged for public liability insurance on any automobile owned by or registered in the name of the assured. It was clearly stated therein: "This policy does not cover * * * (4) For any automobile and/or motorcycle owned in whole or in part by the named assured * * * (6) For any automobile and/or motorcycle registered in the name of the named assured."

In order to avoid the clear and unambiguous terms of the policy, respondent attempts to invoke the doctrine of waiver and the doctrine of estoppel in support of the judgment. In my opinion the undisputed facts fail to justify the application of either of said doctrines. There was no evidence to show that any representative of respondent asked for exactly the same coverage that respondent had under the policies which were about to expire and there was no evidence to show that any representative of appellant stated that such coverage would be given. On the contrary, the change in ownership of the Hudson car and the change to be made in the new policies was freely discussed. Mr. McNeely said: "Now, here is a car that we owned and it is not ours now, we have sold it." The parties discussed the question of whether respondent would be protected by any insurance which Colburn might carry and the nonownership policy was suggested. Mr. McNeely said, "* * * that is O. K." The foregoing evidence offered by respondent shows an express representation that respondent no longer owned the Hudson car and an implied representation that said car was no longer registered in respondent's name. California Vehicle Act, § 45 (e), as amended by St. 1929, p. 514. Acting upon these representations, appellant gave respondent precisely the coverage for which it had asked. Appellant may not be criticized for giving such coverage rather than the more costly coverage which respondent had represented that it no longer required. The new policy, which was dated July 11th, was delivered to respondent about June 19th, was examined by Mr. McNeely, and was retained by respondent. No request for other or different coverage was made.

Respondent seems to take the position that the doctrine of waiver and the doctrine of estoppel may be invoked because of the claimed misrepresentation by appellant of the coverage afforded by the policy. I find no evidence justifying the claim of misrepresentation on the part of appellant, but, on the contrary, the misrepresentation, if any, was on the part of respondent. The result of the judgment herein is to give respondent coverage for which it neither asked nor paid and which it was not given under the terms of the policy. Respondent did not seek to reform the policy and did not pay or offer to pay the added premium which would have been required. In my opinion the judgment should be reversed.

9 Cal.App.2d 1

ROSS v. O'BRIEN.

Civ. 1173.

District Court of Appeal, Fourth District,
California.

Aug. 14, 1935.

1. Malicious prosecution ⇨24(2)

Fact that defendant in criminal prosecution was held to answer to superior court after preliminary examination *held* proof prima facie sufficient to establish probable cause for prosecution, subsequent acquittal not being prima facie evidence of want of probable cause.

2. Malicious prosecution ⇨18(4)

Fact that levy of attachment upon goods used in conducting restaurant amounted to attachment of restaurant business would not justify interference with officer in attempted levy upon business (Pen. Code, § 69).

3. Malicious prosecution ⇨18(4)

Interference with execution of valid levy of attachment *held* to constitute "probable cause" for prosecution for resisting officer, notwithstanding that keeper left in charge of attached goods was alien (Pen. Code, § 69; Gen. Laws 1931, Act 258; Code Civ. Proc. § 542).

[Ed. Note.—For other definitions of "Probable Cause," see Words & Phrases.]

4. Malicious prosecution ⇨21(1)

Reliance upon advice of counsel in preferring and prosecuting criminal charge of resisting officer *held* defense to malicious prosecution action entitling defendant to directed verdict (Pen. Code, § 69).

5. Malicious prosecution ⇨56

Plaintiff in malicious prosecution action, against whom prosecution had been instituted for resisting officer engaged in executing writ of attachment, *held* to have burden of presenting record showing error in attachment proceedings which would have justified his action (Pen. Code, § 69).

6. Costs ⇨207

Upon motion to tax costs claimed by defendant, evidence *held* to support finding that witnesses were necessarily in attendance upon court, that appearance fee had been paid by defendant to clerk, and that charges were proper.

Appeal from Superior Court, Imperial County; Arthur L. Mundo, Judge.

Action by J. Edgar Ross against William O'Brien. Judgment for defendant, and plaintiff appeals.

Affirmed.

J. Edgar Ross, in pro. per.

W. E. Abraham, of Brawley, for respondent.

HARDEN, Justice pro tem.

This is an action to recover damages for alleged malicious prosecution of a criminal action against J. Edgar Ross, plaintiff herein. At the conclusion of a jury trial the court directed a verdict for the defendant. Plaintiff appeals from a judgment entered thereon.

Appellant has failed to comply with the requirements of section 953c of the Code of Civil Procedure by printing in his brief or in a supplement thereto such portions of the record as he desires to call to the attention of the court; and respondent has filed no brief whatever.

An action was started in the justice's court of Brawley township, Imperial county, entitled *Felix Chacon v. Jesus Mardueno*, to recover a money judgment. In said action a writ of attachment was issued. Pursuant to instructions from the attorney for plaintiff therein, the defendant, William O'Brien, as constable of said township, attempted to levy said writ of attachment upon certain goods and chattels used in conducting a restaurant, alleged to be the property of the defendant, Jesus Mardueno, but which were then under the immediate charge of Mardueno's wife and daughter.

There is no uncertainty as to the identity or description of the property. The levy was made by the constable by taking the property into his custody and by putting a keeper in charge, but without removing it from the place of business. (It was the purpose of the officer, upon agreement with Mrs. Mardueno, to permit the use of the attached property in the conduct of the business for a period of two days, in order to sell out some perishable supplies.)

The following statement of occurrences, giving rise to the arrest and prosecution of Ross and to the institution of the present action, is the substance of appellant's testimony given upon the trial of the present action: While the attached property was under the charge of the keeper, Ross (though not an attorney at

law) appeared upon the scene as the legal representative of Mrs. Mardueno and inquired of the keeper what he was doing there; that Ross took the keeper by the arm and told him to get out; that the keeper then left; that later the same evening O'Brien returned and locked up the doors and left the keeper again in charge; that Ross then returned, broke open the screen door and entered the premises, turned on the electric lights, and again ordered the keeper to get out, which he did; that Ross then took a padlock off the front door.

(While it is in evidence that at a later time Ross made and filed a third-party claim in his own behalf to the attached property, basing his claim of ownership upon the contention that he had purchased it for \$50, our understanding of the record is that the interference with the keeper's custody of the property was not made pursuant to said third-party claim, but that Ross was acting therein rather as the agent and representative of Mrs. Mardueno. The record discloses that, upon a trial of the issue, the court held Ross was not the owner of the property. It appears also that Chacon procured a judgment against Mardueno in said action, pursuant to which the attached property was sold in satisfaction of the judgment.)

After the occurrences aforesaid, the constable consulted with a deputy district attorney of Imperial county concerning Ross' conduct and, upon being advised to do so, swore to and caused to be filed a complaint-criminal against Ross, in the justice's court of Imperial township, charging him with violation of section 69 of the Penal Code. After a preliminary examination he was held to answer to the superior court upon said charge. Upon trial in the superior court he was acquitted. He then brought the present action for malicious prosecution against the constable, with the result aforesaid.

[1] The fact that Ross was held to answer to the superior court was proof *prima facie* sufficient to establish probable cause for the prosecution; and the subsequent acquittal was not *prima facie* evidence of the want of probable cause. *Randleman v. Boeres*, 93 Cal. App. 745, 270 P. 374.

[2] Appellant contends that the burden was cast upon defendant to show probable cause for the prosecution by virtue of the allegations of the answer to

the effect that the criminal charge against Ross was true, referring to 38 Corpus Juris, p. 476, and cases cited. Under the circumstances, it is not important where the burden of proof lay in this regard. There was substantially no dispute as to the facts. Ross' testimony alone shows probable cause, provided the grounds upon which he attempts to justify his action are unavailing. That attempted justification comes in part from the contention of appellant that the levy of the attachment as executed amounted to an attachment of the restaurant business; that the constable had no authority under the instructions from Chacon's attorney to attach the business as distinguished from the goods used in conducting the business; that, therefore, Ross was within his legal rights in interfering with the officer in any attempted levy upon the business. Even if correct in this view of the situation, such fact would not justify his interference with the officer in the levy of the writ of attachment upon the goods and chattels. To accomplish the levy of the writ upon said property, it was not necessary to remove it from the premises. The levy of the writ of attachment upon the goods and chattels was valid. Section 542, Code Civ. Proc.; *Rogers v. Gilmore*, 51 Cal. 309; *Smart v. Sosey*, 49 Cal. App. 332, 193 P. 167; *Sinsheimer v. Whitely*, 111 Cal. 378, 43 P. 1109, 52 Am. St. Rep. 192.

[3] Appellant also attempts to justify his action upon the ground that the keeper was an alien and that, therefore, his appointment as keeper was in violation of the provisions of Act 258, Deering's General Laws 1931. The justification upon that ground is entirely lacking. The keeper was at least a de facto officer, whose authority to act as such could not be called into question by appellant. 46 Cor. Jur. 886, note 44; *Heath v. State*, 36 Ala. 273; *Reed v. State*, 103 Ark. 391, 147 S. W. 76, Ann. Cas. 1914B, 811.

[4] The ruling of the court in directing a verdict for defendant was predicated upon a holding that the defense to the effect that the defendant had acted upon

the advice of counsel in preferring and prosecuting said charge was established as a matter of law under the authority of *Johnson v. Southern Pacific Co.*, 157 Cal. 333, 107 P. 611; *Dunlap v. New Zealand F. & M. I. Co.*, 109 Cal. 365, 42 P. 29; *Randleman v. Boeres*, 93 Cal. App. 745, 270 P. 374; and *Moore v. Durrer*, 127 Cal. App. 759, 16 P.(2d) 676. The ruling was correct. The record shows that a full and fair disclosure of the facts was made by defendant to the deputy district attorney; that said attorney advised that a criminal offense had been committed in violation of section 69, Penal Code, and that defendant should swear to and cause the complaint to be filed; that, pursuant to such advice, he acted accordingly.

[5] Appellant contends also that if he had been permitted to do so he could have proved that the justice's court had no jurisdiction of the subject-matter of the civil action. The authorities are divided upon whether such fact would have constituted a defense to the charge of interfering with the officer. 38 Cor. Jur. 387, § 7. We need not decide that question. No offer of proof was made. No copy of the complaint in said action is made a part of the record. However, a copy of the writ of attachment is set forth, from which it appears that the demand of the plaintiff was for \$280. The court appears to have had jurisdiction. The burden is upon appellant to present a record which shows error; and no error appears.

[6] Upon motion to tax costs claimed by defendant amounting to \$23, the court determined upon conflicting evidence that witnesses were necessarily in attendance upon the court, that an appearance fee had been paid by defendant to the county clerk, and that the charges were proper. The ruling was supported by the evidence and was correct.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

AMERICAN MOTORISTS INS. CO. v. IN-
DUSTRIAL ACCIDENT COMMISSION
et al.
Civ. 10266.

District Court of Appeal, Second District,
Division 1, California.
Aug. 31, 1935.

Rehearing Denied Sept. 25, 1935.
Hearing Denied by Supreme Court
Oct. 28, 1935.

Master and servant —398

Where compensation claimant commenced no proceedings and no compensation had been paid or agreed to, within six months from date of injury, claim for new and further disability was barred, although brought within 245 weeks after date of injury (St. 1931, p. 2372, § 11).

Petition by the American Motorists Insurance Company to review an award of compensation to Charles Stevens, claimant, made by the Industrial Accident Commission in a proceeding brought under the Workmen's Compensation Act.

Award annulled.

George Archie Jackson, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco (Arthur I. Townsend, of San Francisco, of counsel), for respondent Industrial Accident Commission.

HOUSER, Justice.

In this proceeding the petitioner seeks to have reviewed by this court an order made by the respondent commission by which an employee of Mascot Pictures Corporation was awarded compensation as for an injury sustained by such employee in the course of and arising out of his said employment.

The essential facts herein appear to be that on September 24, 1932, in the course of his employment and caused by reason of the fact that he was obliged to and did perform his labor during a rainstorm from which he was unprotected, the employee contracted a severe cold which developed into bronchial pneumonia, and on which said date he was placed in a hospital for care and treatment. For a period of eight days, or from September 24th to October 2d, the employee remained in the hospital, but on October 3d he returned to his work, and thereafter for a period of three days

next thereafter apparently performed the duties attached to his employment, at the expiration of which time he suffered a "relapse" and "began to feel ill again and his voice became so hoarse he could not talk." With reference to his then condition, the report of the attending physician shows that the employee appeared "to be convalescing from respiratory infection * * * complicated by laryngitis." Following his "relapse," the employee was under the care of a physician from October 6th to October 16th, or for a period of two weeks, at the expiration of which time apparently he had been restored to normal health and activity.

No compensation or benefits of any kind for his "injury" were ever paid or agreed to be paid by his employer or by its insurer to the employee or to any one for him. Not until November 8, 1934, which was more than two years after the employee first became ill while engaged in his said employment, was any "application for adjustment" of his claim for compensation presented or made by the employee or by any one in his behalf to the respondent commission. Following a hearing by the latter of the said application, the respondent commission made its award to the employee based primarily upon findings that:

"Said injury caused temporary total disability from September 24, 1932, to and including October 2, 1932; and from October 6, 1932, to and including October 16, 1932, entitling the employee to disability indemnity for the period between October 6, 1932, to and including October 16, 1932. * * *

"The claim for disability indemnity between September 24, 1932, and October 6, 1932, is barred by the period of limitations prescribed by said Act. * * *

One of the points upon which petitioner relies for an annulment of the award is that at the time the claim was filed for adjustment with the respondent commission, it was barred by the various provisions of section 11 of the Workmen's Compensation Act (St. 1917, p. 841, as amended by St. 1931, p. 2372). In response thereto, the respondent commission urges that the "relapse" of the employee constituted a "new and further disability" for and on account of which, in accordance with the provisions of section 11 (c) of the act, the employee was privileged to institute a proceeding for the consideration of his claim

by the respondent commission at any time prior to the expiration of 245 weeks from or "after the date of the injury," which period had not elapsed at the time when the "application for adjustment" was filed by said employee.

It well may be doubted that in consideration of the facts herein the "relapse" that was suffered by the employee constituted a "new and further disability" within the intent and meaning of the statutory provision to which reference hereinbefore has been had. However, it is unnecessary that that precise point be herein determined.

In the case of *Kauffman v. Industrial Accident Commission*, 37 Cal. App. 500, 174 P. 690, 692, where the essential facts were similar to those which appear to have been present herein, it was ruled that "if there have been no proceedings commenced within six months from the date of the injury, and if there has been no payment of disability indemnity or agreement therefor, the employee is not entitled to institute proceedings grounded upon 'further disability' after the expiration of six months from the date of the injury."

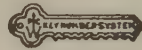
And in the case of *Cowell L. & C. Co. v. Industrial Accident Commission*, 211 Cal. 154, 160, 294 P. 703, 705, 72 A. L. R. 1118, in commenting upon the point under consideration, the same thought was impliedly expressed in the following language: "It is conceded by petitioner that, in case an injured employee files within six months from the date of the injury an application for compensation for temporary disability, and the same is granted by the commission, said employee may, in case his disability becomes permanent, at any time within two hundred and forty-five weeks after the date of his original injury, present and file with the commission his application for further compensation on the grounds that the original injury has caused a new and further disability. This was undoubtedly the clear and unambiguous intent of said section 11 (c) of the Workmen's Compensation Act."

Considering the facts hereinbefore set forth, particularly that more than two years had elapsed between the date when the "injury" was sustained and the date when the application for "adjustment of claim" was filed, that theretofore no compensation or fees for medical services or

benefits of any kind had been paid or agreed to be paid, either by the employer or by its insurer, and that no other fact was shown to have existed that might have had the effect of tolling the statute with reference to the time following an injury within which a claim for compensation legally might have been filed with the respondent commission, this court is of the opinion that, in accordance with the provisions of section 11 of the Workmen's Compensation Act, the claim of the employee herein was barred.

The award is annulled.

We concur: CONREY, P. J.; YORK, J.



9 Cal.App.2d 69

PEOPLE v. LAWYER.

Cr. 1845.

District Court of Appeal, First District,
Division 2, California.

Sept. 3, 1935.

Criminal law ⇨998

Trial court had no jurisdiction to set aside judgment of conviction where grounds assigned could all have been raised on motion for new trial or on appeal.

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Walter Lawyer was convicted of stealing a cow. From an order denying his motion to set aside the judgment, the defendant appeals.

Affirmed.

See, also, 1 Cal. App. (2d) 1, 35 P.(2d) 1036.

Walter Lawyer, in pro. per.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

NOURSE, Presiding Justice.

The defendant was tried on an information charging the stealing of a cow. Following his conviction he appealed to this court, and the judgment and the motion denying a new trial were both affirmed.

Thereafter he made a motion in the trial court to set aside the judgment on fourteen grounds of asserted errors occurring during the trial. His motion was denied, and he now appeals from that order.

All the grounds assigned in the motion were matters which could have been raised on the motion for a new trial or on the appeal from the judgment. All relate to matters of alleged error, but none challenges the jurisdiction of the trial court to pronounce the judgment of conviction. No one of the grounds was sufficient to give the trial court jurisdiction to set aside that judgment. *People v. Russell*, 139 Cal. App. 417, 419, 34 P.(2d) 203, and cases there cited.

The order is affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.



8 Cal.App.2d 705

BERKOWITZ v. WOLFBERG et al.
Civ. 10326.

District Court of Appeal, Second District,
Division 2, California.
Aug. 8, 1935.

1. Negligence ⇨136(14)

Ordinarily, negligence is fact question.

2. Municipal corporations ⇨821(20)

Pedestrian, slipping on portion of sidewalk covered by cooking oil which escaped from container in adjoining building, *held* not contributorily negligent as matter of law.

3. New trial ⇨163(1)

Order which did not grant new trial, but in lieu thereof merely vacated and set aside earlier judgment, retaining in part findings of fact, with direction to attorneys to return new findings and judgment, *held* not void because it failed to specify that it was granted on ground of insufficiency of evidence (Code Civ. Proc. § 657).

4. Judgment ⇨273(8)

Order, directing judgment to be entered *nunc pro tunc*, which stated that earlier minute order was inadvertently made, was not required to state that minute order failed to speak truth, where it was obvious from inspection that minute order failed to speak truth and to express court's intention.

5. Appeal and error ⇨900

Reviewing court need not search for opportunity to reverse judgment, but trial court's orders are entitled to all presumptions in favor of their regularity.

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by G. Berkowitz against Hyman Ben Wolfberg and others. Judgment for defendants was vacated and final judgment entered for plaintiff, and defendants appeal.

Affirmed.

Bordon & Bordon, of Los Angeles, for appellants.

Eugene L. Wolver, of Los Angeles, for respondent.

CRAIL, Justice.

This is an action to recover damages for personal injuries sustained by the plaintiff in a fall while walking on the sidewalk adjacent to the place of business operated by the defendants. Cooking oil belonging to the defendants escaped out of containers and covered a large portion of said sidewalk, and the plaintiff slipped and was injured while attempting to walk over the same. On the 27th day of August, 1934, the court sitting without a jury, having heard the evidence, found that the defendants were not in any way negligent and entered judgment accordingly. Thereafter the plaintiff moved the court to vacate the judgment and to grant a new trial. On the 19th of October, 1934, this motion came on to be heard. After hearing said motion the court made the following minute order: "By the Court: The only question that I will consider on these motions for a new trial and to vacate the judgment, is the Sixth ground, and no other ground, to-wit: the insufficiency of the evidence to justify the judgment. * * *" On the 15th day of November, 1934, the court made the following additional or supplemental minute order on said motions: "The plaintiff's motion for a new trial heretofore submitted, is granted to the following extent only, to-wit: The judgment entered on the 24th day of September, 1934, is hereby vacated and set aside in the whole, but the Findings of Fact are retained, and this court now orders that a new and different judgment be entered thereon in favor of the plaintiff and for the sum of seven hundred fifty (\$750.00) dollars, attorneys requested to prepare findings

and judgment." On the 5th day of December, 1934, the trial court signed and filed its formal order vacating its prior order for a new trial and its amended findings of fact and conclusions of law in which it set forth that the above order with regard to granting a new trial was limited to the setting aside of some of the findings of fact upon the ground that the evidence was insufficient to sustain them and making new findings in lieu thereof upon the same evidence, and it further set forth that the court *inadvertently* omitted to eliminate the finding that the defendants were free from negligence. It further set forth that the defendants were guilty of negligence as set forth in the complaint to the plaintiff's damage in the sum of \$750, and ordered the same to be filed nunc pro tunc as of the 15th day of November, 1934. On the 6th day of December, 1934, a modified judgment was signed and filed giving judgment to the plaintiff and against the defendants for \$750. On December 31, 1934, defendant filed notice of appeal from this final judgment. The defendants also appealed "from the minute order vacating the judgment and granting a new trial." But the record which is before us fails to show when the notice of appeal was filed.

[1,2] It is the first contention of the defendants that the plaintiff was guilty of contributory negligence as a matter of law. The question whether one is guilty or not guilty of negligence is ordinarily a question of fact and not of law. Under the circumstances and evidence in this case we would not be justified in holding that the plaintiff was guilty of negligence as a matter of law.

[3] It is the defendants' next contention that "the order of the trial court granting a new trial is a legal nullity" for the reason that the court expressly ruled out of its consideration all of the grounds excepting the question of the sufficiency of the evidence to sustain the verdict, but that the court did not expressly specify in its order that the order was granted upon the ground of the insufficiency of the evidence, and that section 657 of the Code of Civil Procedure requires such specification, "otherwise, on appeal from such order it will be presumed that the order was not based upon that ground." We see no merit in this contention for the reason that it is clear and obvious from the minute orders of the court that the order of the court was made upon the ground of insufficiency of the evidence, and for the further reason that in spite of

the rather involved language used in the minute orders, it is clear that the court did not in fact grant a new trial, but in lieu thereof merely vacated and set aside its earlier judgment, retaining in part the findings of fact, with directions to the attorneys for the plaintiff to prepare new findings and judgment.

[4] It is the defendants' next contention that "in clear and unequivocal language, the court's findings that the appellants (defendants) exercised due care and were without fault in the matters charged by respondent (plaintiff) were retained and in effect reaffirmed by the minute order," and therefore the findings so ordered retained did not support a judgment for the plaintiff. The minute orders of the court have been set out in full above, and it cannot be said that "in clear and unequivocal language" the court retained the findings which were favorable to the defendants. On the contrary, the court directly ordered the attorneys for the plaintiff to prepare findings and judgment. It was for the very purpose of clearing up this obvious contradiction and equivocation in its minutes that the court directed its judgment of December 5, 1934, to be entered nunc pro tunc as of November 15, 1934. It directly stated therein that the minute order was inadvertently made. It was unnecessary for the court to state that the minute order failed to speak the truth because it was obvious from an inspection of the minute order itself that it failed to speak the truth and failed to express the intention of the court.

[5] Finally, it is the contention of the defendants that "the trial court was divested of jurisdiction to render a modified judgment during the pendency of the appeal from its orders vacating the judgment and granting a new trial, and therefore the modified judgment is void." In this connection it has already been pointed out that the record is devoid of any showing that an appeal was perfected prior to the entry of the modified judgment. The defendants should remember that it is not the duty of this court to search for opportunities to reverse the judgment of the trial court, but that, on the other hand, the orders of the trial court are entitled to all presumptions in favor of their regularity.

Judgment and order appealed from are affirmed.

We concur: STEPHENS, P. J.; FRICKE, Justice pro tem.

9 Cal.App.2d 63

PEOPLE v. DOUGLAS.

Cr. 2683.

District Court of Appeal, Second District,
Division 1, California.

Aug. 31, 1935.

1. Criminal law ☞938(1)

Refusal of motion for new trial *held* not error where affidavits in support of motion did not disclose exercise of due diligence to procure evidence recited therein, and evidence thus offered was merely cumulative and was not of such strength that it would probably change result should new trial be granted.

2. Criminal law ☞736(?)

Whether remark was made in defendant's hearing so as to be admissible *held* for jury where party making remark was seated in booth about eight feet from defendant when crime was committed, and evidence showed that party saw defendant immediately after making remark.

3. Criminal law ☞1141(2)

Alleged error in refusing instructions offered by defendant would not be considered by reviewing court where counsel failed to show wherein subject-matter of such instructions was not completely and correctly covered by instructions given.

4. Criminal law ☞1130(2)

Appellant's failure to comply with court rule requiring that all other instructions given bearing upon subject must be printed in full in brief *held* to preclude reviewing court from considering alleged error in refusing certain instructions (Rules of Court, rule VIII, § 3).

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Victor Douglas was convicted of grand theft from the person together with a prior conviction of a felony, and he appeals.

Affirmed.

Peter T. Rice, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

YORK, Justice.

This is an appeal by defendant from a judgment of conviction of the crime of grand theft from the person, as charged in count one of the amended information, together with a prior conviction of a felony. A remaining count of the informa-

tion charging petit theft and prior conviction of felony was dismissed on motion of the district attorney. Also, defendant appeals from the order denying his motion for a new trial.

The principal question involved in this appeal is that of sufficiency of the evidence to justify the verdict. An examination of the record discloses that there was clearly sufficient evidence to justify the verdict and the judgment. While it is true that a great deal of the evidence was circumstantial, it was very strong and positive evidence.

[1] As to the question whether or not it was an abuse of discretion on the part of the trial court to overrule appellant's motion for a new trial, which question is denominated by appellant as the principal point on this appeal, this is apparently predicated upon the affidavit of newly discovered evidence which was presented in support of said motion for new trial. The affidavit in support of the motion for new trial does not show that due diligence was exercised to procure the evidence which is recited in said affidavit. The lack of proof of due diligence would justify the court in denying the motion, and the denial of said motion was also proper, because the evidence thus offered was merely cumulative, and because the force of such cumulative evidence was not of such strength that it could be said that it probably would or might change the result should a new trial be had.

[2] The appellant also objects to the introduction into evidence of a conversation between one Leonard and one Polster, who were seated in a booth approximately eight but not more than ten feet from appellant, when Leonard turned to Polster and said in an ordinary tone of voice: "That is one of the slickest tricks I have ever seen on Fifth Street." On cross-examination it was shown that, although the witness was not looking at the defendant at the time the remark was made, the witness did look up and saw the defendant immediately after making said remark which was spoken in a normal tone of voice. Whether or not defendant heard the remark was a question for the jury. The evidence shows as a matter of fact that it was made within hearing distance, if spoken in a normal tone of voice, and if there was nothing to drown out or deaden the sound of the speaker's voice. The court properly de-

nied the motion to strike out such testimony, leaving to the jury the duty of determining whether or not it was a remark made within the hearing of the defendant.

[3, 4] Appellant objects to the denial by the trial court of the giving of some twenty instructions offered by him. At the end of each of these instructions, as set forth in the record, appears the indorsement: "Refused, except as covered by other instructions." It has not been pointed out to this court wherein the subject-matter of these instructions was not completely and correctly covered by the instructions which were given to the jury. *People v. Guiterrez*, 140 Cal. App. 720, 35 P.(2d) 1046. Furthermore, owing to the failure of appellant to comply with the provisions of section 3, rule VIII of the Rules of Court, to the effect that "all other instructions given, bearing upon that subject, must be printed in full in the appellant's brief," the alleged erroneous instructions cannot be considered by this court.

The judgment and order are affirmed.

We concur: CONREY, P. J.; HOUSER, J.



WILLIAMS v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY. *

Civ. 9859.

District Court of Appeal, First District,
Division 1, California.
Aug. 27, 1935.

Rehearing Granted Sept. 26, 1935.

1. Justices of the peace ☞ 149(1)

Claimant, who filed verified third-party claim to automobile seized under writ of attachment in action on note, *held* entitled to appeal from determination of justice's court that automobile did not belong to claimant, rendered as part of judgment in action on note, since claimant's property rights were adversely affected by judgment, and statutory provision for determination of title did not preclude inclusion of such determination in judgment (Code Civ. Proc. §§ 689, 974).

2. Mandamus ☞ 57(1)

Mandamus *held* to lie to compel superior court to proceed with hearing of appeal from determination of justice's court denying claim

of ownership of attached automobile, where claimant was entitled to maintain appeal.

Petition for a writ of mandamus by Rozelle L. Williams against the Superior Court of the State of California in and for the County of Alameda to compel the Superior Court to hear and determine an appeal.

Peremptory writ granted.

Dunn, White & Aiken, of Oakland, for petitioner.

McClymonds, Wells & Wilson, of Oakland, for respondent.

KNIGHT, Justice.

Pursuant to a writ of attachment issued out of the justice's court of Brooklyn township in Alameda county in an action brought by A. S. Downing against L. C. Chambers to recover on a promissory note, the sheriff of said county seized an automobile of which the petitioner herein, Rozelle L. Williams, claimed to be the owner. Thereafter and in conformity with the provisions of section 689 of the Code of Civil Procedure, the latter served upon the sheriff a verified third party claim to the automobile, and the sheriff exacted from Downing an indemnifying undertaking in a sum equal to double the value of the property levied upon. Downing then petitioned the justice's court as provided in said Code section to hear and determine the question of title to the automobile. Such a hearing was had, and subsequently, and after Chambers, the defendant in the action, had defaulted, the justice's court entered its judgment that Downing recover from Chambers the amount sued for in the action, and in the same judgment and as part thereof, declared that " * * * it is the judgment of the court that on September 18, 1934, at the time of levy on the writ of attachment in the above action, [the] * * * automobile * * * described in the third party's claim of Mrs. Rozelle L. Williams, was the property of L. Chambers, defendant." Mrs. Williams took an appeal to the superior court, which Downing moved to dismiss; and on April 4, 1935, the motion was denied. A week later, however, the respondent superior court of its own motion made an ex parte order vacating its previous order and granted said motion. Accordingly the ap-

☞ For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 49 P.2d 1126.

peal was dismissed. Thereupon petitioner instituted the present proceeding in mandamus to compel the superior court to set aside its order of dismissal and to hear and determine the appeal.

[1] We are of the opinion that petitioner was entitled to maintain the appeal. Section 974 of the Code of Civil Procedure provides: "Any party dissatisfied with the judgment rendered in a civil action in a * * * justice's court, may appeal therefrom to the superior court. * * * The notice [of appeal] must state whether the appeal is taken from the whole or a part of the judgment, and if from a part, what part, and whether the appeal is taken on questions of law or fact or both." Here the record shows that petitioner and the subject-matter of the title to said property were brought regularly before the justice's court pursuant to the application filed by Downing for the hearing and determination of such issue, after a ten-day notice of such hearing served upon petitioner; and at the conclusion of the trial of said issue, in which all parties interested participated, the justice's court incorporated its adjudication of the issue tried in its final judgment in the action. Express reference was made therein to petitioner by name and to the nature of her claim, and therefore, since her property rights were adversely affected by such judgment, her status, in our opinion, came within the meaning of the opening clause of said section 974, which declared that "any party dissatisfied with the judgment" may appeal from the whole or any part thereof.

It is argued in behalf of the respondent that the result of the determination of title to property by a justice's court pursuant to the provisions of said section 689 cannot be considered part of the judgment; that said section contemplates a separate proceeding of a summary character, the result of which is not res judicata; and that since the Code does not specifically provide an appeal from such an adjudication, the remedy of an aggrieved third party claimant is by way of an action for conversion. There is no language used in said section 689 implying, however, that such adjudication shall not be embodied in the judgment, nor has respondent cited any cases so holding. It would seem to follow necessarily, there-

fore, that inasmuch as such adjudication was incorporated in the judgment and made part thereof, a right of appeal therefrom was available to petitioner under the broad terms of the opening clause of said section 974. The argument advanced in behalf of respondent suggests several other questions, namely, whether in the state of the record here presented an appeal from the judgment was petitioner's exclusive remedy, or whether she was afforded an alternative remedy by way of an action for conversion; also whether an appeal is the proper remedy where the justice's court adjudication of title is embodied in a separate order made prior to or at the time of the rendition of the final judgment, or where its adjudication is made subsequent to the entry of final judgment, as in cases of property seized under process of execution. We need not concern ourselves with those questions here, however, because a solution thereof is not essential to a determination of the particular proceeding before us; nor could it be helpful in future cases for the reason that the uncertainty heretofore existing as to the nature of the remedy to be invoked in all cases arising under section 689 has been done away with by a 1935 legislative revision of said Code section, wherein it is provided, among other things, that "an appeal lies from any judgment determining title under this section, such appeal to be taken in the manner provided for appeals from the court in which such proceeding is had."

[2] Nor do we find any merit in respondent's remaining point that the erroneous action of the superior court dismissing the appeal can be reached only on certiorari, and cannot be corrected by mandamus. As held in the case of *Golden Gate Tile Co. v. Superior Court*, 159 Cal. 474, 114 P. 978, mandamus will lie to compel a superior court to proceed with the hearing of a justice's court appeal, when properly taken and the superior court has erroneously dismissed the same upon the ground that it had not acquired jurisdiction thereof.

Upon the grounds and for the reason stated, it is ordered that the peremptory writ issue herein as prayed.

We concur: TYLER, P. J.; CASHIN, J.

9 Cal.App.2d 43

**BATES v. ESCONDIDO UNION HIGH
SCHOOL DIST. OF SAN DIEGO
COUNTY et al.**

**FOY et al. v. GROSSMONT UNION HIGH
SCHOOL DIST. OF SAN DIEGO
COUNTY et al.**

Civ. 1156.

District Court of Appeal, Fourth District,
California.

Aug. 28, 1935.

1. Evidence ⚡471(23)

In action for injuries sustained by children in school bus which collided with another automobile, testimony that approaching automobile was traveling at "a rapid pace," "fast," "too fast," held mere expressions of comparative opinion, meaning little in law.

2. Appeal and error ⚡931(1)

Trial judge must pass on weight and sufficiency of evidence and credibility of witnesses, and appellate court must accept as true all evidence tending to support findings and must consider evidence in light most favorable to prevailing party.

3. Negligence ⚡136(14)

Negligence of defendant is ordinarily question of fact to be determined by trial judge from all evidence before him.

4. Appeal and error ⚡1010(1)

In action for injuries received by children in school bus which collided with another automobile, finding that school districts and bus driver were free from negligence, which was supported by substantial evidence, would not be disturbed on appeal.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Actions by Edgar Bates, by his guardian ad litem, Gilbert Bates, against the Escondido Union High School District of San Diego County and others; and by Edwin Foy, by John E. Foy, his guardian ad litem, and another against the Grossmont Union High School District of San Diego County, State of California, and others. Judgment for named defendant in each case, in favor of Escondido High School District, San Diego County, State of California, John W. Gray and Lenton D. Simmons, respectively, in first case, and in favor of the Grossmont Union High School District of San Diego County, John W.

Gray and Lenton D. Simmons, respectively, in second case, and plaintiffs appeal.

Affirmed.

Robert B. Burch, A. M. Thompson, and H. P. Larson Beck, all of San Diego, for appellants.

Thomas Whelan, Dist. Atty., Frank T. Dunn, Chief Deputy Dist. Atty., and Frank J. Macomber, all of San Diego, for respondents.

MARKS, Acting Presiding Justice.

This is an appeal from judgment in favor of respondents in actions to recover damages for injuries sustained by the minor appellants in a collision between a Buick coupé driven by George Warner and a school bus driven by John W. Gray. The accident happened on August 28, 1931, on the state highway about twelve miles north of Paso Robles. The two cases were tried together and are presented on two clerk's transcripts and one reporter's transcript.

The case of Bates v. Escondido Union High School District et al. is before us for the second time. 133 Cal. App. 725, 24 P.(2d) 884. Many of the facts stated in the first opinion are applicable to both the present appeals and will not be repeated here. Both the minors were riding in the school bus and were injured in the same accident by having their left arms broken.

In the Bates Case the trial court found that none of appellants were guilty of any negligence and that the injury to that minor was caused solely by the negligence of the defendant George Warner. In the Foy case the trial court found that none of the respondents were guilty of any negligence at any time mentioned in the complaint. As sole grounds for reversal of the judgments appellants urge that these findings are contrary to the evidence and that the evidence shows respondents guilty of negligence as a matter of law which was the proximate cause of their injuries.

We have studied the record and have concluded that a considerable preponderance of the evidence supports the challenged findings.

Gray was driving the school bus south-erly on the state highway with the vehicle well over on his own right-hand (western-ly) side of the twenty-foot pavement. He approached a small bridge twenty-four feet long down a slight grade. His speed

was about thirty miles an hour at the commencement of the grade and was reduced to about fifteen miles an hour at the time of the accident. When but a short distance from the bridge, Gray and other witnesses observed Warner's car being driven rapidly northward along the highway with its left wheels westerly of the center line of the pavement. No estimate of the exact speed of Warner's car is in the record. When the school bus was about to the bridge, Warner's car was about forty yards southerly from it with two of its wheels between one and two feet westerly of the center line of the pavement. At the time of the collision the right-hand or westerly side of the bus was very close to the westerly guardrail of the bridge, probably about six inches from it. The side of the Buick raked along the easterly side of the bus and broke the minors' left arms, which were probably protruding slightly through the bus windows. The road from north of the bridge southerly made a broad curve to the east. The body of the bus had a maximum width of six feet ten inches.

[1] It seems to be the theory of appellants that when Gray saw the Warner automobile approaching at a rapid pace with two of its wheels over on the westerly side of the pavement, he should have driven the bus off the pavement in order to let the other car pass. There are many considerations to which appellants have evidently given no attention in making such an argument. In the first place, such expressions as "a rapid pace," "fast," "too fast," could not convey to the trial judge nor to us any idea of the actual speed of the car. They are mere expressions of comparative opinion and mean little in law. *Diamond v. Weyerhaeuser*, 178 Cal. 540, 174 P. 38; *Rosander v. Market St. R. Co.*, 89 Cal. App. 710, 265 P. 536; *McKinley v. Dalton*, 128 Cal. App. 298, 17 P.(2d) 160. Secondly, the most careful driver, on seeing a car approaching him forty or more yards away with two of its wheels slightly on the wrong side of the center line of the pavement, might have reasonably concluded that it was safe to proceed with the reasonable belief that the other driver would perform the duty the law imposed upon him and return to his own side of the road. Thirdly, a guardrail was constructed northerly from the bridge along the westerly side of the pavement for between about seventy-five and one hundred feet. We are

not advised of the exact distance between this guardrail and the edge of the pavement, though it would appear from photographs to be constructed on about a line that would be made by producing the westerly guardrail of the bridge northerly along the pavement. The school bus was probably south of the northerly end of this guardrail at the time the Buick appeared in view. It is probable that the bus was about upon the bridge when the danger of a collision should have been apparent to Gray. He drove the bus as near to the westerly guardrail of the bridge as possible and left Warner about thirteen feet of clear roadway in which to drive. When the probability of a collision was apparent, the bus could not have been driven off the pavement because of the guardrails. It is difficult to see what more Gray could have done to have avoided the accident.

[2-4] It is elementary that the trial judge must pass on the weight and sufficiency of the evidence and the credibility of the witnesses and that an appellate court must accept as true all evidence tending to support the findings and must consider the evidence in the light most favorable to the prevailing party. Ordinarily the negligence of a defendant is a question of fact to be determined by the trial judge from all the evidence before him. An appellate court will not set aside a finding when there is material and competent evidence in the record to support it. In the instant case the trial court having found that respondents were free from any negligence and there being an abundance of the evidence to support these findings, we cannot disturb them on appeal.

Respondents have argued a number of other interesting questions in their briefs, such as the liability of the school districts for the negligence, if any, of their respective employees and the liability of one school district for the negligence, if any, of the employee of the other. In view of the finding of the trial court that none of the respondents were negligent, we do not consider it necessary to discuss these questions.

Judgments affirmed.

I concur: JENNINGS, J.

Mr. Presiding Justice BARNARD, being absent, has not participated in this decision.

9 Cal.App.2d 13

AMERICAN EMPLOYERS' INS. CO. v. SUPERIOR COURT IN AND FOR SAN MATEO COUNTY et al.

Civ. 9863.

District Court of Appeal, First District,
Division 1, California.

Aug. 16, 1935.

Hearing Denied by Supreme Court
Oct. 14, 1935.

Counties 996

Surety on official bond of county treasurer taking prescribed steps to be released from further liability on bond on ground that it did not desire to assume such further liability held entitled to release as against contention that surety's reason for release must be one concerning conduct of public officer in relation to office (Pol. Code, §§ 972-975).

Petition by the American Employers' Insurance Company for mandate to compel the Superior Court in and for San Mateo County and the Honorable A. R. Cotton, as Judge of such court, to make an order releasing petitioner from all liability thereafter to arise on an official bond.

Petition granted.

Hearing denied by Supreme Court;
SEAWELL, J., dissenting.

Redman, Alexander & Bacon, of San Francisco, for petitioner.

Paul A. McCarthy, of San Francisco, for respondents.

TYLER, Presiding Justice.

Petition for mandate to compel respondents to make an order releasing petitioner from all liability thereafter to arise on an official bond.

Petitioner is a surety on the official bond of Harry E. Jenkins as county treasurer of San Mateo county. Desiring to be relieved from liability thereon afterwards accruing, on March 16, 1935, it filed with respondents, who were authorized by law to approve such bond, a statement in writing setting forth the desire of the surety to be released from said liabilities, which statement was subscribed and verified by affidavit. On March 16, 1935, a copy of said statement was served on the said Jenkins and return made thereon. On April 8, 1935, and after the lapse of ten days from such service, petitioner demanded of respondents that they make an order releasing it from all liabilities thereafter to arise on such official bond. This demand was refused, and the present

application is one to compel the making of said order.

The procedure by which a surety on the official bond may obtain a release from future liability thereon is controlled by sections 972 to 975 of the Political Code. They read as follows: Section 972. "Any surety on the official bond of a city, town, county, or state officer, may be relieved from liabilities thereon afterwards accruing by complying with the provisions * * * following." Section 973. "Such surety must file with the judge, court, board, officer, or other person authorized by law to approve such official bond, a statement in writing setting forth the desire of the surety to be relieved from all liabilities thereon afterwards arising, and the reasons therefor, which statement must be subscribed and verified by the affidavit of the party filing the same." Section 974. "A copy of the statement must be served on the officer named in such official bond and due return or affidavit of service made thereon as in other cases." Section 975. "In ten days after the service of such notice the judge, court, board, officer, or other person with whom the same is filed, must make an order declaring such office vacant, and releasing such surety from all liability thereafter to arise on such official bond, and such office thereafter is in law vacant, and must be immediately filled by election or appointment, as provided for by law as in other cases of vacancy of such office, unless such officer has before that time given good and ample surety for the discharge of all his official duties as required originally."

It is the claim of petitioner that it has carefully complied with the foregoing sections, and it was therefore the plain and manifest duty of the respondents to make the order of release which this proceeding seeks to compel. Respondents have demurred to the petition on the ground that the application of petitioner to be relieved from liabilities fails to give the reasons for such application, as provided for by section 973 of the Political Code. The reasons assigned by petitioner to be relieved as surety are that petitioner and its reinsuring companies did not desire to assume any further liability under said bond, and said reinsuring companies had instructed petitioner to take the necessary proceedings to terminate all further liability thereon. It is the contention of respondents that the requirement of the statute, that the reasons for the desire of the surety to be relieved be shown in the verified statement as a condition precedent to any action by the court, implies that the

reason must be one concerning the conduct of the public officer in relation to the office. The statute does not admit of such limited construction. It simply provides that the reason for a release must be given. What motives, reasonable or otherwise, may have controlled the action of petitioner and its associates in seeking to be relieved, the statute in no manner compels them to reveal. Their desire to no longer remain sureties upon the bond is a reason, and a sufficient one within the meaning of the statute, and this irrespective of the manner in which the duties of the office are performed or what other motive may have controlled petitioner in seeking its release.

It is ordered that respondents and each of them make an order releasing petitioner from all liability in accordance with the prayer of its petition.

We concur: CASHIN, J.; KNIGHT, J.



9 Cal.App.2d 30

PEOPLE v. WILLIAMS.

Cr. 289.

District Court of Appeal, Fourth District,
California.

Aug. 19, 1935.

Appeal and error ⇨773(4)

Where transcripts were filed with clerk of District Court of Appeal on July 18, 1935, and case was placed on calendar called on August 15, 1935, when no appearance was made for defendant and no brief was filed by him, plaintiff *held* entitled to affirmance of judgment (Pen. Code, § 1253).

On Motion to Affirm Judgment of Superior Court, San Diego County; Lloyd E. Griffin, Judge. Granted.

Proceeding by the People of the State of California against George Williams. On plaintiff's motion to affirm a judgment of the superior court of San Diego county.

Motion granted, and judgment affirmed.

U. S. Webb, Atty. Gen., and John T. Holt, Deputy Dist. Atty., of San Diego, for the People.

N. W. Hacker and George R. Baird, both of San Diego, for defendant.

MARKS, Acting Presiding Justice.

This is a motion to affirm the judgment under the provisions of section 1253 of the Penal Code. The clerk's and the reporter's transcripts were filed in the office of the clerk of this court on July 18, 1935, and the case placed on the calendar called on August 15, 1935. At that time no appearance was made on behalf of defendant and no brief had been filed by him.

The motion is granted, and the judgment is affirmed.

I concur: JENNINGS, J.



CROUCH v. GILMORE OIL CO., Limited, et al. (two cases). *

DORAN v. SAME.

DORAN et al. v. SAME.

Civ. 9380.

District Court of Appeal, Second District,
Division 1, California.

Aug. 31, 1935.

Rehearing Denied Sept. 30, 1935.

Hearing Granted by Supreme Court
Oct. 28, 1935.

1. Trial ⇨165

On consideration of motion for nonsuit, trial court cannot include within case made by plaintiff derogatory evidence elicited on direct or cross-examination of defendant or representative of defendant (Code Civ. Proc. § 2055).

2. Automobiles ⇨245(36)

Evidence that truck involved in automobile accident had name of oil company painted thereon, that company furnished the gasoline, that driver owned truck and made deliveries and procured sales tickets which bore name of oil company, and that company furnished advertising matter and refused to sell gasoline to operators not embraced within driver's territory, *held* to establish prima facie case against oil company, justifying denial of motion for nonsuit.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Actions by Joseph Crouch, a minor, by Homer L. Crouch, his guardian ad litem; by Homer L. Crouch; by Jack L. Doran, and by Hazel K. Doran and Jack L. Doran, husband and wife, against the Gilmore Oil Company, Limited, and Smith Tank Line, a copartnership, and others. From a judgment of nonsuit as to the defendant Gilmore Oil Company, Limited, plaintiffs appeal.

Reversed.

Meserve, Mumper, Hughes & Robertson, J. D. Taggart, and Baldwin Robertson, all of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for appellants.

Salisbury, Robinson & Himrod, of Los Angeles, for respondent.

HOUSER, Justice.

On the trial of the action, the trial court granted a motion for nonsuit as to the defendant Gilmore Oil Company, a corporation; and the issue presented by this appeal depends for its determination upon the authority of the trial court, in the premises, to order a nonsuit as to such party.

Under the provision of section 2055 of the Code of Civil Procedure, either on the direct or the cross examination of the individual defendants, or of the representatives of the defendant corporation, the facts were elicited from testimony given at the instance of plaintiff; and although not exhaustive as to all minor details, the essential facts, thus presented, were as follows: Early in the month of May, 1931, the defendant Gilmore Oil Company, as one party, and defendant Smith (the latter doing business under the name of Owens Valley Oil Company), as the other party, entered into an agreement by which the former was to sell to the latter gasoline and oils in bulk for the purpose of resale by him of such products in smaller quantities within a specified and restricted territory. In furtherance of that purpose, and for the distribution of such gasoline and oils, Smith purchased an oil truck which, at the expense of the said Gilmore Oil Company, was painted in its "colors" and "insignia"; that is to say, on each side of the tank on the truck the word "Gilmore", and on the rear end of such truck, likewise in such "colors," the "insignia" of the defendant corporation were painted. However, on the door on each side of the cab of the truck the words "Owens Valley Oil Company" were painted. For gasoline

purchased by Smith from Gilmore Oil Company for the purpose of operating said truck, Smith paid therefor one cent per gallon less than the regular price thereof. Defendant Shaw, who theretofore had been a truck driver for defendant Smith in his operation of a general trucking business, was placed by Smith in charge of the gasoline truck for the purpose of reselling the gasoline and oils that might be purchased by Smith from Gilmore Oil Company, and during all the time here involved the salary of Shaw was paid by Smith. Before starting in the work of making such sales, Shaw procured from Gilmore Oil Company pads of sales tickets, contract and conditional sale forms for the sale of gasoline and oils, as well as pumps for the gasoline, which might thereafter be purchased by operators of gasoline service stations located within the territory specified in the agreement between Gilmore Oil Company and Smith. At the same time that such forms were procured, at the request of Shaw, he was informed and instructed by an officer of Gilmore Oil Company regarding the manner of filling in the blank spaces in such forms when occasion might require; but in that connection Shaw was instructed to "scratch out" the name of Gilmore Oil Company wherever it occurred in either of such forms, and in place thereof to insert "Owens Valley Oil Company." However, thereafter, disregarding such latter instruction, on each of several occasions, either in the preparation of a sales slip, a contract for the sale of gasoline, or a conditional sale of a gasoline pump, Shaw failed to "scratch out" and to "insert," respectively, as theretofore instructed. So that on their respective faces the various said sales slips or other papers purportedly were made or executed by Gilmore Oil Company, instead of by Owens Valley Oil Company. On two other matters Shaw consulted, and was advised by, Gilmore Oil Company, to wit: Firstly, as to the attitude of that company toward "price cutting"; and, secondly, because of an asserted violation by a service-station operator of the terms of a contract which theretofore had been entered into between Shaw, for the defendant Owens Valley Oil Company, and a gas service-station operator, as to the method that should be employed by Shaw in canceling such contract. Prior to the date when the contract between Smith and Gilmore Oil Company was executed, the latter had been supplying its

products to a customer therefor whose place of business was located within the limits of the territory embraced or described in the contract between Gilmore Oil Company and Smith; but after such date, Gilmore Oil Company ceased to supply the wants of such customer and the same were thereupon and thereafter supplied by Smith. Gilmore Oil Company furnished to Smith for distribution certain advertising matter that included "gasoline sticks, song books," etc. Gilmore Oil Company refused to sell gas in tank lots to an operator of a service station located in territory outside of that embraced within the territory supplied by Smith, unless the truck that transported such gasoline were owned by Gilmore Oil Company. In making sales of gasoline from a truckload thereof, if any gasoline were "left over," Gilmore Oil Company "took it back"; and at night Smith's empty truck was sometimes stored on the premises of Gilmore Oil Company. In substance, one of the officers of Gilmore Oil Company testified that if Smith were to neglect "a substantial number of Gilmore-products customers he imagined that they would make arrangement to take the territory over themselves." More than one year after the accident had occurred upon which the instant actions were predicated, Smith ceased the "arrangement" he theretofore had had with Gilmore Oil Company; and about one month thereafter the gasoline truck which had been used by Smith in transporting gasoline was acquired by Gilmore Oil Company. At all times prior thereto, the state license, etc., to operate the gasoline truck had been issued in Smith's name.

[1,2] On the authority of the rule announced in the case of *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529, on the consideration of a motion for nonsuit the trial court is unauthorized to include within the case made by the plaintiff any derogatory evidence which, under the provision of section 2055 of the Code of Civil Procedure, may have been elicited either on the direct or the cross examination of a witness who is a defendant, or a representative of a defendant, in the action. With that ruling in view (and which necessarily is here accepted as controlling), it becomes apparent that, eliminating from consideration all that part of the testimony of the several defendants which constituted all the evidence of the ultimate fact that

Gilmore Oil Company was neither the owner nor the operator of the truck, and that the driver of the truck was not in the employ of said company, the several inferences that might have been indulged respecting the remaining facts were sufficient to invoke, and to cause the application of, the rule that where any substantial evidence has been presented by the plaintiff that in effect establishes a prima facie case on the facts alleged in the complaint, a motion for a nonsuit may not be granted.

The judgment is reversed.

We concur: CONREY, P. J.; YORK,



8 Cal.App.2d 703

PEOPLE v. VAN ROLLINS.

Cr. 2698.

District Court of Appeal, Second District,
Division 1, California.

Aug. 8, 1935.

Burglary § 41(1)

Criminal law § 1202(3)

Evidence held to support conviction of burglary and judgment which adjudged defendant to be habitual criminal (Pen. Code, § 644).

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Clarence Van Rollins was convicted of second-degree burglary, and he appeals.

Affirmed.

William J. F. Brown, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

SHINN, Justice pro tem.

Defendant was charged by information with the crime of burglary and with having suffered three prior convictions of felony. He admitted each prior conviction, was found guilty by a jury of the crime of burglary in the second degree, and was adjudged to be an habitual criminal under section 644 of the Penal Code. He ap-

peals from the judgment and from an order denying his motion for a new trial. The sole contention on the appeal is that the evidence is insufficient to sustain the verdict and judgment.

The record presents abundant evidence of defendant's guilt, including a confession which he made to the arresting officers, and later on the stand, admitted having made.

The judgment and order denying a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.



9 Cal.App.2d 84

PEOPLE v. BRILEY.
Cr. 2753.

District Court of Appeal, Second District,
Division 2, California.
Sept. 3, 1935.

1. Criminal law § 751(2)

Corroboration of accomplice required by statute need not be such as tends to establish commission of offense or to corroborate precise facts testified to by accomplice, but it is sufficient if, in addition to testimony of accomplice, there is some evidence tending to connect defendant with commission of offense (Pen. Code, § 1111).

2. Criminal law § 751(2)

Testimony of accomplice, standing alone, is sufficient to establish commission of crime, and extrajudicial declarations of defendant are sufficient corroboration to sustain conviction, where effect of such declarations is to connect defendant with commission of crime (Pen. Code, § 1111).

3. Criminal law § 751(2)

Defendant's extrajudicial statement, in which he conceded undue familiarity with his daughters and admitted all acts of which he was accused except act forming gist of statutory offense, held sufficient corroboration to sustain conviction, since statement tended to connect defendant with offense charged (Pen. Code, §§ 288a, 1111).

4. Criminal law § 780(3)

Where defendant's daughters testified that he committed lewd acts, instruction that defendant's admission of acts of undue fam-

ilarity with daughters, if believed, was sufficient corroboration of testimony of daughters, who allegedly were accomplices, held proper (Pen. Code, §§ 288a, 1111).

5. Criminal law § 755½

Refusing instruction that charges involved could easily be made but were difficult to prove held not error, since not a statement of law and since trial court has discretion to refuse to comment upon facts and defendant did not testify (Pen. Code, § 288a).

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Ersie Briley was convicted of violation of section 288a of the Penal Code, and he appeals.

Affirmed.

Irons & Greene and Sidney Sampson, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

FRICKE, Justice pro tem.

Appeal from the judgment and order denying a motion for a new trial.

Appellant was charged and convicted of having committed upon his two daughters, aged 17 and 19 years, the offense described in section 288a of the Penal Code.

Appellant contends that his conviction rests solely upon the testimony of the two daughters, who under the evidence were obviously accomplices, without the corroboration required by section 1111 of the Penal Code. The testimony of each of the daughters was that, in addition to the specific act constituting a violation of section 288a, the defendant had committed lewd and lustful acts upon various portions of the persons of each of his daughters, evidencing an abnormal sexual tendency toward them, particularly so since he was their father. The corroboration relied upon by the prosecution consists of a voluntary statement of the defendant, made in the sheriff's office, in which he conceded undue familiarity with his daughters and admitted all of the acts of which they accused him with the single exception of the specific act forming the gist of the offense prescribed by section 288a, which he denied. The defendant neither took the witness stand nor offered any evidence in his defense.

[1-3] The corroboration of an accomplice required by section 1111 need not be such as tends to establish the commission of the offense or to corroborate the precise facts testified to by the accomplice. *People v. Kempley*, 205 Cal. 441, 271 P. 478; *People v. Tanner* (Cal. Sup.) 44 P.(2d) 324; *People v. Nichols*, 2 Cal. App. (2d) 99, 37 P.(2d) 710; *People v. Conklin*, 122 Cal. App. 83, 10 P.(2d) 98; *People v. Barr*, 134 Cal. App. 383, 25 P.(2d) 503; *People v. Knowles*, 75 Cal. App. 229, 242 P. 508; *People v. Casey*, 79 Cal. App. 295, 249 P. 525. All that the law requires is that, in addition to the testimony of the accomplice, there be some evidence which, though slight, tends to connect the defendant with the commission of the offense. The testimony of the accomplice, standing alone, is sufficient to establish the commission of the crime charged (*People v. Richardson*, 161 Cal. 552, 563, 120 P. 20; *People v. Snyder*, 74 Cal. App. 138, 239 P. 705), and the extrajudicial declarations of the defendant are sufficient corroboration to sustain a conviction where the effect of such declarations is to tend to connect him with the commission of the crime charged. (*People v. Richardson*, 161 Cal. 552, 563, 120 P. 20; *People v. Tobin*, 39 Cal. App. 76, 179 P. 443; *People v. Groenig*, 57 Cal. App. 495, 207 P. 502; *People v. Fraser*, 81 Cal. App. 281, 253 P. 340; *People v. Bonilla*, 124 Cal. App. 212, 12 P.(2d) 64). The defendant's own statements, while not amounting to a confession, were clearly such that they tended to connect the defendant with the offenses charged, and this is all the corroboration which the law requires.

[4, 5] Appellant claims error because of the giving of an instruction that the statement of the defendant, if the jury believed that the defendant had made the statement testified to, was sufficient corroboration of the testimony of the accomplices. This was a correct statement of a rule of law as applied to testimony which was not contradicted. Error is also claimed because of the refusal of an instruction requested by the defense. That portion of the instruction that "charges of the nature involved in this case can easily be made and are difficult to prove" is not a statement of any rule of law and as a statement of a fact it had little application here, for the defendant did not take

the witness stand. The matter of commenting upon the facts is one which lies within the discretion of the trial court, which may, but is not required by law to comment upon the facts. The remainder of the refused instruction was fully covered in the instructions given.

The judgment is affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.



PEOPLE v. GLENDALE & M. RY. CO. et al.*
Civ. 5396.

District Court of Appeal, Third District,
California.
Aug. 8, 1935.

Hearing Granted by Supreme Court
Oct. 7, 1935.

1. Taxation ☞144

Ad valorem tax which is imposed upon railroad under the Constitution is a tax upon the property of the company which is operative on the first Monday in March of the year during which the tax is levied (Const. art. 13, § 14).

2. Taxation ☞144

Ad valorem tax on all railroad companies and their properties used exclusively in the operation of their business in the state is not specific in its nature merely because the amount thereof is estimated upon the gross receipts of the company for the preceding year (Pol. Code, §§ 3607, 3661a, 3665b, 3665c, 3666; Const. art. 13, § 14).

3. Taxation ☞144

Levying of ad valorem tax on railroad companies and their properties used exclusively in the operation of their business in the state is mere method of estimating amount of taxes which are levied upon property owned by railroad company, which has been adopted because of the rapidly changing character of its rolling stock and equipment, and consequent difficulty of determining the fluctuating values thereof (Pol. Code, §§ 3607, 3664a, 3665b, 3665c, 3666; Const. art. 13, § 14).

4. Taxation ☞144

Statute authorizing levy of ad valorem tax on all railroad companies and their properties used exclusively in the operation of their business in state held to contemplate levying of taxes against railroad companies

based upon their gross receipts for preceding year only upon such property as is used exclusively in operation of their business during year for which taxes are imposed (Pol. Code, §§ 3607, 3664a, 3665b, 3665c, 3666; Const. art. 13, § 14).

5. Taxation ⇨284

Railroad's nonoperative property is taxable only by county wherein property is located (Pol. Code, §§ 3607, 3664a, 3665b, 3665c, 3666; Const. art. 13, § 14).

6. Taxation ⇨47(4)

Where railroad substantially abandoned its business in 1931 and notified county assessor of such action, levy of tax in 1931 based on $4\frac{1}{4}$ per cent. of company's gross receipts for 1930 held void as being double tax on company's nonoperative property not used for railroad purposes during year levy was made (Pol. Code, §§ 3607, 3664a, 3665b, 3665c, 3666; Const. art. 13, § 14).

7. Taxation ⇨47(1)

Property may not be subject to double tax, either directly or indirectly, payable by same party (Pol. Code, § 3607; Const. art. 13, § 14).

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceeding by the People against the Glendale & Montrose Railway Company and others. From a judgment for plaintiff, named defendant appeals.

Reversed.

O'Melveny, Tuller & Myers, William W. Clary, and James M. Irvine, Jr., all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and R. L. Chamberlain, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant Glendale & Montrose Railway Company has appealed from a judgment in favor of the state of California for the payment of taxes on its railroad property for the year 1931 calculated on the basis of $4\frac{1}{4}$ per cent. of the gross receipts from the business of the company during the previous year, imposed under the provisions of article 13, § 14, of the Constitution of California. It is contended by the appellant that this levy of taxes is erroneous and void as to the bulk thereof for the reason that the railroad company had previously aban-

doned its railroad business and the largest proportion of its property was nonoperative in character. The cause was tried upon stipulated facts.

Prior to the year 1931 the Glendale & Montrose Railway Company owned and operated an intrastate railroad business with its principal place of business at Los Angeles. It was then a regular common carrier of freight and passengers. Its property then consisted of railroad tracks, rights of way, trolley wire system, rolling stock, including locomotives, passenger and freight cars, railroad buildings, and the ordinary equipment included in a regular railroad enterprise. In 1930 the gross receipts from its railroad business amounted to \$64,267.59. Upon application duly made, the Railroad Commission of the state of California authorized the defendant railroad company to abandon the use of its railroad property by an order which was made November 13, 1930. Thereafter the company ceased to use its railroad property for railroad or other purposes, which property thereby became nonoperative in character, with the exception of two locomotives, one work car, substation equipment, and certain supplies of the agreed value of \$12,750. The defendant's tracks were taken up, trolley wires removed, its railroad buildings were dismantled, and it ceased to conduct its railroad business, including the carrying of all freight and passengers. The only property which was thereafter used were the two locomotives and the work car and apparatus last mentioned of the value of \$12,750. This property was used in the year 1931 only upon contract for the purpose of rendering a freight switching service for the Los Angeles & Salt Lake Railroad Company at Los Angeles.

The county assessor of the county of Los Angeles was promptly notified of the abandonment of the defendant's railroad business and the nonoperative character of the bulk of its property. In March, 1931, the state board of equalization was notified by the county assessor in the manner provided by law of the cessation of defendant's business and the nonoperative character of its property, with the exception of the locomotives and property which were being used for switching purposes as above stated. In spite of the defendant's abandonment of its railroad business and its notice of the nonoperative char-

acter of the bulk of its property, the state board of equalization proceeded to levy an ad valorem tax upon all of the railroad property owned by the defendant on the basis of $4\frac{1}{4}$ per cent. of the gross receipts of its business for the year 1930 under the provisions of article 13, § 14, of the Constitution, and the provisions of the Political Code which were enacted pursuant thereto. This levy of taxes for the year 1931 amounted to the sum of \$2,731.38, against which levy the defendant protested and thereafter tendered in payment of its taxes for the year 1931 the sum of \$464.39, being $4\frac{1}{4}$ per cent. estimated on the agreed value of its operative property which was used in that year as above stated.

The cause was tried by the court sitting without a jury. Judgment was rendered for the plaintiff in the sum of \$2,731.38 and penalties for nonpayment thereof, aggregating the sum of \$3,072.79 and costs of suit. From this judgment the defendant Glendale & Montrose Railway Company has appealed.

We are of the opinion the court erred in rendering judgment for taxes for the year 1931 upon the nonoperative property of the defendant based upon its gross earnings in the previous year of 1930 for the reason that the company had abandoned its railroad business and the use of the bulk of its property which was of a nonoperative character. Article 13, § 14, of the Constitution, authorizes the levying of taxes against all railroad companies and their properties, "or any part thereof used exclusively in the operation of their business in this State" computed, during the time involved in this litigation, on the basis of $4\frac{1}{4}$ per cent. of "the gross receipts and gross premiums herein mentioned shall be computed for the year ending the thirty-first day of December prior to the levy of such taxes and the value of any property mentioned herein shall be fixed as of the first Monday in March."

[1-4] Section 3664a of the Political Code, enacted pursuant to the constitutional provision heretofore mentioned, authorizes the levying of an ad valorem tax on all railroad companies and their properties "used exclusively in the operation of their business in this state." Section 3665c of the Political Code requires the officers of such railroad companies to report in writing to the county assessor

of the county wherein the property is located and to the state board of equalization "within ten days after the first Monday in March of each year" the operative or nonoperative character of their property. Section 3666 of the same Code provides that either the assessor or the board of equalization may protest by petition the character of the property as alleged by the company within thirty days after the notice thereof. The last-mentioned section then provides that "if such petition is not filed within the time herein stated the property covered in said assessor's protest shall be conclusively deemed nonoperative property and shall be placed upon the tax roll by the proper official as nonoperative property." "Operative property" is defined in section 3665b as the property of a railroad company which is "used exclusively in the operation of the railroad business, depot grounds and buildings. * * *" It appears to be the settled law of this state that the ad valorem tax which is imposed upon a railroad company by article 13, § 14, of the Constitution, and section 3664a of the Political Code is a tax on the property of the company which is operative in its nature on the first Monday in March of the year during which the tax is levied. *Feather River Power Co. v. State Board of Equalization*, 206 Cal. 486, 274 P. 962; *Hobart Estate Co. v. Waters*, 220 Cal. 669, 32 P.(2d) 613. We are of the opinion such taxes may not be deemed to be specific in their nature merely because the amount thereof is estimated upon the gross receipts of the company of the preceding year as provided by law. This is a mere method of estimating the amount of taxes which are levied upon the property owned by a railroad company, adopted on account of the rapidly changing character of its rolling stock and equipment and the consequent difficulty of determining the fluctuating values thereof. The law contemplates the levying of taxes against railroad companies based upon their gross receipts for the preceding year only upon such property as is "used exclusively in the operation of their business" during the year for which the taxes are imposed.

[5] In the present case the trial court rendered judgment in favor of the state of California contrary to the explicit provisions of the Constitution and the Political Code above mentioned for taxes up-

on nonoperative property based upon the gross receipts of the previous year. Such nonoperative property is taxable only by the county wherein it is located. It is argued that this is the only method of ascertaining the amount of taxes to be levied which is provided by the law, and that it would be impossible to segregate the amount of taxes levied upon operative property from that which is imposed upon nonoperative property. But this furnishes no reason for levying what amounts to double taxation. There appears to be no difficulty in solving this problem under the circumstances of the present case. It is stipulated that the gross receipts of the company for the year 1930 were \$64,267.59; the value of the operative property which the company continued to use in 1931 for switching purposes is \$12,750; the value of the nonoperative property as reported by the defendant is assessable by the county of Los Angeles and may readily be ascertained. In compliance with the provisions of the Constitution and the Political Code, the proportion which the operative property bears to the nonoperative property would readily determine the proportion of the gross receipts of the previous year which would become a valid tax against the company. At least neither the Constitution nor the statutory provisions of the Political Code authorize the levying of a tax against a railroad company except upon such property as is "used exclusively in the operation of their business."

[6] It follows that the state board of equalization was without authority to levy a tax upon the nonoperative property of the defendant which was not used for railroad purposes, or at all, during the year of 1931, in which year the levy was made.

[7] Moreover, the tax which was imposed in the present case in favor of the state of California amounts to double taxation upon the nonoperative portion of the defendant's property for the reason that under the circumstances of this case it becomes the duty of the assessor of Los Angeles county to tax such nonoperative property pursuant to law in favor of Los Angeles county. It is an established maxim of law that the same property shall not be subject to a double tax payable by the same party, either directly or indirectly. 1 Cooley on Taxation

(3d Ed.) 398. Both the Constitution of California and our statutes prohibit the imposition of a double tax upon the same property in this state. Article 13, § 14, Const.; section 3607, Pol. Code. In authorizing the imposition of taxes upon the property of all railroad companies in this state, the constitutional provision last cited provides that "such taxes shall be in lieu of all other taxes and licenses, State, county and municipal."

For the reason that the nonoperative property of the appellant railroad company was illegally taxed contrary to the inhibition of the Constitution, the levy is void.

The judgment is reversed.

We concur: PULLEN, P. J.; PLUMMER, J.



8 Cal.App.2d 722

WOLLENBERG v. TONNINGSEN et al.

Civ. 9812.

District Court of Appeal, First District,
Division 2, California.

Aug. 12, 1935.

Rehearing Denied Sept. 11, 1935.

Hearing Denied by Supreme Court
Oct. 10, 1935.

1. Pleading ⚡418(1)

Where defendant had failed to stand upon his demurrer to complaint but had answered and gone to trial and evidence disclosed manifest equities in judgment, sufficiency of complaint *held* immaterial, since complaint need not state cause of action for relief sought if facts stated show some right of recovery.

2. Action ⚡6

Statute authorizing action for declaratory judgment *held* intended to authorize such action by one desiring a declaration of his rights or duties with respect to another, or in respect to property, even though such rights or duties do not depend upon a written instrument (Code Civ. Proc. §§ 1060-1062a).

3. Action ⚡6

Under statute authorizing action for declaratory judgment, complaint seeking declaration of rights to stock and alleging facts showing that some of parties to action claimed title to disputed stock, under either an oral or written trust and one party claimed under fraudulent transfer *held* to state cause

of action for declaratory judgment, even if written instrument did not constitute binding contract and complaint did not state cause of action based upon a written instrument (Code Civ. Proc. §§ 1060-1062a).

4. Action ⇐6

That an available remedy existed in an ordinary action at law or in equity *held* not to prevent party from bringing action for declaratory relief (Code Civ. Proc. §§ 1060-1062a).

5. Action ⇐6

Under statute authorizing any person interested to maintain action for declaratory relief, beneficiary of trust *held* entitled to maintain action to determine rights under trust agreement (Code Civ. Proc. §§ 1060-1062a).

6. Action ⇐6

Failure to join a party mentioned as a beneficiary in original trust agreement as a defendant in an action by a beneficiary for declaratory judgment declaring his rights in stock constituting corpus of trust *held* not to render complaint defective, where it appeared that such party no longer had any interest in trust (Code Civ. Proc. §§ 1060-1062a).

7. Action ⇐6

Entering of decree in action for declaratory relief determining rights of beneficiary in trust, ratifying appointment by the two surviving beneficiaries of one of such beneficiaries as substituted trustee, *held* proper (Code Civ. Proc. §§ 1060-1062a).

8. Judgment ⇐735

Statement in opinion, in action against one of the two beneficiaries under a stock trust, that beneficiary had transferred stock to legal holder to evade stockholders' liability, *held* not res judicata as to whether transfers were in fraud of creditors of beneficiaries in action wherein such issue was raised, where in prior action purpose of transfer was not in issue, and if it had been evidence introduced was incompetent for such purpose (Code Civ. Proc. §§ 1060-1062a).

On Petition for Rehearing.

9. Corporations ⇐244(1), 268(5)

Transfer of corporate stock in trust to escape future liability as stockholder may be made in good faith and without fraud; but, if issue of fraud is raised, it must be alleged and proved, and not presumed or inferred from proof of transfer alone.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by C. M. Wollenberg, as administrator with the will annexed of the estate of Charles L. Patton, deceased, substituted in the place and stead of Stella M. Leviston, as executrix of the will of Charles L. Patton, deceased, against Pauline E. Tonningsen and another, as executors of the will of John Tonningsen, deceased, substituted in the place and stead of John Tonningsen, Charles Bone and another. From an adverse judgment, Charles Bone appeals.

Affirmed.

William H. Bryan, of San Francisco, for appellant.

John L. McNab and Ernest K. Little, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued for a declaratory judgment "together with such relief as may be requisite or proper." The defendant Tonningsen's answer admitted the allegations of the complaint and his interests are identical with those of the plaintiff. A demurrer of the Golden Gate Land Association was sustained and the cause was dismissed as to that defendant. The defendant Bone answered and from the judgment adverse to him prosecutes this appeal. After the litigation was started the original plaintiff, Mrs. Leviston, and the defendant John Tonningsen both died and substitutions have been made for them.

In the year 1904 the Golden Gate Land Association was incorporated for the purpose of conducting a cemetery on the outskirts of San Francisco. The incorporators were Maurice Siminoff and Charles L. Patton. Later John Tonningsen came into the corporation and some time prior to the earthquake and fire of 1906 a trust agreement was executed by Siminoff, Patton, Tonningsen, Bone, and one E. W. Brown whereby a large part of the stock was to be held by Patton as trustee. In accordance with this agreement a portion of the stock owned by Tonningsen and a portion of that owned by Patton was transferred on the books of the company to the name of Bone, and in August, 1921, an agreement was executed by Bone, Tonningsen, and Patton whereby they recognized the former trust agreement and stipulated that all the stock standing in the name of Bone should continue to be held by Patton under the former trust agreement as trustee with full power to transfer and sell the same. They also

stipulated in this agreement that all of the stock in whosoever name it stood should belong one-third thereof to each of the following persons; Tonningsen, Patton, and Emma Ungar, the successor in interest to Siminoff.

The complaint alleged the execution of this agreement and that prior thereto 72,500 shares of the stock owned by Tonningsen and 59,640 shares belonging to Patton had been put in the name of Bone; that though the agreement of August 22, 1921, was not executed by Emma Ungar all her interest in the stock was acquired by Tonningsen by purchase; and that he and Patton were the sole beneficiaries under the agreement. It was then alleged that Patton died in 1923 and that plaintiff, as his executrix, agreed with Tonningsen, as the sole beneficiary of the trust, to designate and appoint Tonningsen as trustee thereof. The controversy is alleged to have arisen through the claim of defendant Bone that in the year 1907 the stock referred to was placed in his name as the result of a conspiracy between Patton, Tonningsen and Bone whereby Patton and Tonningsen hoped to escape stockholders' liability for debts of the corporation and that the defendant Bone, by reason of this intended fraud to which he claims to have been a party, claims that the other conspirators have thereby forfeited to him all their interest in the stock though the said defendant recognized the claims of Patton and Bone and acknowledged the trust relation from the time of the transfer in 1907 until the fourth day of June, 1931. The plaintiff alleged that she disputed and denied all these contentions made by the defendant Bone and asked for a declaration of the rights and duties of the respective parties with respect to the agreement of August 22, 1921, and also "with respect to said shares of the capital stock of said corporation, together with such relief as may be requisite or proper."

The trial court found in accordance with all the allegations of the complaint, and in addition thereto found that it was untrue that the stock was transferred to Bone in fraud to escape stockholders' liability or otherwise; that such transfer did not enable any of the parties to escape stockholders' liability and no claim was ever made against the stockholders based upon such liability; and that no creditor of the corporation was ever defrauded or injured by such transfer. The court further found that the defendant Bone had no right, title,

or interest or any claim upon the stock in litigation and expressly ratified and confirmed the appointment of Tonningsen as substituted trustee.

[1] Appellant first argues that the complaint fails to state a cause of action because the writing of August 22, 1921, was not a valid contract and because there was no controversy under this writing. The point is that since the writing was not signed by all the parties to be bound by it no valid contract was made and that in the absence of a valid contract no real controversy could arise to give the court jurisdiction to grant declaratory relief. The point would have presented a question of debatable interest if the appellant had stood upon his demurrer, but having answered and gone to trial and the evidence having disclosed the manifest equities incorporated in the judgment the question of the sufficiency of the complaint becomes academic. This is particularly so in view of the rule stated in *Zellner v. Wassman*, 184 Cal. 80, 88, 193 P. 84, 87, that: "It is not essential that a complaint state a cause of action for the relief which plaintiff seeks, provided the facts stated show some right of recovery, and a party cannot be thrown out of court merely because he may have misconceived the form of relief to which he is entitled." *Brown v. Anderson-Cottonwood Irr. Dist.*, 183 Cal. 186, 188, 190 P. 797; *Martin v. Hall*, 219 Cal. 334, 339, 26 P.(2d) 288.

[2,3] Appellant assumes that the jurisdiction to entertain a proceeding for declaratory relief depends upon the existence of a controversy with respect to some written instrument. Provision for such proceeding is found in sections 1060 to 1062a of the Code of Civil Procedure. Section 1060 reads: "Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, * * * may, in cases of actual controversy relating to the legal rights * * * bring an action in the superior court for a declaration of his rights and duties in the premises. * * *" The use of the word "or" following the word "contract" definitely expressed the purpose to authorize such an action by one who desires a declaration of his rights or duties with respect to another or in respect to property. Hence, though the plaintiff pleaded the agreement of 1921 and asked for a declara-

tion or her rights in respect to it, she also pleaded the facts which disclosed a controversy over the rights and duties of the parties with respect to the stock of the corporation. It cannot be said that the complaint failed to plead a controversy when it alleged facts showing that some of the parties claim title to the property under either an oral or written trust and the other claims under a fraudulent transfer. Hence we may assume that the writing did not become a binding contract and also that the plaintiff has not pleaded a controversy based upon a written instrument, but nevertheless, having pleaded facts which would entitle her to equitable relief, the complaint stated a cause of action and fully supports the decree entered.

[4] The third point raised by the appellant is that the action for declaratory relief will not lie when there is an available remedy in an ordinary action at law or in equity. The answer is that the Code does not so limit that right of action. Appellant cites *Stenzel v. Kronick*, 102 Cal. App. 507, 283 P. 93, and *Hamburger & Sons v. Kice*, 129 Cal. App. 68, 18 P.(2d) 115, in support of his argument. Neither case is in point. Both applied the provisions of section 1061 of the Code of Civil Procedure which gave the court discretion to refuse to exercise the power where it is not necessary or proper under the circumstances.

[5,6] Appellant next argues that the complaint is defective because the trustee and not the plaintiff is the proper party to begin the action and because another party mentioned in the original trust agreement was not joined as a defendant. Without discussing the ancient rules relating to trusteeships, it is sufficient to say that the code section authorizes the maintenance of an action for declaratory relief by "any person interested." As to the nonjoinder of defendants the evidence showed without the slightest conflict that they had no interest, beneficial or otherwise, in the subject-matter of the litigation and also that the failure to join them did not in any way prejudice the interests of the appellant herein. All the stock originally held by Siminoff passed to Patton, Tonningsen and Emma Ungar and all that coming to the latter passed to Tonningsen. The stock originally set aside for Brown to use in building up the good will of undertakers was never delivered to him and so far as it appears from this record he has made no

claim to it over a period of twenty-five years.

[7] The appellant attacks that portion of the decree which adopts and approves the appointment of Tonningsen as substituted trustee of the stock owned by Tonningsen and the Patton estate. At the time of the trial it appeared that Tonningsen and the Patton estate were the sole beneficiaries under this trust. The executrix of the Patton estate did not desire to act as trustee and joined with Tonningsen in naming him for that purpose. The decree declares that this appointment is "ratified, approved, made, adopted and confirmed." This order finds full warrant in *Sacramento Bank v. Murphy*, 158 Cal. 390, 393, 115 P. 232.

[8] Finally, it is argued that the judgment should be reversed because of the finding that the transfers to Bone in 1907 were not in fraud of the creditors of Patton and Tonningsen. It is not contended that this finding is not supported by the evidence and such contention could not be made in face of the record. With a mass of oral and documentary evidence completely disproving appellant's claim that he acquired title through a conspiracy to defraud the creditors of the corporation and with the showing that he had testified directly to the contrary in another proceeding involving the same stock, the trial court had no difficulty in finding that his testimony in this case was untrue. But it is argued that the question is foreclosed by a statement in the opinion of the Supreme Court in *Leviston v. Tonningsen*, 212 Cal. 656, 659, 299 P. 724, to the effect that this stock had been transferred to Bone in order to evade the stockholders' liability. Respondent correctly points out that the purpose of the transfer of the stock was not in issue in the former case and that it was based solely on Tonningsen's testimony to the effect that Bone had told him that such was Patton's purpose. If the purpose of the transfer had been in issue in the former case it could not have been determined upon such testimony. On the other hand, the vital issue in the former case was the ownership of these particular shares of stock and upon that issue the court found that Patton and Tonningsen were the owners.

The appellant has had his full day in court and nothing occurring at the trial has prejudiced his rights in the least. He came into court on an unconscionable claim but nevertheless was given every possible consideration in the presentation

of his case. The record is singularly free from error and the judgment is based upon sound legal and equitable principles.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

On Petition for Rehearing.

NOURSE, Presiding Justice.

[9] On his petition for a rehearing the appellant criticizes that portion of the opinion treating his plea that the transfer of the corporate shares was made in fraud of creditors. He fails to distinguish between a case of fraud and a case of transfer in trust to escape future liability. Such a transfer may be made in good faith and without fraud. But if fraud is the issue it must be alleged and proved, not presumed or inferred from proof of the transfer alone.

In *Leviston v. Tonningsen et al.*, reported in 212 Cal. page 656, 299 P. 724, the trial court found that the transfer of the shares by Patton and Tonningsen to Bone "was a transfer made whereby the beneficial ownership of said shares still remained in said Patton and Tonningsen, and said Bone received said shares simply to hold the same in trust for said Tonningsen and said Patton." Also that "the purpose and object sought to be accomplished by said Patton and Tonningsen in transferring said shares was to avoid liability as stockholders in said corporation, which liability became a matter of apprehension."

The Supreme Court expressly affirmed the finding as to the beneficial ownership of the shares, and also stated that the transfer was made "in order to evade stockholders' liability." The finding followed the pleading of the amended complaint in intervention. There was no issue, finding, or proof that it was made to "defraud" creditors, or that any creditor was defrauded or hindered in any degree.

There is a wide difference between a transfer of property to avoid future liability and a transfer made to defraud creditors. It is when a fraud has been accomplished that the courts will deny relief to the transferor. Here the trial court found that the transfer did not operate to escape stockholders' liability "for either the existing or future debts of the corporation; that no claim was ever made against the stock-

holders of said corporation for stockholders' liability and no creditor of said corporation was ever defrauded or injured by said transfers."

It is a simple proposition of law that the transfer would not relieve either Patton or Tonningsen from liability accruing while they were stockholders. Bone was a man of means, and the transfer to him did not defeat the rights of creditors of the corporation. But it seems necessary to emphasize that the issue here is not the "intent" of the transfer, but the issue is one of fraud. No evidence of fraud was offered, while the evidence supporting the finding above noted has no conflict.

The petition for a rehearing is denied.



9 Cal.App.2d 70

FRALEY v. CITY OF LOS ANGELES.

Civ. 10372.

District Court of Appeal, Second District,
Division 2, California.

Sept. 3, 1935.

Municipal corporations §822(3)

In action against city for injuries resulting from alleged defective condition of public street, application of subject of constructive notice of alleged defect *held* properly limited to notice to board of public works of city, in view of provision of city charter making construction and maintenance of public streets the special charge of board of public works.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Gertrude C. Fraley against the City of Los Angeles. Judgment for defendant, and plaintiff appeals. On motion by defendant to dismiss the appeal or affirm the judgment.

Judgment affirmed.

Wendell W. McCanles and John W. Hill, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., and G. Ellsworth Meyer, Deputy City Atty., both of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Respondent moves to dismiss the appeal or affirm the judgment for the defendant in an action to recover damages for personal injuries resulting from an alleged defective condition of a public street.

The principal errors claimed by appellant lie in the refusal of a requested instruction and the giving of certain instructions to the jury which limited the application of the subject of constructive notice of the alleged defect to notice to the board of public works of the city. As stated in *Douglass v. City of Los Angeles* (Cal. App.) 44 P.(2d) 463, under the charter of the city of Los Angeles the construction and maintenance of its public streets is made the special charge of the board of public works, and the limitation in the instructions was therefore proper.

Other contentions are without merit.

The judgment is affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.



9 Cal.App.2d 77

DOBYNS v. CHESHIRE, Tax Collector
(McCRACKEN, Intervener).

Civ. 10482.

District Court of Appeal, Second District,
Division 2, California.
Sept. 3, 1935.

1. Taxation Ⓒ301(2)

Delinquencies in collections for prior years may be included in subsequent tax levies.

2. Municipal corporations Ⓒ406(1)

Tax levied pursuant to provisions of Municipal Improvement District Act may include delinquencies in collections for prior years (St. 1915, p. 103, § 9, and p. 104, § 14, as amended by St. 1919, p. 671, § 4).

3. Municipal corporations Ⓒ463

Tax levied pursuant to provisions of Municipal Improvement District Act held not invalidated because if wholly paid it would exceed amount necessary to meet accruing bond interest and principal during year fol-

lowing levy of such tax since anticipation of future delinquencies is proper in a tax levy (St. 1915, p. 103, § 9, and p. 104, § 14, as amended by St. 1919, p. 671, § 4).

4. Mandamus Ⓒ10

Issuance of mandate is not warranted unless right to it be clear and certain.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition for writ of mandamus by Winifred S. Dobyns against S. F. Cheshire, as Tax Collector of the City of Pasadena, wherein H. J. McCracken, Sr., intervened. From a judgment for the defendant, plaintiff appeals.

Judgment affirmed.

Roscoe R. Hess, of Los Angeles, for appellant.

Harold P. Huls, City Atty., and John W. Holmes, Deputy City Atty., both of Pasadena, for respondent S. F. Cheshire.

O'Melveny, Tuller & Myers and James L. Beebe, all of Los Angeles, for respondent H. J. McCracken, Sr.

CRAIL, Justice.

This is an appeal on the judgment roll alone from a judgment against appellant after an order sustaining a demurrer, without leave to amend, to appellant's petition for a writ of mandamus alleging the illegality of a tax which had been levied by the city of Pasadena. Appellant says "the fundamental problem is whether a tax levy for one year under the Municipal Improvement District Act of 1915 can include delinquencies in the collection for the prior year." Appellant contends the answer should be a negative one. However, the question is more accurately stated in the following form: Is a tax, levied pursuant to the provisions of the Municipal Improvement District Act of 1915 (Stats. 1915, p. 99), wholly or partially invalid for the reason that such tax if wholly paid would be in excess of the exact amount necessary to meet the accruing bond interest and principal during the year following the levy of such tax?

The pertinent part of section 9 of said statute (page 103) reads as follows: "The legislative body of such city shall, at the time of fixing the general tax levy, and in the manner for such general tax levy provided, levy and collect a tax each year up-

on the taxable property in such district sufficient to pay the interest on such bonds for that year, and such portion of the principal thereof as is to become due before the time for making the next general tax levy; provided, however, that if the maturity of the indebtedness created by the issue of such bonds be made to begin more than one year after the date of such issue, such tax shall be levied and collected, at the time and in the manner aforesaid, each year sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof on or before maturity." Section 14 of said statute (St. 1915, p. 104, § 14, as amended by St. 1919, p. 671, § 4) provides: "The provisions of this act shall be liberally construed to effect the purpose thereof."

[1,2] Delinquencies in collections for prior years may be included in subsequent tax levies. This has been the decision of the Supreme Court of this state and other courts when called upon to consider similar statutes. *Municipal Improvement Co. v. Thompson*, 201 Cal. 629, 258 P. 955; *O. T. Johnson Corporation v. County of Los Angeles*, 128 Cal. App. 440, 17 P.(2d) 792; *Robinson v. Butte County*, 43 Cal. 353; *Marr v. Southern California Gas Co.*, 198 Cal. 278, 245 P. 178; *East St. Louis v. United States ex rel. Amy*, 120 U. S. 600, 7 S. Ct. 739, 30 L. Ed. 798. Such is our decision as to this statute.

[3,4] Appellant proceeds upon the assumption that the portion of the tax against which she complains was levied for the purpose of overcoming past delinquencies. This, however, is not necessarily true. The facts appearing in the record are equally consistent with the theory that said portion of the tax was levied in anticipation of future delinquencies. The anticipation of such delinquencies is proper. *Hughson v. Crane*, 115 Cal. 404, 47 P. 120; *Municipal Improvement Co. v. Thompson*, 201 Cal. 629, 258 P. 955; *Escondido High School Dist. v. Escondido Seminary*, 130 Cal. 128, 62 P. 401. Under the facts disclosed herein the city is authorized by said statute to levy and collect taxes, not only sufficient to pay the interest on the indebtedness as it falls due, but "also to constitute a sinking fund for the payment of the principal thereof on or before maturity." If the city had authority to levy the larger tax, the court will

not issue a writ to compel the acceptance of a smaller tax. The issuance of a writ of mandate is not warranted unless the right to such writ be clear and certain. *Perrin v. Honeycutt*, 144 Cal. 87, 77 P. 776; *Stevens v. Truman*, 127 Cal. 155, 59 P. 397.

The intervener, an owner of one or more of the bonds, contends at considerable length and with much persuasive force that the tax levy made by the board of directors of the city of Pasadena is, under the sinking fund provisions of the statute, too small and the prior levies likewise have been too small to provide the necessary sinking fund, but the intervener did not appeal, and the question is not before us for determination.

Judgment affirmed.

We concur: STEPHENS, P. J.; FRICKE, Justice pro tem.



9 Cal.App.2d 33

CALIFORNIA TRUST CO. v. COHN et al.
Civ. 1716.

District Court of Appeal, Fourth District,
California.

Aug. 27, 1935.

Hearing Denied by Supreme Court
Oct. 24, 1935.

1. Reformation of Instruments ⚡37

Cross-complaint in action to quiet title held to allege cause of action for reformation of a written real estate contract, so as to make it conform to a prior oral agreement.

Cross-complainants alleged that plaintiff had represented that for \$7,500 it would hold lot as trustee for benefit of itself and defendants and resell it on or before certain date at price that would yield defendants a profit of \$10,000; that plaintiff had agreed to reduce such representations to writing; that thereafter plaintiff had falsely represented that it had done so and that defendants had signed contract without reading it; that upon demand for additional payment, true nature of contract had been discovered.

2. Reformation of Instruments ⚡43

Presumption was that written contract allegedly reducing to writing representations of owner of realty concerning prospective deal as to such realty, having been deliberately

executed, correctly expressed intention of parties, and, although presumption was not conclusive, burden of overcoming presumption rested upon parties seeking to avoid its plain terms.

8. Reformation of instruments ⇨45(2)

Evidence which is relied upon to establish existence of fraud or mistake as ground for revision of written contract must be clear and convincing and not loose, equivocal, or contradictory, leaving question of fraud or mistake in doubt.

4. Reformation of instruments ⇨43

Presumption that written instrument, having been deliberately executed, correctly expresses intention of parties is equally efficacious as evidence where remedy of revision is sought on ground of fraud instead of mistake (Civ. Code, § 3399).

5. Reformation of Instruments ⇨45(3)

In action to quiet title to lot in which defendants claimed an interest upon basis of an agreement which was allegedly incorrectly reduced to writing, written contract, together with presumption that having been deliberately executed it correctly expressed intention of parties, *held* "evidence" entitled to consideration of court in determining whether written contract expressed real agreement of parties.

[Ed. Note.—For other definitions of "Evidence," see Words & Phrases.]

6. Reformation of instruments ⇨45(2)

Satisfactory explanation of failure to read instrument alleged to incorrectly state true agreement will justify a trial court in holding that explanation relieves party from charge of negligence, where failure, if unexcused, might properly warrant denial of remedy of reformation.

7. Reformation of Instruments ⇨45(3)

In action to quiet title to lot in which defendants claimed an interest upon basis of an agreement which was allegedly incorrectly reduced to writing, court, in considering right of defendants to reformation, was not bound to accept explanation offered by defendants as excuse for failure to read written contract that plaintiff's agent had assured them that instrument contained all representations made to them, but could accept view that failure to read was not sufficiently explained, or that instrument was read and that defendants were merely attempting to escape consequences.

3. Contracts ⇨245(1)

Written contract reducing to writing an oral agreement supersedes all the negotiations and stipulations concerning its subject-

matter which preceded or accompanied the execution of the instrument (Civ. Code, § 1625).

9. Reformation of instruments ⇨45(3)

In action to quiet title to lot in which defendants claimed an interest upon basis of an agreement which was allegedly incorrectly reduced to writing, and which written instrument defendants sought to have reformed on ground that defendants had not been prevented from reading it by assurance of plaintiff's agent that instrument contained representations made, evidence, in view of weight to be given written instrument, *held* to sustain findings that defendants had not been defrauded, and hence were not entitled to reformation of contract, or damages (Civ. Code, § 1625).

10. Appeal and error ⇨1011(1)

In action to quiet title to lot in which defendants claimed an interest upon basis of an agreement which had been allegedly incorrectly reduced to writing by fraud of plaintiff, Court of Appeal could not disturb findings absolving plaintiff from fraud if it merely believed that findings were based on evidence that was conflicting.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by the California Trust Company against J. J. Cohn and another, in which defendants filed a cross-complaint. Judgment for plaintiff, and defendants appeal.

Affirmed.

See, also, 214 Cal. 619, 7 P.(2d) 297.

D. Chase Rich, of Los Angeles, for appellants.

Goudge, Robinson & Hughes, David A. Sondel, and Swanwick, Donnelly & Proudfit, all of Los Angeles, for respondent.

JENNINGS, Justice.

The plaintiff instituted this action to quiet its title to certain land in Los Angeles county. The complaint alleged that the defendants claimed some interest in the land, that such claim was without right, and concluded with a prayer that defendants be required to set forth the nature of their claim, and that it be adjudged to be without right, and void and that defendants be perpetually enjoined from asserting any claim to the land.

To the above-described complaint the defendants file an answer and a cross-complaint. The latter of these pleadings is of particular importance on this appeal. It

contained the following allegations: That on May 15, 1926, the plaintiff was the owner of the land and on said date represented to defendants that if they would pay to plaintiff the sum of \$7,500 plaintiff would thereafter hold the title to the land in trust for the use and benefit of defendants and on or before May 15, 1927, plaintiff would sell the land to another purchaser at a price that would yield to defendants a profit of \$10,000; that on the above-mentioned date plaintiff made a number of other representations, and further, that plaintiff stated that it would prepare and execute a written agreement which would contain the aforesaid representations and agreements and no other agreements whatsoever; that acting solely in reliance upon the various representations so made, the defendants paid to plaintiff the sum of \$7,500. It is then alleged that on August 13, 1926, plaintiff presented to defendants for signature a written contract which it represented contained all of the various statements, representations, and agreements previously made by plaintiff, and that it contained no representation or agreement which had not theretofore been agreed to by the parties; that defendants fully believed and solely relied on the representation thus made and without reading the contract signed and executed the same. It is then alleged that the various statements and representations, and in particular the representation that the written contract contained all representations theretofore made by plaintiff, were false and untrue, were known by plaintiff to be false and were made with intent to deceive and defraud defendants. It is further alleged that on October 17, 1927, plaintiff demanded that defendants pay to plaintiff an additional \$7,500 in accordance with the terms of the written contract whereupon defendants for the first time read the written agreement signed by them on August 13, 1926, and discovered the fraud which plaintiff had practiced upon them. The pleading avers that defendants immediately renounced "and do hereby renounce" the written contract of August 13, 1926, and declare that the only agreement which they made with respect to the real estate was contained in the various statements, representations, and agreements which were made on May 15, 1926. It is further alleged that defendants have been damaged in the sum of \$1,000 for attorney's fees in protecting their interest in the property and in the additional amount of \$17,500

with interest thereon from May 15, 1927, caused by plaintiff's failure to resell the land as it agreed to do. The prayer of the pleading is threefold: First, that it be decreed that plaintiff holds legal title to the land as trustee for defendants; second, that the written contract of August 13, 1926, be so reformed that it shall contain all of the representations, statements, and agreements alleged to have been made by plaintiff on May 15, 1926, and that all terms and provisions of the said agreement which are contrary or repugnant to such prior representations or which are in addition thereto be canceled; third, that defendants be awarded the above-mentioned total sum of \$18,500 as damages.

When the case was called for trial, the defendants, through their counsel, stipulated in open court that the plaintiff was entitled to a judgment quieting its title to the land unless the defendants should prevail under the allegations of their cross-complaint. Upon the conclusion of the trial, judgment was rendered in favor of plaintiff by the trial court. From the judgment thus rendered, defendants have prosecuted this appeal.

The first contention advanced by appellant is that the trial court erroneously ruled that appellants had failed to establish that the Santa Monica Land & Water Company was the agent of respondent at the time the various alleged misrepresentations regarding the land and the written contract providing for its sale to appellants were made. It is pointed out that the evidence produced by appellants in support of the allegations of their cross-complaint showed that certain statements and representations were made to appellants by Phillip J. Connors on May 13, 1926, the date on which appellants signed a written application for reservation of the land addressed to the Santa Monica Land & Water Company and the date on which appellants paid the sum of \$3,000 as an initial deposit on the agreed purchase price to be paid for the land. It is also urged that the evidence showed that certain other representations were made by Connors on August 15, 1926, the date on which appellants signed the formal written agreement by whose terms they obligated themselves to buy the land for the price specified in the contract and the date on which appellants paid the further sum of \$4,500, which together with the \$3,000 previously paid made up the total sum of \$7,500 which the contract recited had been paid in cash

on the purchase price prior to the signing and delivery of the contract. It is next pointed out that it was conceded during the trial of the action that Connors was the agent of the Santa Monica Land & Water Company and that respondent's answer to the cross-complaint admitted that respondent had received the entire amount of \$7,500 paid by appellants on the purchase price of the property. It is also observed that respondent's complaint alleged that it was the owner of the land which formed the subject of the written contract executed by appellants on August 13, 1926.

In connection with this contention, it should be noted that the trial court made no express finding on the question of agency. Examination of the record impels the conclusion that the court entertained the opinion that the relationship of agency between the Santa Monica Land & Water Company and respondent had not been established by appellants. For the purposes of this opinion and without here passing upon the correctness or incorrectness of the court's opinion regarding the question of agency, it will be assumed that the contention of appellants in this regard is correct, and that the Santa Monica Land & Water Company was the agent of respondent at all times material to the present inquiry.

The second contention advanced by appellants is that the trial court erroneously found that appellants were not defrauded by respondent. In this regard, it is declared that the undisputed evidence produced by appellants showed that various representations were made by the agent Connors to appellants on May 15, 1926, which were false and which induced appellants to enter into the contract and to part with their money in reliance thereon. It is particularly urged that the evidence showed that Connors stated to appellant Cohn on August 15, 1926, when he presented the formal written agreement for the signature of appellants that all of the previous statements, representations, and agreements were contained in the document, whereas none of them was therein contained. Especial reference is made to the fact that the written contract failed to contain a representation made by Connors on May 15, 1926, that if appellants would pay the sum of \$7,500 on account of the purchase price of the lot he would resell it for them within a year for a price that would yield them a profit of \$10,000. The broad contention of appellants that the trial court

erroneously decided that they were not defrauded by respondent or by its agent necessitates an analysis of appellants' cross-complaint and some consideration of the evidence bearing upon the question of fraud.

[1] The task of analyzing the cross-complaint upon which appellants relied as establishing a cause of action for affirmative relief has been simplified by reason of the fact that this pleading has heretofore received the attention of the Supreme Court in *California Trust Co. v. Cohn*, 214 Cal. 619, 7 P.(2d) 297. Reference is there made to the pleading as a "threefold cross-complaint" due to the fact that its prayer demands threefold relief. At page 628 of 214 Cal., 7 P.(2d) 297, 300, it is declared that "the relief sought by way of damages is but incidental and ancillary to the prayer for a decree reforming the written contract and declaring plaintiff to hold lot 2 in trust for the purpose alleged." It is also stated at the top of page 628 of 214 Cal., 7 P.(2d) 297, 300, that in the opinion of the reviewing court "the defendants' second amended cross-complaint alleges a good and sufficient cause of action for reformation of the written instrument."

It is therefore our opinion, based upon the analysis of the pleading made by the Supreme Court in the above-cited decision and upon our own reading of it, that the cross-complaint alleged a cause of action for reformation of a written contract so that it should be made to conform to a prior oral agreement, and that the relief sought by it is threefold, viz.: (1) Reformation; (2) a decree that respondent holds legal title as trustee for itself and appellants for the purpose of reselling the land at a price which will yield to appellants a profit of \$10,000; and (3) a judgment for damages in the amount specified caused by respondent's false representation that it would resell the land within a year at a price that would yield return to appellants their initial payment of \$7,500 and a profit of \$10,000 on their investment. It is apparent that the principal representation which appellants desired to have incorporated in the written contract was that whereby respondent allegedly obligated itself to resell the land at a profit to appellants of \$10,000. This is evident from the fact that the amount claimed by way of damages is the exact amount which appellants claim they are entitled to receive because of respondent's failure to have performed the alleged oral agreement to resell

the property at a profit of \$10,000 plus the sum of \$1,000 alleged to have been expended by them as attorney's fees in this action. It is also evident from the fact that the purpose for which it is asked that the court decree that respondent holds legal title in trust for appellants is that respondent shall perform the alleged oral agreement to resell the property at the above-mentioned profit to appellants.

[2-5] So far as the evidence is concerned, it must be conceded that appellants produced evidence which, if it had been believed by the trial court, would have entitled appellants to the remedy of reformation. Appellant Cohn testified positively that the various representations alleged in the cross-complaint were made to him by the agent Connors on May 15, 1926, and that when Connors brought the written contract to him for his signature on August 13, 1926, Connors stated that he need not read the instrument as all of the various representations which Connors had previously made to him were incorporated in the contract. Connors, who was called as a witness by appellants, likewise testified that he had made the various alleged representations to Cohn and that he told Cohn on August 13, 1926, that he need not read the written contract, since it contained all of the representations and statements which he had theretofore made to Cohn. If, therefore, as appellants contend, no other evidence bearing on the question of prior representations was submitted to the trial court, the contention of appellants that the court erroneously decided that no fraud was perpetrated on them by respondent or by an agent acting in its behalf, and that therefore the remedy of reformation is not available to appellants must be sustained. However, in considering whether or not the written agreement should be reformed, it must be borne in mind that the trial court had to determine whether the written contract expressed the real agreement of the parties or whether it did not due to the absence from its provisions of one or more of the various representations which the evidence of appellants showed were made by Connors. In arriving at a solution of the problem, the written contract itself was an important factual element, evidence of a high order that could not be disregarded. Furthermore, this important evidentiary factor derives no inconsiderable support from the established legal presumption that, having been deliberately executed, it correctly

expressed the intention of the parties. *Welk v. Conner*, 102 Cal. App. 286, 289, 282 P. 963. The presumption is not conclusive and may be overcome by satisfactory evidence which shows that the written instrument is not in conformity with the true agreement of the parties. The burden of overcoming the presumption, however, rests upon him who seeks to avoid the plain terms of the written contract. *Hochstein v. Berghauser*, 123 Cal. 681, 684, 56 P. 547; *Burt v. Los Angeles Olive Growers Ass'n*, 175 Cal. 668, 675, 166 P. 993; *Oakdale Mercantile Co. v. Baer*, 128 Cal. App. 350, 354, 17 P.(2d) 779; *Manning v. Sourisseau*, 128 Cal. App. 635, 639, 18 P.(2d) 77. This burden is rendered the more onerous because of the announced rule that the evidence which is relied upon to establish the existence of fraud or mistake as a ground for revision must be clear and convincing and not loose, equivocal, or contradictory, leaving the question of fraud or mistake in doubt. *Burt v. Los Angeles Olive Growers Ass'n*, supra; *Dale v. Dale*, 87 Cal. App. 359, 369, 262 P. 339. While the authorities cited are cases wherein reformation was sought on the ground of mistake, the presumption is equally efficacious as evidence where the remedy of revision is sought on the ground of fraud. Section 3399 of the Civil Code, which expresses in statute form the familiar equitable principle that a written contract may be reformed when it is made to appear that the instrument does not express the intention of the parties makes no distinction between fraud and mistake as grounds for revision. *Wolfe v. Morgan*, 95 Cal. App. 656, 658, 273 P. 64. The aforesaid presumption is evidence entitled to consideration in either event, and the burden of overcoming it rests upon the party seeking revision whether he relies upon fraud or mistake as the ground upon which he rests his prayer for reformation.

[6, 7] In connection with the contention that the trial court's denial of the remedy of reformation is not justified by the evidence, it should also be noted that it was conceded that appellants did not read the written contract prior to their execution of it. They sought to excuse their failure in this regard by the production of evidence which showed that when the contract was presented to appellant Cohn for his signature, he commenced to read it, but, upon the assurance of the agent Connors that the instrument contained all of the various representations and statements theretofore

made to him by Connors, he ceased reading and affixed his signature and shortly afterward informed the appellant Gibbons of the assurance that Connors had given him, whereupon Gibbons also signed the document without reading any of its contents. While it is true that, as was said in *Los Angeles & R. R. Co. v. New Liverpool Salt Co.*, 150 Cal. 21, 87 P. 1029, the mere failure of a party to read an instrument with sufficient attention to perceive an error or defect in its contents will not prevent reformation of the instrument, this means no more than that a satisfactory explanation of the failure to read will justify a trial court in holding that the explanation relieves the party from a charge of negligence which, if unexcused, might properly warrant denial of the remedy of reformation. In the instant case the trial court was not bound to accept the naive explanation offered by appellants as an excuse for their failure to read the written contract. It is apparent from an examination of the record that the court took the view either that the failure to read comprehendingly was not sufficiently explained or that in fact the instrument was read comprehendingly and that appellants were merely attempting to escape the consequences. It is immaterial which of these two views the court adopted. The evidence under the peculiar circumstances of this case sustains either of them. *Burt v. Los Angeles Olive Growers Ass'n*, supra; *Security First Nat. T. & S. Bank v. Loftus*, 129 Cal. App. 650, 654, 19 P.(2d) 297.

[8-10] Appellants appear to contend that the evidence which they produced made out a clear cause of fraud, and that they were therefore entitled to recover damages irrespective of whether or not they were afforded relief in the form of reformation. Again, it must be conceded that the record shows the production of evidence by appellants which would have warranted the trial court in granting relief in the form of damages. However, the presence in the evidence of the formal written contract may not be overlooked. The trial court was not bound to accept the testimony of appellants' witnesses in preference to the written contract which superseded all the negotiations and stipulations concerning its subject-matter which preceded or accompanied the execution of the instrument. Section 1625, Civ. Code;

Russell v. Riley & Peterson, 82 Cal. App. 728, 734, 256 P. 557. Whether, therefore, the problem is considered from the point of view of the remedy of reformation or of the incidental remedy of damages for fraud, the fact remains that the written contract of the parties was before the court as an important factor in the case, particularly in view of the above-mentioned presumptions. The most that can be said with respect to the contention of appellants that the trial court erroneously found that appellants were not defrauded is that the findings absolving respondent from fraud are based on evidence that was conflicting which effectually forecloses a reviewing court from disturbing the criticized findings.

With respect to the contention that the trial court should have decreed that respondent held legal title to the land as trustee for itself and appellants for the purpose of resale at a price that would yield a profit of \$10,000 to appellants within a year, the same observations which have been made regarding the remedies of reformation and allowance of damages for alleged fraud are applicable. Appellants' claim that they are entitled to such a decree is dependent on the contention that the undisputed evidence demonstrated that respondent's agent orally agreed that respondent would resell the land within a year at a price that would yield the specified profit. Unfortunately for appellants, the written contract which appellants themselves produced in evidence contained no such agreement. It may not, therefore, be declared that the evidence as to the making of the promise was undisputed. The testimony of the witnesses of appellants that such a promise was orally made is contradicted by the formally and deliberately executed written contract which contains no provision whatever respecting a resale of the property.

The view which we take of the case renders unnecessary any consideration of other contentions advanced by appellants.

The judgment from which this appeal has been taken is therefore affirmed.

I concur: MARKS, Acting P. J.

Presiding Justice BARNARD, not being present, does not participate in this opinion.

9 Cal.App.2d 72

PEOPLE v. KERNS.

Cr. 2751.

District Court of Appeal, Second District,
Division 2, California.

Sept. 3, 1935.

Rehearing Denied Sept. 18, 1935.

Hearing Denied by Supreme Court
Oct. 3, 1935.**1. Bribery ☞3/2**

Inspector, employed by board of public health to enforce quarantine regulations with regard to birds of psittacine family, to sign shipping certificates necessary for interstate shipments of birds, to inspect aviaries for quarantine purposes, and to enforce bird quarantine orders of health department, *held* "executive officer" within Penal Code, providing for punishment of executive officer who asks bribe upon understanding that his official action should be influenced thereby (Pen. Code, § 68; Pol. Code, § 2979).

[Ed. Note.—For other definitions of "Executive Officer," see Words & Phrases.]

2. Bribery ☞1(2)

Agreement between executive officer seeking bribe and person unlawfully approached *held* unnecessary to constitute offense under statute providing for punishment of executive officer who asks bribe upon understanding that his official action should be influenced thereby, where there is understanding on part of such bribe seeker that his official action shall be influenced (Pen. Code, § 68).

3. Bribery ☞6(2)

In bribery prosecution, information, which charged that defendant unlawfully asked bribe for purpose of influencing his action upon official matters then pending before him in his official capacity as state executive officer, *held* sufficient to charge public offense under statute providing for punishment of executive officers who ask bribe upon understanding that their actions upon official matters then pending shall be influenced (Pen. Code, § 68).

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Ben F. Kerns was convicted of bribery, extortion, and attempted extortion, and he appeals.

Affirmed.

Horowitz & McCloskey, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist.

Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for the People.

CRAIL, Justice.

The defendant was charged under numerous counts in an information with bribery, extortion, and attempted extortion. A jury was waived, and after trial defendant was found guilty of bribery upon ten counts, of extortion upon fourteen counts, and of attempted extortion upon one count. In each of the counts of bribery, the defendant was charged with "wilfully, unlawfully, corruptly, knowingly and feloniously asking * * * a bribe, * * * for the purpose of influencing the opinion and action of the said Ben F. Kerns [defendant] upon official matters then pending before him and which might thereafter be brought before him in his official capacity as Junior Epidemiologist-Bacteriologist of the Department of Public Health of the State of California, * * * the said defendant being then and there and at all times herein mentioned an executive officer of the State of California * * *."

[1] The first contention of the defendant is that he was not an executive officer and was therefore not subject to the provisions of section 68 of the Penal Code, as it existed at the time of the alleged offenses. At that time said section, as it applies to this case, provided that any executive officer who asks any bribe upon any understanding that his action upon any matter then pending in his official capacity shall be influenced thereby is punishable, etc.

The defendant was employed, under the authority of the board of public health of California, as a junior epidemiologist-bacteriologist, to enforce quarantine regulations with regard to all birds of the psittacine family, because of an epidemic of fever and sickness among such birds which was dangerous to the public health. At the trial it was stipulated that: "On January 19, 1932, the State Board of Health approved the action of the Director of Public Health of the State of California in employing Mr. B. F. Kerns, the defendant here, as an epidemiologist-bacteriologist, at the salary of \$150.00 per month for one month, and from month to month thereafter; that employment continued until June 17, 1933." Defendant's duties were prescribed by the state board of health; he was to make a survey in Los

Angeles city and county and nearby counties; some of the literature of the department described him as "Supervisor Psittacosis Control, State Department of Public Health." In other evidence, he was described as "Inspector, State Board of Health." It was his duty, among other things, to sign shipping certificates when birds were to be shipped interstate; and express companies would not accept birds without that certificate. It was his duty to inspect aviaries for quarantine purposes. He wore a badge upon which was the legend, "Inspector."

During this time Dr. Porter, director of the state department of health, issued an order dated October 6, 1932, to all health officials under the provisions of section 2979 of the Political Code, directing the isolation and confinement of every bird of the psittacine family and that the premises upon which they were found be quarantined, and that any violation of the quarantine as provided in the order constituted a misdemeanor. It was the defendant's duty as inspector to enforce this order.

Title 7 of the Political Code concerns itself with the police powers of the state. Article 1 of chapter 2 thereof provides for the state board of health, and section 2979 thereof is entitled, "Powers and duties of board." Among other things, it provides: "It shall have general power of inspection, examination, quarantine and disinfection of persons, places and things, within the state, and for the purpose of conducting the same may appoint inspectors, who, under the direction of the board, shall be vested with like powers."

The defendant's activities were in the exercise of one of the sovereign powers of the state, to wit, the police power. Viewing the evidence in the light most favorable to the respondent, the duties of the defendant involved (first) the formation of an opinion by the inspector which would form (second) the basis of action in executing the law. In *People v. Markham*, 64 Cal. 157, 30 P. 620, 49 Am. Rep. 700, the Supreme Court affirmed a judgment in which a police officer was convicted of bribery under section 68 of the Penal Code. In *People v. Edson*, 68 Cal. 549, 10 P. 192, a police officer was convicted in the trial court of bribery under the said section; the court held the indictment good, citing the *Markham* Case with approval, although the case was reversed on other grounds. In *Harris v. Superior*

Court, 51 Cal. App. 15, 196 P. 895, the court held that a police officer was chargeable with bribery under said section 68. In *People v. Lips*, 59 Cal. App. 381, 211 P. 22, 23, the defendant, a deputy sheriff of Los Angeles county, was so held and the conviction affirmed; the court saying: "It is insisted that he was a ministerial officer. If it be conceded that he was the latter, it cannot therefore be said that he was not an executive officer. Of our three branches of government, the executive, the legislative, and the judicial, sheriffs and their deputies undoubtedly belong to the first named." In *People v. Anderson*, 75 Cal. App. 365, 242 P. 906, a city marshal of the city of Torrence was convicted of bribery under said section and the conviction was sustained. In *Logan v. Shields*, 190 Cal. 661, 214 P. 45, the petitioner was employed "as a traffic officer or employee" by the board of supervisors and the question arose whether he was an officer or merely an employee. Among other things, the court said: "It clearly follows that as the duty of the petitioner herein was to regulate traffic upon the public streets of the county of San Mateo, he was to that extent exercising a part of the sovereign power of the state, and for that reason was a public officer, as distinguished from a mere employee, such as a street sweeper or laborers upon the highway." There is a sharp conflict in the evidence regarding the matter, but we are satisfied that there is substantial evidence in the record to sustain the implied finding that the defendant was an executive officer within the meaning of said section 68 of the Penal Code.

[2,3] It is the next contention of the defendant that each of the bribery counts fails to state a public offense for the reason that it fails to allege "that the accused was ready to agree or enter into an understanding." In *People v. Squires*, 99 Cal. 327, 330, 33 P. 1092, 1093, the Supreme Court said, with regard to a similar statute: "Section 93 of the Penal Code denounces, as liable to punishment, those who ask for a bribe. To complete the offense, it is not necessary that the party approached shall consent to give it. Unless he does so, there could be no agreement or understanding. In such case it cannot be charged that such agreement or understanding exists, but only that the accused was ready to agree or enter into an understanding." In the instant case, it is not

necessary that there be an understanding, in the sense of an agreement, with the person unlawfully approached, but merely an understanding on the part of the bribe seeker himself that his official action shall be influenced. We are satisfied that the language of the information, the relevant parts of which we set forth above, is a sufficient allegation in this regard. *People v. Beesly*, 119 Cal. App. 82, 6 P.(2d) 114, 970; *People v. McGee*, 107 Cal. App. 56, 290 P. 61; *People v. Seeley*, 137 Cal. 13, 69 P. 693.

Except one, all of the remaining points of the defendant depend upon the contention that the evidence, in the respect therein specifically set forth, is insufficient. It is not necessary to discuss in detail the facts and circumstances in evidence. It is sufficient to say that there is substantial evidence to sustain the conviction on each of the several counts upon which defendant was convicted; that the testimony of the Cohns is not (as claimed) inherently improbable; and that there was substantial evidence that the injuries which were threatened under the counts of extortion were unlawful injuries as distinguished from lawful ones. The final contention of the defendant is that the trial court indicated such a prejudicial attitude toward the defendant during the progress of the trial that he is entitled to a new trial. We see no merit in this contention.

Judgment affirmed.

We concur: STEPHENS, P. J.;
FRICKE, Justice pro tem.



9 Cal.App.2d 89

KORCHAK v. PACIFIC ELECTRIC RY. CO.

et al.

Civ. 10214.

District Court of Appeal, Second District,
Division 2, California.

Sept. 3, 1935.

Hearing Denied by Supreme Court
Oct. 31, 1935.

1. Railroads ⇨301

In action by pedestrian who was struck by interurban car at crossing on company's right of way, pedestrian's right to recover *held* governed by rules relating to accidents

at steam railway crossings rather than rules governing cases where street cars operated on city streets are involved in accidents.

2. Negligence ⇨83

"Last clear chance doctrine" operates only where injured party through his own negligence was placed in dangerous situation which he could not escape and where another was aware of this and should have realized injured party's inability to escape and had last clear chance to avoid injuring but failed by exercise of ordinary care to do so, and in absence of any of these elements case is governed by ordinary rules of negligence and contributory negligence.

[Ed. Note.—For other definitions of "Last Clear Chance," see Words & Phrases.]

3. Negligence ⇨83

For operation of last clear chance doctrine, plaintiff need not show his inability to escape threatened danger was physical impossibility, the doctrine applying equally if he was wholly unaware of his danger and for that reason was unable to escape it.

4. Railroads ⇨320

Engineer or motorman is not charged with knowledge that pedestrian approaching railroad tracks will change his position to one of peril, but may assume pedestrian will exercise caution and not remove himself from place of safety and recklessly expose himself to danger, when with slightest care he could stop and avoid peril.

5. Railroads ⇨320

Motorman who observed pedestrian approaching track *held* not charged with knowledge that pedestrian would negligently go upon track in front of interurban car, and not required to stop car to allow pedestrian to cross.

6. Railroads ⇨338

Where pedestrian walked upon interurban car crossing, though motorman of approaching car gave proper warning and made every effort to stop car while pedestrian was yet in position of safety, last clear chance doctrine *held* not applicable.

Appeal from Superior Court, Los Angeles County.

Action by Hyman Korchak against the Pacific Electric Railway Company, a corporation, and another. From a judgment for the defendants, plaintiff appeals.

Judgment affirmed.

Henry K. Elder and Boyd A. Taylor, both of Los Angeles, for appellant.

Frank Karr, E. E. Morris, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondents.

WILSON, Justice pro tem.

This action is for personal injuries received by plaintiff when struck by a car of respondent Pacific Electric Railway Company. The court directed a verdict in favor of defendants, and from the judgment entered thereon plaintiff appeals. It was stipulated that plaintiff was guilty of negligence, and that the sole question to be determined was whether or not the doctrine of last clear chance was applicable, entitling the plaintiff to have the cause go to the jury upon that question alone.

The accident occurred in Culver City when appellant was crossing the interurban track of respondent company at a private crossing leading from a public highway into a moving picture studio at which appellant was employed. The tracks extend easterly and westerly on a private right of way parallel with and north of the said public highway and separated therefrom by a curb 6 inches high. The ties are above the surface of the ground, and the rails extend their full height above the ties excepting that portion of the right of way occupied by the crossing which is 30 feet in width. The crossing is paved flush with the top of the rails and is maintained with the consent of the railway company. Near the intersection of the east line of the crossing with the south line of the railroad right of way there is a wigwag. It is a distance of 21 feet from the curb on the south line of the right of way to the south rail of the eastbound track, and 18½ feet from said rail to the north rail of the westbound track. The trolley poles are between the tracks. A chain was suspended between two posts across the private crossing about 3 feet above the pavement and about 10 feet south of the south rail. The chain was movable for the purpose of allowing vehicular traffic to pass between the public highway and the studio. The accident occurred after dark. The crossing was lighted, the wigwag was oscillating, and nothing obscured the view of the track upon which the car was traveling. The chain was in place and appellant walked around one of the posts in order to cross the railway tracks.

Appellant testified that when he was on the curb, 21 feet from the south rail, he

looked westerly and saw no car, that he did not see it until he was struck, that he did not hear a whistle blown, and did not see the wigwag. The motorman testified that he saw appellant when the latter was at the curb line and the car was 125 feet from the crossing; that he applied the emergency brakes and sounded the emergency whistle; that appellant paid no attention but, apparently oblivious of the approaching car, walked onto the track and was struck when he was near the north rail.

[1] The accident having happened on the respondent company's private right of way on which it operated its interurban cars and trains, and not on a city street, the cases cited by appellant in which street cars, or interurban cars operated on paved city streets, were involved in accidents are not applicable, but the rules relating to steam railroad crossings govern. *Simoneau v. Pacific Electric Ry. Co.*, 159 Cal. 494, 115 P. 320; *California Rendering Co. v. Pacific Electric Ry. Co.*, 205 Cal. 73, 269 P. 922; *Riney v. Pacific Electric Ry. Co.*, 45 Cal. App. 145, 187 P. 50; *Phillips v. Pacific Electric Ry. Co.*, 89 Cal. App. 122, 264 P. 538; *New York Lubricating Oil Co. v. United Railroads*, 191 Cal. 96, 215 P. 72; *Billig v. Southern Pac. Co.*, 192 Cal. 357, 219 P. 992. Consequently the same care and caution was required of appellant in crossing respondent's tracks as is required of one crossing the tracks of a steam railway. The duties and liabilities of the motorman here were similar to those of an engineer of a railroad train and were not limited by the rules relating to motormen of street railway cars.

[2,3] The presence of five elements is necessary in order that the doctrine of last clear chance may be invoked: (1) That the plaintiff has been negligent; (2) that as a result thereof he was present in a situation of danger from which he could not escape by the exercise of ordinary care; (3) that the defendant was aware of his dangerous situation and realized, or ought to have realized, his inability to escape therefrom; (4) that the defendant then had a clear chance to avoid injuring him by the exercise of ordinary care; (5) that the defendant failed to avoid the accident by the use of ordinary care. It is not required that the plaintiff show that his inability to escape from the threatened danger was a physical

impossibility. The doctrine applies equally if he was wholly unaware of his danger and for that reason was unable to escape it. *Darling v. Pacific Electric R. Co.*, 197 Cal. 702, 242 P. 703; *Choquette v. Key System Transit Co.*, 118 Cal. App. 643, 5 P.(2d) 921. The absence of any one of these elements renders the doctrine inapplicable, and the case is governed by the ordinary rules of negligence and contributory negligence. *Bagwill v. Pacific Electric R. Co.*, 90 Cal. App. 114, 265 P. 517; *Palmer v. Tschudy*, 191 Cal. 696, 218 P. 36; *Chappell v. San Diego, etc., R. Co.*, 201 Cal. 560, 258 P. 73.

[4, 5] During all of the time that a pedestrian is approaching a railroad track he is in a position of absolute safety. The law is well established that an engineer or a motorman is not charged with knowledge that the pedestrian will change his position to one of peril, but he has a right to assume that the pedestrian will exercise his faculties of observation and caution, and will not remove himself from a place of safety and recklessly expose himself to danger, when it is obvious that with the slightest care he could stop and avoid the peril. *Green v. L. A. Terminal R. Co.*, 143 Cal. 31, 76 P. 719, 101 Am. St. Rep. 68; *Billig v. Southern Pac. Co.*, supra; *Basham v. Southern Pac. Co.*, 176 Cal. 320, 168 P. 359; *Holmes v. South Pac. Coast Ry. Co.*, 97 Cal. 161, 31 P. 834; *Green v. Southern Pac. Co.*, 122 Cal. 563, 55 P. 577; *Choquette v. Key System Transit Co.*, supra. The fact that the motorman saw the appellant approaching the track did not charge the motorman with knowledge that the appellant would negligently go upon the track in front of the approaching car, and did not require the motorman to stop his car for the purpose of allowing the appellant to cross. *Green v. L. A. Terminal R. Co.*, supra; *Choquette v. Key System Transit Co.*, supra.

[6] From the time when the motorman first saw appellant at the curb line the latter was in a safe location until he placed himself in a position of peril by stepping upon the railroad track. *Schooley v. Fresno Traction Co.*, 56 Cal. App. 705, 206 P. 481; *Green v. L. A. Terminal R. Co.*, supra. Until that time there was no dangerous situation of which the motorman could have been aware. It is nevertheless evident that the motorman kept a lookout, and that he used proper care in at-

tempting to stop his car even while the appellant was yet in a position of safety. As soon as he saw the appellant, the latter being then 21 feet from the rail, he used every effort to warn the appellant and to stop the car, by sounding his whistle and setting the brakes in emergency. At the time when the motorman was performing these acts he still had a right to assume that appellant would exercise his faculties and would himself avoid the calamity. *Choquette v. Key System Transit Co.*, supra; *Basham v. Southern Pac. Co.*, supra; *Billig v. Southern Pac. Co.*, supra. The doctrine of last clear chance has no application in this case.

Judgment affirmed.

We concur: STEPHENS, P. J.;
CRAIL, J.



9 Cal.App.2d 97

PEOPLE v. CALHOUN.

Cr. 1847.

District Court of Appeal, First District, Division 2, California.

Sept. 4, 1935.

Rehearing Denied Sept. 19, 1935.

1. Criminal law ☞570(3)

Trial court's refusal to treat prior commitment to state hospital for insane in North Dakota as conclusive evidence of defendant's insanity at time of commission of criminal offense and at time of trial held not error (Pen. Code, § 476a).

2. Criminal law ☞997

Petition of person convicted of criminal offense for writ of error coram nobis held properly denied, even if trial court had committed error in making rulings complained of, where defendant had adequate remedy either by way of motion for new trial or by appeal (Pen. Code, § 476a).

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Thomas F. Calhoun was convicted of a violation of Penal Code, § 476a, and from an order denying a petition for a writ of error coram nobis, he appeals.

Affirmed.

Thomas F. Calhoun, in pro. per.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

SPENCE, Justice.

Defendant was charged with a violation of section 476a of the Penal Code, alleged to have been committed on January 25, 1934. The jury found against defendant on his pleas of not guilty and not guilty by reason of insanity, and defendant was sentenced to the state prison at San Quentin on March 20, 1934. No motion for a new trial was made, nor was any appeal taken from the judgment. Thereafter on February 8, 1935, defendant filed in the superior court a petition for a writ of error coram nobis. A hearing was had and said petition was denied. Defendant appeals from the order denying said petition.

It was alleged in said petition that defendant was duly adjudicated an insane person in the state of North Dakota in 1928; that he was thereafter confined in the North Dakota State Hospital for Insane from which he subsequently escaped; that defendant had not been restored to capacity by any court and that said judgment of insanity remained in full force and effect; that at the time of his arraignment and again at the time of the trial on the above-mentioned charge, defendant moved the court for a dismissal of the information on the ground that defendant was an insane person and filed with the court "an exemplified copy of the 'judgment roll' of the North Dakota court showing petitioner to be an insane person," but that the court refused to grant said motion.

[1,2] The facts alleged in said petition were not controverted, but it affirmatively appears that every fact alleged therein was before the trial court prior to the conviction of said defendant. A reading of the petition discloses that defendant claims that the trial court erred on the original trial in refusing to treat the prior commitment to the state hospital in North Dakota as conclusive evidence of defendant's insanity at the time of the commission of the offense and at the time of the trial. We find no error in the trial court's rulings on the original trial (*People v. Willard*, 150 Cal. 543, 89 P. 124; *People v. Gilberg*, 197 Cal. 306, 240 P. 1000; *People v. McConnell*, 80 Cal. App. 789, 252 P. 1068; *People v. Prosser*, 56 Cal. App. 454, 205 P. 869), but even assuming that the trial

court erred in said rulings, defendant had an adequate remedy either by way of motion for new trial or by appeal. We therefore conclude that the trial court properly denied defendant's petition for a writ of error coram nobis. *People v. Reid*, 195 Cal. 249, 232 P. 457, 36 A. L. R. 1435; *People v. Mooney*, 178 Cal. 525, 174 P. 325; *People v. Paysen*, 123 Cal. App. 396, 11 P.(2d) 431; 8 Cal. Jur. 480, § 496.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



9 Cal.App.2d 87

SLACK et al. v. METROPOLITAN TRUST
CO. OF CALIFORNIA et al.
Civ. 10254.

District Court of Appeal, Second District,
Division 2, California.
Sept. 3, 1935.

1. Pleading ☞235

Where justice will be served by permitting amendment and rights of other parties are not prejudiced, court may not arbitrarily deny motion to amend.

2. Banks and banking ☞315(1)

In action upon written contract, under which investment company was to pay money to plaintiffs, and an ancillary contract between investment company and trust company whereby trust company was to pay money to plaintiffs, in case of default by investment company, out of investment company's funds in its possession, refusal to permit plaintiffs to amend complaint to include allegation that trust company had moneys in its possession which were payable toward plaintiffs' contract at time of plaintiffs' demand upon it held abuse of discretion.

3. Judgment ☞197

Rendering judgment without prejudice in action upon contract tried on the merits held reversible error.

Appeal from Superior Court, Los Angeles County; Maurice T. Dooling, Judge.

Action by Elizabeth Slack and another against the Metropolitan Trust Company

of California and another. Judgment for defendants, and plaintiffs appeal.

Reversed.

R. Bruce Murchison, of Los Angeles, for appellants.

CRAIL, Justice.

This is an appeal by the plaintiffs from a judgment in an action based upon a mortgage certificate; i. e., a written contract on the part of the Security Investment Company to pay money to the plaintiffs, and an ancillary contract between the said company and the Metropolitan Trust Company, made for the benefit of the plaintiffs, whereby the trust company, it was alleged, agreed in case of default to pay the sum due on said certificate out of funds of the security company in the possession of the trust company. The case was tried on the merits, but, after the evidence was closed, the court held that before the plaintiffs could recover it was necessary for them to allege and prove that the trust company had moneys in its possession which were payable toward the plaintiffs' certificate at the time demand was made upon it. On two different occasions the plaintiffs moved the court for permission to amend their complaint for the purpose of setting up such allegation. The court denied said motions and rendered, first, a judgment on the merits in favor of defendants, but finally it changed the judgment to read "without prejudice to plaintiffs to maintain another action against the defendants upon the mortgage certificate referred to in the complaint." It is the contention of the plaintiffs that the court erred in denying their motions for permission to amend the complaint and that the court erred in rendering a judgment "without prejudice."

[1,2] It will be observed that the proposed amendment did not set up a new cause of action, neither did it in any way seek to change the nature of the action. Where justice will be served by permitting an amendment, and the rights of other parties are not prejudiced, a court may not arbitrarily deny a motion to amend. Amendments should be liberally allowed in order to secure fair and speedy trials on the merits, and in this case the denial of the motion to amend was an abuse of discretion.

[3] Likewise the court erred in refusing to render a judgment on the merits.

The plaintiffs were knocking at the door, asking for justice. As it was said in olden time, "What man is there of you, whom if his son ask bread, will he give him a stone?" Chief Justice Waste, speaking for the court in the case of *Milo v. Prior*, 210 Cal. 569, 292 P. 647, 648, said with more direct applicability, "A cause tried and submitted on its merits should never result in a judgment without prejudice."

Judgment reversed.

We concur: STEPHENS, P. J.; FRICKE, Justice pro tem.



9 Cal.App.2d 80
BERKOWITZ v. PELTON et al. (two cases).
Civ. 10314.

District Court of Appeal, Second District,
Division 2, California.
Sept. 3, 1935.

Rehearing Denied Sept. 25, 1935.

Hearing Denied by Supreme Court
Oct. 31, 1935.

1. Master and servant ⇨5

An "independent contractor" is one who in rendering services exercises an independent employment or occupation and represents his employer only as to results of his work, and not as to means whereby it is to be accomplished, the chief determining consideration being that employer has no right of control as to mode of doing work contracted for.

[Ed. Note.—For other definitions of "Independent Contractor," see Words & Phrases.]

2. Automobiles ⇨244(29)

In action for injuries sustained in automobile collision allegedly caused by negligence of driver of automobile being used in service of corporation, evidence showing that services contracted for by corporation in employing driver were the personal services of the driver under its direction and control, held to sustain finding that driver was "servant" of corporation for whose negligence corporation was liable, and that he was not an "independent contractor" (Civ. Code, § 2009; National Industrial Recovery Act, 48 Stat. 195).

Evidence showed that driver, although owner of automobile, was under control of corporation's transportation dispatcher,

was on call during hours and at special place prescribed by corporation, was paid at stipulated sum per mile traveled or at stipulated sum per hour, whichever was larger, that records of trips were kept in corporation's office in same manner as those of other drivers, that before absenting himself from work for personal reason and before using a substitute driver he secured approval of corporation, and that daily rate of compensation was increased when National Industrial Recovery Act became effective.

[Ed. Note.—For other definitions of "Servant," see Words & Phrases.]

STEPHENS, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Separate actions which were tried together by John A. Berkowitz and by Shepard Berkowitz against F. E. Pelton, the Metro-Goldwyn-Mayer Distributing Corporation, and another. Judgment for plaintiffs, and the Metro-Goldwyn-Mayer Distributing Corporation appeals.

Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

Lasher B. Gallagher, of Los Angeles, for respondents.

FRICKE, Justice pro tem.

These actions, tried together, were brought to recover damages for personal injuries suffered by plaintiffs as the result of the negligence of defendant Scarcliffe, whose automobile, while he was performing services for appellant, collided with that in which the plaintiffs were riding.

Appellant's principal point is that there is no evidence to support the conclusion that Scarcliffe was a servant of appellant and not an independent contractor.

[1, 2] Appellant has failed to print in its brief either by direct quotation or in substance sufficient portions of the evidence to present the question as to the nature and character of the employment as required by rule VIII of the Supreme Court and District Courts of Appeal. Respondent, however, has presented sufficient of the record to disclose among other facts that Scarcliffe some years previous had solicited "a job" from appellant and was told that he could have one. He bought a car and reported for work and was on call

inside the studio gates during the hours and at the special place prescribed by appellant. During the entire time of his employment, a period of several years, the work he did was under the control of the transportation dispatcher employed by appellant. Whenever his services were required he was called. He was paid either at a stipulated sum per mile traveled or at a stipulated sum per hour, it being agreed that his compensation should be calculated according to whichever method of computation resulted in the larger sum. His orders were upon the same form used for all other drivers for the studio. On return from a trip he had to check in to the office of appellant. When not rendering service, he remained at a special place inside the studio walls, designated for drivers and automobiles. His employment was not limited to local transportation, but included trips to San Francisco and other places in the state, and on such occasions appellant paid his hotel and garage expenses. The employment was not based upon any written contract, but rested solely upon his applying for a job, being told to go to work and his continued employment thereafter. When the per diem of appellant's employees was increased under the National Recovery Act Code, Scarcliffe's per diem was also increased. When he desired to be absent on a personal matter, such as going to a football game, he always first asked the transportation manager for his approval. On a few occasions when he had to substitute another driver of the car in place of himself, he secured the approval of a transportation dispatcher because "I could not put anybody on that car and have them in the studio working there."

Difficulty is sometimes experienced in drawing the distinction between an independent contractor and a servant, but this difficulty is more apparent than real. "A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter" (Civ. Code, § 2009) while "an independent contractor is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished." * * * "The chief consideration which determines one to be an independent contractor is the fact that

the employer has no right of control as to the mode of doing the work contracted for." Green v. Soule, 145 Cal. 96, 78 P. 337, 339; Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 417, 156 P. 491; Chapman v. Edwards, 133 Cal. App. 72, 77, 24 P.(2d) 211, and note in 75 A. L. R. 725. The case of Chapman v. Edwards, supra, is in principle strongly analogous to the case at bar. There, as here, the hours of labor and wage paid were the same as for other employees doing the same kind of work, the work and the manner of performance were under the control of the person for whom the work was done, and the employee used his own motor vehicle. Appellant here was not securing the mere performance of labor but the personal services of Scarcliffe. The latter would not have complied with his agreement had he furnished his automobile with any person as the driver.

The facts herein related lead to but one possible conclusion, that it was the personal services of Scarcliffe under the direction and control of appellant, for which appellant contracted. This is further borne out by the fact that the records of Scarcliffe's trips were kept in appellant's office where all drivers had to check in upon their return; that before absenting himself from work for a purely personal purpose or when it became necessary to use a substitute driver, Scarcliffe first secured the approval of the appellant; and that his per diem rate of compensation was increased when the National Industrial Recovery Act (48 Stat. 195) went into effect. We find here ample evidence, even without further recourse to the record, to sustain the conclusion that Scarcliffe was employed in the capacity of a servant and employee and not as an independent contractor.

Appellant urges that there is no proof that the employment was by Metro-Goldwyn-Mayer Corporation. While another corporation, Metro-Goldwyn-Mayer Distributing Corporation, was named in the action, it neither was served nor appeared in the action. Throughout the trial the employer of Scarcliffe was never referred to by its correct full name, but in every instance witnesses and attorneys used the abbreviations "Metro-Goldwyn Mayer," "Metro Goldwyn Mayer Studios" or "M. G.M." While there would have been a greater technical nicety had each witness and each attorney, when referring to

appellant, stated its name in full, it is obvious that each of the abbreviated designations were used and understood by all persons concerned in the trial, including the court and jury, as referring to the appellant.

The judgment is affirmed.

I concur: STEPHENS, P. J.

CRAIL, Justice.

I dissent. I am not convinced on the question of the relationship of master and servant between the appellant and the defendant Scarcliffe.



Cal.App.2d 60

STEWART et al. v. LANGER et al.

Civ. 1172.

District Court of Appeal, Fourth District,
California.

Aug. 29, 1935.

1. Appeal and error ⇨931(3)

Findings having been waived, every intendment is in favor of judgment, and hence, upon all issues raised by pleadings, it must be presumed that trial court, in effect, found all facts necessary to support judgment in favor of successful party.

2. Appeal and error ⇨989

Where sole question on appeal is sufficiency of evidence to support implied findings of trial court, only problem of Court of Appeal is to determine if there is any material and competent evidence in record supporting such implied findings.

3. Automobiles ⇨244(6, 50, 59)

In action for death of person who was killed when he ran across pavement in front of defendant's automobile, which was proceeding toward him at rate of 35 miles an hour on clear night when there was nothing to obstruct vision, evidence held to support judgment for defendant, based on findings that defendant was not negligent, that deceased was contributorily negligent, and that defendant did not have last clear chance to avoid accident.

4. Appeal and error ⇨659(1)

Motions for diminution of record were denied where record, as filed, was amply suf-

ficient for determination of all issues presented.

5. Appeal and error ☞110

Order denying motion for new trial is not appealable (Code Civ. Proc. § 963).

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by Minnie Stewart and another against Otto Langer and another. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Geo. B. Bush, of Los Angeles, for appellants.

Wright, Monroe, Thomas & Glenn, of San Diego, for respondent.

MARKS, Acting Presiding Justice.

This is an appeal from a judgment rendered in favor of defendant Otto Langer denying plaintiffs' judgment for damages caused by the death of William Alfred Stewart, who was killed in a collision with an automobile being driven by defendant. Plaintiffs sued as the sole heirs at law of the deceased. The state of California did not appear in the action. Otto Langer will be referred to as the defendant.

[1] Findings of fact were waived. The judgment recites that the trial court found the issues of the negligence of the defendant and the contributory negligence of Stewart in favor of defendant. "Findings having been waived, every intendment is in favor of the judgment, and, therefore, upon all of the issues raised by the pleadings, it must be presumed that the trial court, in effect, found all the facts necessary to support the judgment in favor of the plaintiff [the successful party]. *Antonelle v. New City Hall Com'rs*, 92 Cal. 228, 28 P. 270; *Bruce v. Bruce*, 16 Cal. App. 353, 116 P. 994." *Gray v. Gray*, 185 Cal. 598, 197 P. 945.

As grounds for reversing the judgment, plaintiffs urge that: "1. The deceased was not negligent. 2. The defendant was negligent. 3. The defendant had the last clear chance to avoid the accident."

[2] As the sole question before us is the sufficiency of the evidence to support the implied findings of the trial court, our only problem is to determine if there is any

material and competent evidence in the record supporting those implied findings. We are not concerned with conflicts in the evidence nor with the weight to be given to conflicting evidence.

[3] There is evidence in the record showing the following facts: That highway No. 101, at the place of the accident, runs in a general northwesterly and south-easterly direction and has a 20-foot strip paved with concrete; that defendant was approaching the place of the accident from the north traveling at a speed of about 45 miles an hour which he reduced to about 35 miles an hour when several hundred feet north of the point of the accident; that the night was clear and dry with nothing to obstruct vision; that deceased alighted from his automobile on the easterly side of the pavement and after waiting for a car to pass proceeded to cross towards the westerly side; that defendant saw him and reduced his speed; that deceased stopped in the center of the pavement when defendant's automobile was about 100 feet away, defendant continuing on his course; that when about 25 feet separated deceased and defendant's automobile, deceased started to run across the westerly half of the pavement; that defendant swerved his automobile to the right, but the end of the left front fender struck deceased and his death ensued.

With these facts before him the trial judge was fully justified in concluding that defendant was not negligent; that deceased was guilty of contributory negligence; that the defendant did not have the last clear chance to avoid the accident.

[4] Both parties have moved for diminution of the record. We find the record, as filed, amply sufficient for a determination of all the issues presented here.

[5] The motions for diminution of the record are denied. An order denying a motion for new trial is not appealable. Section 963, Code Civ. Proc. The attempted appeal from such order is dismissed.

The judgment is affirmed.

I concur: JENNINGS, J.

Mr. Presiding Justice BARNARD, being absent, does not participate herein.

4 Cal.2d 265

**MILLER v. JOHNSON, County Auditor,
et al.**
Sac. 4897.

Supreme Court of California.
Sept. 3, 1935.

Rehearing Denied Oct. 3, 1935.

1. Insurance Ⓒ55

School district *held* "person" within County Mutual Fire Insurance Act, and hence authorized by statute to become member of mutual insurance company, in view of statutory authority given school trustees to insure property of their districts in mutual insurance company (School Code, § 6.2; Gen. Laws 1931 and Supp. 1933, Act 3729).

[Ed. Note.—For other definitions of "Person," see Words & Phrases.]

2. Schools and school districts Ⓒ22

Statute authorizing school districts to insure with mutual insurance company *held not* unconstitutional on ground that it authorized

political subdivision to become stockholder in insurance corporation, where mutual fire insurance company in which school district was insured issued no stock (School Code, § 6.2; Const. art. 4, § 31 and art. 12, § 13).

3. Schools and school districts ⇨90

Statute or policy which subjects school district to possible unlimited assessment to meet losses violates constitutional provisions prohibiting pledging of credit (Const. art. 4, § 31, and art. 12, § 13).

4. Schools and school districts ⇨22

Statute authorizing school districts to insure with mutual insurance company held not unconstitutional on ground that it purported to authorize pledging of credit by political subdivision, where assessments against members of mutual insurance company were limited to five times amount of original premium (School Code, § 6.2; Const. art. 4, § 31, and art. 12, § 13).

In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by J. H. Miller against F. H. Johnson, Auditor of the County of San Joaquin, and others. Judgment for defendant, and plaintiff appeals.

Affirmed.

Nutter & Rutherford & Hague and Nutter & Rutherford, all of Stockton, for appellant.

Langdon & Tope, Guard C. Darrah, Dist. Atty., and Ward A. Hill, Asst. Dist. Atty., all of Stockton, for respondents.

R. R. Fowler, Dist. Atty., and F. O. Hoover, Deputy Dist. Atty., both of Modesto, amici curiæ.

F. O. Hoover, of Modesto, amicus curiæ for Farmers' Mut. Fire Ins. Co. of Turlock.

Albert E. Sheets, of Sacramento (Norris J. Burke, of Sacramento, of counsel), amici curiæ for the First Re-Insurance Company of California.

LANGDON, Justice.

This is an action by a taxpayer to enjoin the defendants from paying an insurance premium from county funds. The defendant trustees of Ripon Union High School District in 1933 took out a policy of fire insurance on school buildings in the principal sum of \$21,000, with the defendant Farmers Mutual Protective Fire

Insurance Company of San Joaquin County, a mutual fire insurance company organized under the County Fire Insurance Company Act. (St. 1897, p. 439, as amended; Deering's Gen. Laws, 1931, Act 3729, Deering's 1933 Supp., p. 1720.) The complaint attacks this action as illegal. Defendants filed demurrers, which were sustained without leave to amend, and plaintiff appealed. The question presented is whether a school district may in California insure school property in a mutual fire insurance company organized under our laws.

A mutual fire insurance company, under the above statute, may be organized by any number of persons not less than 25, residing in any county and owning insurable property therein worth at least \$50,000. Thereafter any person owning insurable property in the county or an adjoining county may become a member by insuring therein. Every member binds himself to pay his share of losses sustained by any other member. Where the policy is over \$6,000, the company must reinsure the excess amount with some other company, except where it has a certain large volume of insurance on its books, in which case the limit is progressively increased. When a loss exceeds cash on hand, the directors assess property of members in proportion to premiums. By amendment in 1933, assessments were limited to five times the amount of the premium, and this limitation clause is made a part of the standard policy.

[1] The first contention of appellant is that a school district is not a "person" within the meaning of the County Mutual Fire Insurance Act, and for this reason cannot be a member of a mutual insurance company. It is neither necessary nor desirable to review the numerous decisions which have held, under particular circumstances, that a statute referring to "persons" applied to a school district or a municipal corporation. See, for example, *Skelly v. Westminster School Dist.*, 103 Cal. 652, 37 P. 643; *City of Sacramento v. Industrial Accident Commission*, 74 Cal. App. 386, 240 P. 792; *People v. City of Oakland*, 92 Cal. 611, 28 P. 807; *City of Pasadena v. Stimson*, 91 Cal. 238, 27 P. 604. In the instant case, the problem is solved by section 6.2 of the School Code (Deering's Gen. Laws, 1931, Act 7519), providing that school trustees shall have

power to insure property of their respective districts "in any mutual insurance company organized under the laws of this state." Reading this in connection with the County Mutual Fire Insurance Act, and particularly section 8 thereof, as amended by St. 1933, p. 1040 [Gen. Laws Supp. 1933, Act 3729] which provides for issuing policies on various types of property, including "schoolhouses," the legislative intention seems entirely clear. This was, indeed, recognized by this court in *People v. Stanley*, 193 Cal. 428, 225 P. 1. See, also, *Dalzell v. Bourbon County Board of Education*, 193 Ky. 171, 245 S. W. 360.

[2-4] Appellant, however, contends that section 6.2 of the School Code is unconstitutional in purporting to authorize a political subdivision to become a stockholder in an insurance corporation, and to lend its credit to a corporation, in violation of article 4, section 31, and article 12, § 13, of the California Constitution. We cannot agree with this view. The mutual fire insurance company issues no stock, and the position of a member is not analogous to that of a stockholder in an ordinary private corporation. As to the pledging of credit, this precise question has received the attention of a few courts, and an important distinction has been recognized. If the statute or policy subjects the political subdivision to a possible unlimited assessment to meet losses, it is objectionable under such constitutional provisions. *School Dist. v. Twin Falls County Mutual Fire Ins. Co.*, 30 Idaho, 400, 164 P. 1174. But where the assessments are limited, as here, to some such sum as five times the original premium, there is no pledging of credit by the political subdivision. It is simply an arrangement where there is a maximum contingent liability by way of premium, but only one-fifth thereof need ordinarily be paid, and the balance is never collected unless some extraordinary losses occur. The lending of credit, if any, is by the insurance company to the public body; and neither the letter nor the spirit of the Constitution is violated by the transaction. In *Downing v. Erie School District*, 297 Pa. 474, 147 A. 239, 241, the court distinguished the Idaho case of *School Dist. v. Twin Falls County Mutual Fire Ins. Co.*, supra, and said: "Taking of insurance in a mutual company with limited liability is not within the inhibition,

for the district does not become strictly a stockholder, nor is it loaning its credit. It agrees to pay a fixed sum, and can be called upon for the total only in case of some unusual catastrophe causing great loss. Until this contingency arises it is required to advance but a small portion of the maximum, and is, in effect, loaned credit as to a possible future demand by the company for the balance which may become payable." Leading text-writers have reached the same conclusion, upholding the validity of such insurance by school districts. See 5 McQuillin, *Municipal Corporations* (2d Ed.) § 2329; 3 Dillon, *Municipal Corporations* (5th Ed.) § 976; 1 Cooley's *Briefs on Insurance*, p. 104.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; THOMPSON, J.



PEOPLE v. MURGUIA.*

Cr. 3850.

Supreme Court of California

Sept. 4, 1935.

Rehearing Granted Oct. 4, 1935.

1. Homicide ☞308(1)

In murder prosecution, refusal of court to instruct jury that it should find defendant guilty of murder of first degree or should find him not guilty *held* not error, since, if evidence might have warranted verdict of murder of first degree, such verdict if rendered would have included murder of second degree or one of manslaughter.

2. Criminal law ☞351(3)

Immediate flight, in absence of any accusation, may afford persuasive evidence of consciousness of guilt.

3. Criminal law ☞778(11)

In murder prosecution, giving of instruction to jury on flight by one who has committed crime *held* not prejudicial to defendant who, after shooting deceased, had walked some 60 or 70 feet from where body of deceased lay.

4. Criminal law ☞763, 764(6)

In prosecution for murder, where death resulted from shooting, instruction embodying statutory provision that, in prosecution for commission of or attempt to commit felony against person of another, fact that assailant was armed with firearm in violation of statute should be prima facie evidence of intent to commit such felony, *held* not error, since statute was constitutional and instruction was not one with respect to matter of fact (St. 1923, p. 696, § 3; Const. art. 6, § 19).

5. Statutes ☞105(2)

Constitutional provision requiring subject of act of Legislature to be expressed in title must be liberally construed, and all that can be required to be contained therein to meet provision is reasonably intelligent reference to subject to which legislation is to be addressed (Const. art. 4, § 24).

6. Statutes ☞118(1)

Where purpose of statute as expressed in title was to control and regulate possession of firearms, provision that, in prosecution for commission of or attempt to commit felony against person of another, fact that assailant was armed with firearm in violation of statute should be prima facie evidence of intent to commit such felony, *held* not unconstitutional on ground that such provision did not fall within matters included in title (St. 1923, p. 696, § 3; Const. art. 4, § 24).

7. Constitutional law ☞266

Statute providing that, in prosecution for commission of or attempt to commit felony against person of another, fact that assailant was armed with firearm in violation of statute should be prima facie evidence of intent to commit such felony, *held* not unconstitutional on ground that it provided that certain facts should be conclusive proof of guilt, since defendant under statute was not precluded from establishing his innocence in opposition to statutory presumption (St. 1923, p. 696, § 3; Const. art. 1, § 13).

PRESTON, CURTIS, and LANGDON, JJ., dissenting.

In Bank.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Francisco Murguia was convicted of murder of the second degree, and he appeals.

Affirmed.

Prior opinion, 42 P.(2d) 325.

Gregory P. Maushart, of Los Baños, for appellant.

U. S. Webb, Atty. Gen., Ralph H. Cowing, Deputy Atty. Gen., and S. P. Galvin, Dist. Atty., of Merced, for the People.

WASTE, Chief Justice.

The defendant appeals from a judgment of conviction of murder of the second degree. It was admitted by the defendant and proved by the only eyewitness to the offense, that defendant killed the deceased, Martinez, by shooting him in the head. The defendant took the stand and testified that he and Martinez had been playing poker with some other Mexicans; the deceased and he got into a quarrel over the game, and Martinez cursed him and called him a vile name. The latter remonstrated, and Martinez invited him outside. They did not immediately go out, but did so after a short time; the appellant going first and Martinez following him. When they got outside, the defendant testified, the deceased started toward him with a knife; that he (the defendant) warned him not to come closer, and fired two shots from a revolver into the ground; that Martinez still advanced with a knife in his hand, whereupon he fired a third shot, this one at Martinez, hitting him in the temple. The defendant then started away from the scene, but was brought back unresistingly, by the only person who witnessed the shooting, and who, as a witness for the defense at the trial, corroborated the defendant's testimony.

[1] Little comment is necessary on appellant's contention that the evidence supports neither a verdict of second degree murder nor of any other offense. The exact contention was advanced and disapproved in *People v. Roselle*, 20 Cal. App. 420, 129 P. 477. The defendant was charged with murder. He shot and killed Martinez. The jury was at liberty to convict him of murder of the first degree, or to acquit him if it believed he was justified in taking the life of the deceased. In this case, it is evident that while the jury believed that the deceased may, in some degree, have been the aggressor, the defendant was not justified in killing him. Assuming that the evidence here might have warranted a verdict of murder of the first degree, such verdict, if rendered, would have included murder of the second degree, or one of manslaughter. *People v. Muhler*, 115 Cal. 303, 47 P. 128; *People v. McFarlane*, 138 Cal. 481, 71 P. 568, 72

P. 48, 61 L. R. A. 245; *People v. Coulter*, 145 Cal. 66, 78 P. 348. It was not error, therefore, for the court to refuse to instruct the jury that it should find the defendant guilty of murder of the first degree or should find him not guilty.

[2,3] Complaint is made by appellant that the trial court gave to the jury an instruction on flight by one who has committed a crime. The complaint has little merit. After shooting Martinez, the defendant had walked some sixty or seventy feet from where the body of the deceased lay when he was stopped and brought back to the spot by the man who had witnessed the shooting. While it is true the defendant had not gone far from the immediate scene of the crime, we are of the view that the case is well within the line of the decisions of this court in *People v. Erno*, 195 Cal. 272, 281, 232 P. 710, and *People v. Minamino*, 56 Cal. App. 386, 391, 205 P. 463. Immediate flight, in the absence of any accusation—in advance, perhaps, of the probability of an accusation, formal or informal—may afford persuasive evidence of a consciousness of guilt. See *People v. Erno*, *supra*. In this case, the defendant had killed the deceased. No other inference can be reasonably drawn from the record than that he knew he would be charged with the crime. The defendant was, therefore, not prejudiced by the giving of the instruction.

The defendant had no license or permit to carry a pistol, as is required by the act to control and regulate the possession of pistols, revolvers, and other firearms capable of being concealed upon the person. St. 1923, p. 695. The court charged the jury as follows: "You are instructed that section 3 of the act of the Legislature of the State of California entitled 'An Act to control and regulate the possession, sale and use of pistols, revolvers and other firearms capable of being concealed upon the person, etc.,' approved June 13, 1923, Statutes of 1923, p. 695, as amended, reads in part as follows: 'In the trial of a person charged with committing or attempting to commit a felony against the person of another, while armed with any of the weapons mentioned in Section One hereof, or while armed with any pistol, revolver, or other firearm capable of being concealed upon the person, without having a license or permit to carry such firearms as hereinafter provided, the fact

that he was so armed shall be prima facie evidence of his intent to commit such felony.' Therefore, if you find from the evidence that the defendant was at the time of the killing of the said Aristeo [Aristideo] Martinez armed with a pistol or revolver and did not have a license to carry such pistol or revolver, then, the fact that he was so armed and did not have such license is prima facie evidence that he intended to kill and murder the said Aristeo [Aristideo] Martinez."

[4-6] Appellant contends that the giving of this instruction was error, first, because it charges as to a question of fact, and is violative of the provision of the Constitution that "judges shall not charge juries with respect to matters of fact." Const. art. 6, § 19. We do not regard the instruction as one of fact. To the argument of respondent that the statute expressly permits the giving of such an instruction, appellant replies that the provision of the statute included in the instruction is unconstitutional as not falling within any of the matters included in the title of the act. Const. art. 4, § 24. It has been long settled that the constitutional provision requiring the subject of an act of the Legislature to be expressed in the title must be liberally construed, and that all that can be required to be contained therein to meet the provision is a reasonably intelligent reference to the subject to which the legislation is to be addressed. In *re Estate of Wellings*, 192 Cal. 506, 519, 221 P. 628. We deem further citation of authority on that point unnecessary. For a somewhat comprehensive discussion of the question and citation of authorities, see the cited case. When the purpose of the act to control and regulate the possession of firearms in this state (*supra*), as expressed in its entire title, is borne in mind, it must at once appear that the provision of the act relating to the evidence in trials of persons charged with committing felonies against the persons of others while armed with any of the proscribed weapons is logically germane to the title of the act, and is included within its scope.

[7] It is urged that, for another reason, the statute is unconstitutional. With that contention we do not agree. The argument against the constitutionality of the statute establishing the presumption rests upon the many cases which, in effect, hold that

a law which provides that certain facts are conclusive proof of guilt are unconstitutional, as are those laws which would make an act prima facie evidence of crime which has no relation to a criminal act, and no tendency whatever to establish a criminal act (Const. art. 1, § 13). Such an authority is *State v. Beach*, 147 Ind. 74, 43 N. E. 949, 46 N. E. 145, 146, 36 L. R. A. 179. The reason for this rule is that "in judicial investigations the law of the land requires an opportunity for a trial; and there can be no trial if only one party is suffered to produce his proofs." 2 Coolley's Constitutional Limitations (8th Ed.) (Carrington) pp. 768, 769. "If, however, the Legislature, in prescribing the rules of evidence in any class of cases (as, for instance, here, felonies against the person of another), leaves a party a fair opportunity to establish his case or defense, and give in evidence to the court or jury all the facts legitimately bearing on the issues in the cause to be considered and weighed by the tribunal trying the same, such acts of the Legislature are not unconstitutional." *State v. Beach*, supra. As was said by the Supreme Court of Ohio: "It may be conceded that, within proper constitutional limits, the Legislature has the general power to prescribe rules of evidence and methods of proof—to determine what may or may not be competent evidence in a particular case—and, with certain qualifications, has, perhaps, the power to enact and prescribe that in criminal prosecutions certain facts, when duly established, shall be held to be presumptive or prima facie evidence of guilt." *Hammond v. State*, 78 Ohio St. 15, 84 N. E. 416, 15 L. R. A. (N. S.) 906, 125 Am. St. Rep. 684, 14 Ann. Cas. 732. Mr. Justice Lurton, in the case of *Mobile, etc., R. Co., v. Turnipseed*, 219 U. S. 35, 42, 43, 31 S. Ct. 136, 137, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463, has this to say: "Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous."

If, in the present case, the presumption declared by the statute was made "conclusive," the objections to its constitutionality

would be sound. The "prima facie" presumption here involved does not in any way preclude defendant from establishing his innocence in opposition to it. The Legislature here has merely prescribed a rule of evidence in a class of cases, felonies against the person of another, and yet leaves the defendants in such cases a full and fair opportunity to establish their defense. In the case at bar, the defendant, by his own admissions, committed a voluntary homicide. Pen. Code, § 192, subd. 1. In committing the crime he used one of the weapons which, by the terms of the act, he was forbidden to carry without a license, which he did not have. We are of the view that the inference to be drawn from the fact that the defendant was in the unlawful possession of the revolver he carried at the time was not so unreasonable as to be a purely arbitrary mandate. The defendant accepted the challenge of the deceased to meet him outside the place where they were playing cards. He was the first to go out and, being in possession of the revolver, no doubt felt he was ready for the anticipated fray. It was therefore not error for the court to read to the jury the provision of the act relating to the intent of one charged with a felony against the person of another, under the circumstances of this case.

The judgment is affirmed.

We concur: SHENK, J.; SEAWELL, J.; THOMPSON, J.

PRESTON, Justice (dissenting).

I dissent. The evidence, technically speaking, makes a complete case of self-defense. But it is possible under the evidence as a whole to deduce the conclusion that on account of the intoxication of the deceased and the willingness of the defendant to go outside for the purpose of indulging in an affray with him, that there was no real necessity for the homicide. The men were friends and for three weeks had been living together. It is readily inferable from the transaction that whisky, on the part of both the deceased and the defendant, caused the tragedy.

The court instructed the jury as follows: "In the trial of a person charged with committing or attempting to commit a felony against the person of another,

while armed with any of the weapons mentioned, * * * or while armed with any pistol, revolver, or other firearms capable of being concealed upon the person, without having a license or permit to carry such firearms as hereinafter provided, the fact that he was so armed shall be prima facie evidence of his intent to commit such felony."

For several reasons the giving of this instruction was error and its prejudicial character is plain. Under it the jury were empowered, upon a mere statutory presumption, to find the defendant guilty not only of second degree but of first degree murder, when, under the evidence, the deceased and defendant were friends up to within a few moments before the shooting. When the defendant left his home with the gun, an assault upon the deceased could not have been in contemplation. The men were not only friendly when the gun was taken, but had actually gone to town together on this very day. Under these facts, it was a clear encroachment upon the province of the jury to authorize them to indulge said presumption of murder. Moreover, where the charge is murder in the first degree, requiring the presence of malice, deliberation, and premeditation, I cannot see how such an instruction can ever be properly given. Certainly it should not be given until evidence tending to prove these elements antedates the donning of the gun.

The title of the act from which the instruction was taken, so far as here material, reads: "An Act to control and regulate the possession, sale, and use of pistols, revolvers and other firearms capable of being concealed upon the person," etc. Clearly, there is therein no reference whatsoever to the creation of a rule of evidence as to crimes committed against the person while carrying a concealed weapon. Such a far-reaching rule, frustrating the time-honored quantum of evidence to complete the crime of murder in the first degree, could not be promulgated without a clear reference thereto in the title of the act.

I think a reversal is the proper order in this case.

We concur: CURTIS, J.; LANGDON, J.

In re GOLDEN'S ESTATE.

LINSTEAD v. STODDARD.

Sac. 4868.

Supreme Court of California.

Sept. 3, 1935.

Rehearing Denied Oct. 3, 1935.

1. Wills ⚭270

That citation of contest of will was not properly served on all heirs and that all parties interested were not before court did not divest court of jurisdiction to hear and determine contest between parties properly before it, although judgment would not be binding upon interested persons who were not properly served with citation until after lapse of six months after probate was granted, during which time validity of will could be contested (Probate Code, §§ 370, 380-382).

2. Wills ⚭270

Statutory requirement that citation of contest of will be served personally or by publication in manner provided by law for service of summons in civil actions was not met by service of citation of time and place of hearing of contest by mail (Probate Code, §§ 370, 380-382).

3. Evidence ⚭271(19), 318(2)

In proceeding to revoke probate of holographic will, proponent of will could prove receipt of letter from attorney in reply to his letter that he had holographic will of deceased, but could not prove contents of letter (Code Civ. Proc. § 2055).

4. Appeal and error ⚭1060(1)

Challenge of attorney to opposing litigant to call witness whom he knew to be intoxicated held not prejudicial misconduct.

5. Wills ⚭229

Public administrator is not such an "interested person" as would entitle him to contest will (Probate Code, §§ 370, 380).

[Ed. Note.—For other definitions of "Interest" see Words & Phrases.]

6. Wills ⚭229

Brother of deceased is such an "interested person" as is entitled to contest will (Probate Code, §§ 370, 380).

7. Wills ⚭269

That deceased's brother living 2,000 miles away had 18 days' notice of petition to probate will did not preclude him from contesting will after it had been admitted to probate, since notice under circumstances did not as matter of law give sufficient time to contest original probate (Probate Code, § 380).

8. Wills ⚡423

That public administrator contested probate of will did not preclude brother of deceased from subsequently contesting will, because contest by public administrator was not valid contest, so that, in proceeding by brother to contest, refusal to submit special issues as to whether brother had actual knowledge of previous contest was proper (Probate Code, § 380).

9. Wills ⚡423

Order admitting will to probate was not res judicata so as to bind brother and preclude him from maintaining subsequent petition to revoke probate, where there had been no valid previous contest of will (Probate Code, § 380).

10. Appeal and error ⚡259

Exception to improper remark by trial judge during trial of action must be made when remark is made or before close of trial to avail party claiming injury thereby, except where it is apparent that it would be fruitless on part of injured party to apply to court to rectify wrong committed by improper remark.

11. Appeal and error ⚡201(2)

Litigant who fails to object to trial judge's improper remark when remark is made or before close of trial waives right to thereafter except to improper remark.

12. Wills ⚡320

In proceeding to revoke probate of holographic will on ground will was forgery, trial judge's questioning of handwriting expert as to suspicious circumstances and cautious writing of certain documents and his questioning of counsel as to contention that certain documents were part of fraudulent scheme and were forgery held not to create inference unfavorable to proponent of holographic will.

13. Wills ⚡324(14)

In proceeding to revoke probate of holographic will on ground will was forgery, evidence held for jury.

14. Appeal and error ⚡1002

Where there is substantial conflict in evidence, verdict of jury must be upheld.

In Bank.

Appeal from Superior Court, Mendocino County; Hilliard Comstock, Judge.

Petition by W. J. Linstead to revoke probate of holographic will of George Golden, deceased, opposed by E. T. Stod-

dard. From a judgment denying probate, E. T. Stoddard appeals.

Affirmed.

Prior opinion, 37 P.(2d) 106.

Taft & Spurr, of Ukiah, for appellant.

Hale McCowen, Jr., of Ukiah, for respondent.

CURTIS, Justice.

The following portion of the opinion of the District Court of Appeal rendered in this action we approve and adopt as a part of our opinion:

This is an appeal from a judgment rendered pursuant to the special findings of a jury setting aside a previous order admitting a holographic will to probate, on the ground that the alleged will is a forgery.

George Golden, whose real name was George Linstead, died in Mendocino county February 29, 1932, possessed of real and personal property valued at about \$25,000. His wife died long prior to the execution of the holographic will which is here involved. He left no heirs except three brothers, who reside in Montana, one of whom is the contestant herein, and Margaret Hauser, a niece, who lives in San Francisco. Golden left the East many years ago with another man's wife, and changed his name on that account. He had been a resident of Fort Bragg and was prominent in business and politics in Mendocino county for more than thirty-five years. E. T. Stoddard was also a resident of Fort Bragg and was prominent in that community in business and politics during that period of time. He was successively a contractor, the manager of a stage route and of a gas station on the Redwood highway. He possessed a good reputation and was a close personal friend of Golden for thirty-five years prior to the death of the testator. In September, 1931, after the death of his wife, Mr. Golden suffered a stroke of paralysis and was afflicted with diabetes. He told Joseph Olinsky, a friend of his, in the summer of 1931, that "he had some brothers in Montana and a niece somewhere about the Bay there, but he had been out of touch with them for a good many years, and they meant nothing to him; that was after his wife had died. And, he said he did

not expect to leave his relatives anything. That he had some good friends, Dave Miller and Ed Stoddard, and that he would leave his property to them." Stoddard was in communication with his friend Golden up to within six months of his death. Stoddard testified that he drove in his automobile to the Piercy post office, about four miles from his gas station, on January 20, 1932, where he received by mail the will and a letter from Golden, which he examined and "put them in a leather pouch in which I carry my mail and placed them in the front seat of my automobile." He also claimed to have received another typewritten letter from Golden, which he carried into his gas station and placed on the cash register, but afterwards destroyed it. This was before the death of Golden. When he afterwards looked for the will and accompanying letter from Golden, he failed to find them. He searched in vain for them, and concluded he must have lost them. He did not tell his wife about the lost will until about March 3, 1932, after he learned of the death of Golden. The holographic will and accompanying letter purport to be in the handwriting of Golden, and are in the following language:

"Nov. 27th, 1931.

"For and in consideration of the friendship and friendly love for E. T. Stoddard and for other considerations that has existed for the last twenty five years it is my last will to give and grant unto E. T. Stoddard one half of my estate at the time of my death any thing it may consist of at that time.

"Geo. Golden."

"Fort Bragg, Cal. 1/18/32.

"Mr. Ed. Stoddard, Piercy, Cal.

"Dear Ed. Pleased to hear you are in good health. My sick spell hangs on like the devil and dont get any better. No didnt expect you over as it has been raining all the time cold as the mischief. Now Eddie inclosed find document for you and should any thing happen to me you will have same.

"Wishing you all the best of good luck let me hear from you.

"Geo. Golden."

The preceding letter is not included in the bill of exceptions. Soon after the death of Mr. Golden, Austin Smith was riding in May, 1932, with Mr. Stoddard in his automobile when they were forced to

stop because of a flat tire. He testified that he lifted the cushion of the front seat to procure some tools with which to repair the flat tire, when a mouse jumped out. He said: "I rummaged around for the pump and got it out and while I was pumping up the tire a mouse ran out of the car. When Ed came over there I said 'Ed, do you know there are mice in your car? I saw one run out.' Then he went to looking in the car and pulled out the front cushion, and a leather pouch fell out and the contents came out and fell to the ground. I started to pick them up and handed him an envelope. He said, 'That's the thing I have been looking for for some-time.' He opened it up and I looked at it. It was a will signed by George Golden and a letter. I identify Exhibits 10 and 11 as being the same documents. We went over to the store and I got a sandwich and was eating the same at the counter and looking at the will."

Mr. Golden died February 29, 1932. Stoddard did not learn of his death until March 3d. He searched for the will, but did not find it, as above related, until the following May. In the meantime he told his wife of the lost will and also informed Leonard Stone, an attorney at Fort Bragg, of that fact. There is substantially no conflict of evidence regarding the foregoing facts, except the circumstances which will be hereafter related.

Upon petition therefor, the public administrator of Mendocino county was appointed and qualified as administrator of the estate of George Golden, deceased. After the discovery of the will, it was filed May 9, 1932. On petition of E. T. Stoddard, it was admitted to probate May 27, 1932, and Margaret L. Hauser, the niece of deceased, was appointed and qualified as administratrix with the will annexed of the estate of George Golden, deceased. October 10, 1932, W. J. Linstead, of Montana, a brother of the deceased, filed a petition to revoke the probate of the holographic will on the sole ground that the document is not in the handwriting of the deceased. An answer to this petition was filed by the legatee, E. T. Stoddard. The cause was tried with a jury. Special issues were submitted to the jury, which found that the purported will dated November 27, 1931, was neither written, dated, nor signed by the hand of George Golden. A general verdict was also returned in favor of the plaintiff.

Pursuant to the special findings and general verdict of the jury, the court rendered judgment February 2, 1933, revoking the letters of administration theretofore issued to Margaret Hauser, and denying probate of the will. From this judgment E. T. Stoddard has appealed.

It is contended the probate court was without jurisdiction to hear or determine the petition to revoke the probate of the will, for the reason that all of the persons interested in the estate were not parties to the contest; that the former order of court made on May 27, 1932, admitting the will to probate, is *res judicata* for the reason that the petitioner, W. J. Linstead, had full knowledge of that proceeding; that the judgment is not supported by the evidence; that the trial judge and counsel for the petitioner in this proceeding were guilty of prejudicial misconduct; and that the court erred in rejecting competent evidence.

[1,2] The court properly denied the appellant's motion to dismiss the petition to revoke the probate of the will. This motion was made on the ground that the court was without jurisdiction to hear and determine the contest of the will for the reason that the citation had not been served upon all heirs of the deceased, as required by sections 381 and 382 of the Probate Code, and that the interested parties were not all represented in the proceedings. It is true that the citation of the time and place of hearing the contest was served upon the brothers of the deceased who reside in Montana only by mail. This does not conform to the requirements of section 370 of the Probate Code, which directs the citation to be served "personally or by publication in the manner provided by law for the service of summons in civil actions." Two of the brothers of the deceased failed to appear in the contest of will. Personal service was made on the sole devisee of the will, Stoddard, and upon Margaret Hauser, the administratrix with the will annexed. The petition to revoke the probate was filed and prosecuted by W. J. Linstead, one of the brothers of the deceased. The proponent of the will might have moved to continue the contest until other proper parties were brought into the proceeding. Other heirs and interested parties are, however, precluded from contesting the will under the provisions of section 380 of the Probate Code for failure to file

their petitions to revoke the probate within six months after the will was admitted to probate.

This defect of service of the citation did not divest the court of jurisdiction to hear and determine the contest between the parties who were properly before the court.

It has been held that "the trial court was without jurisdiction to proceed with a hearing of the contest for the reason that the citation mentioned in sections 1328 and 1329 [now sections 381 and 382, Probate Code] of the Code of Civil Procedure was not served upon all the legatees under the will." *In re Estate of Visaxis*, 95 Cal. App. 617, 273 P. 165, 167. In the case last cited the court further says: "We can see no reason why a will contest should not proceed as between the contestant and those upon whom the citation is served. It is settled that jurisdiction over a will contest attaches upon the filing of the petition. *In re Estate of Maescher*, 78 Cal. App. 189, 248 P. 537."

A petition for hearing in that case was denied by the Supreme Court. It follows that the trial court had jurisdiction in the present proceeding to hear and determine the petition to revoke the probate of the will, between the parties who appeared in court, in spite of the fact that all of the parties interested therein were not before the court, although the judgment would not be binding upon such heirs or interested persons who were not properly served with citation until after the lapse of six months after probate was granted, during which time they were permitted to contest the validity of the will.

[3] The court did not err in sustaining the respondent's objection to an offer on the part of the appellant to rehabilitate the testimony of Mr. Stoddard with respect to a statement that he had written Attorney Leonard Stone a letter telling him that he had an holographic will which was executed by George Golden. While Stoddard was being examined by the respondent under the provisions of section 2055 of the Code of Civil Procedure, he was asked if he had ever told any one, other than his wife, that he had the holographic will of Golden. Stoddard replied that he had written Attorney Stone to that effect. He was then asked if Stone had replied to that letter. Stoddard said that Stone had written to him, but that he had

destroyed his letter. Subsequently, when Leonard Stone became a witness in behalf of the appellant, he was asked if he had received a letter from Mr. Stoddard regarding the will. An objection to this question on the ground that it was incompetent, hearsay, and self-serving, was sustained, for the reason that the appellant sought to prove the contents of the letter, rather than the mere fact that Stone had received such a letter. Mr. McCowen, attorney for contestant, said: "If all you want to prove by this witness is the receipt of a letter from Mr. Stoddard, our objection will be withdrawn." Attorney Taft replied, "We expect to prove the contents of that letter." It is therefore clear that the objection was sustained on the theory that the appellant sought to prove the contents of the letter rather than the mere receipt thereof. That would have been self-serving and hearsay evidence. He did have a right to prove that Stone received a letter from him concerning the will. *Davis v. Tanner*, 88 Cal. App. 67, 262 P. 1106. But that privilege was not denied him. The court correctly ruled that the appellant was not entitled to prove the contents of the letter.

[4] We are unable to say that the challenge of the attorney for contestant to the appellant to call a witness whom he knew to be intoxicated was prejudicial misconduct. The witness was called and examined, and his evidence was favorable to the appellant. If his evidence was discredited because of his intoxicated condition, the record fails to disclose that fact.

We are of the opinion the court properly denied the appellant's motion to dismiss the petition of W. J. Linstead to revoke the former order admitting the will to probate. The motion was made on the ground that the brother was precluded from maintaining the proceeding under the provisions of section 380 of the Probate Code because he had actual knowledge of Stoddard's petition to probate the will a short time after it was filed. Section 380 of the Probate Code provides: "When a will has been admitted to probate, any interested person, other than a party to a contest before probate and other than a person who had actual notice of such previous contest in time to have joined therein, may, at any time within six months after such probate, contest the same or the validity of the will."

[5] The will was filed May 9, 1932. The petition to probate it was filed by Stoddard on the same day. The original contest to the probating of the will was filed May 23, 1932, by the public administrator. The public administrator was not such an "interested person" as would entitle him under the provisions of sections 370 or 380 of the Probate Code to contest the will. In *re Estate of Sanborn*, Deceased, 98 Cal. 103, 32 P. 865, 866. In the case last cited it is said: "A public administrator has no interest in an estate, or in the probate of a will. That is a matter which concerns only those to whom the estate would otherwise go."

[6, 7] W. J. Linstead is a brother of the deceased, and is therefore interested in the estate so as to entitle him to maintain a contest to the will or a petition to revoke the probate thereof after it had been admitted, pursuant to the provisions of section 380 of the Probate Code. He lives in Montana. He did not know of the petition to probate the will until after May 9th, when it was filed. It was actually admitted to probate eighteen days later, on May 27th. In the absence of evidence to the contrary, we are unable to say, as a matter of law, that eighteen days' notice to one who lives 2,000 miles away in Montana is sufficient time to have enabled him "to join therein." There is no evidence that Linstead knew when the petition for probate of the will would be heard. Moreover, since the public administrator was not entitled to maintain a contest to the will, it may not be said there was a valid contest of the will which would preclude Linstead under section 380 of the Probate Code from subsequently petitioning the court to revoke the probate thereof.

[8] For the reason that there was no valid contest of the will by the public administrator which would preclude Linstead from maintaining a subsequent contest thereof under section 380 of the Probate Code, the court properly refused to submit to the jury the special issue which was proposed by the appellant in the following language: "Did W. J. Linstead have actual knowledge of the probate of the will on May 27th, 1932, and the contest raised by the pleadings filed by E. T. Stoddard, W. F. Ornbaum and Margaret Holt Hauser?" Margaret Hauser was not a contestant of the will. She

was a proponent of the will, and merely asked that she be appointed administratrix with the will annexed in the event that the will was admitted to probate.

[9] For the reasons heretofore assigned, the order admitting the will to probate on May 27, 1932, was not *res judicata* so as to bind W. J. Linstead thereby and preclude him from maintaining a subsequent petition to revoke the probate of the will under the provisions of section 380 of the Probate Code.

Appellant assigns as reversible error certain questions asked and statements made by the trial judge during the course of the trial. On one occasion counsel for respondent was examining Stoddard, the appellant, under the provisions of section 2055 of the Code of Civil Procedure in reference to the contents of the typewritten letter which he stated he had received from the deceased and had placed upon the cash register. The witness stated he did not recall the letter's contents except that it contained "some things which had happened between" himself and Golden which the deceased wanted to be kept secret. His attention was then called to an alleged discrepancy between that statement and a former one contained in a printed transcript. Respondent's counsel contended that a comparison of the statements of the witness was important because Stoddard said that Golden "sends him two letters reaching him at the same time and he destroys one and, according to this testimony, one set of facts exists at the former hearing, and we now maintain he is testifying to some other thing different." The following colloquy between court and counsel then ensued:

"The Court: You contend, Mr. McCowen, of course, that this will and the letter which accompanied it, and the envelope in which it was received, were all a part of the fraudulent scheme, and were all a part of one forgery, do you not?"

"Mr. McCowen: Yes, Your Honor.

"The Court: And consequently, the basis of that contention must be that either the witness Stoddard mailed it to himself during the illness of Mr. Golden, or had a confederate mail it to him, and that the letter which was received at the same time would contain absolutely inconsistent material?"

"Mr. McCowen: Yes, Your Honor.

"The Court: And [the typewritten letter] was one of the true authorship of George Golden. Well, I think the destruction of that letter, under the theory counsel is proceeding under, the destruction of it and all circumstances connected with the destruction of it, including inconsistencies as to the destruction of it, are material."

On another occasion, while the appellant's handwriting expert, Chauncey McGovern, was on the witness stand endeavoring to support his opinion that the will was genuine by a comparison of the handwriting contained in the will and certain exemplars of the deceased's writing, the court interrupted the cross-examination of this witness in the following manner:

"The Court: Before you leave the subject of that 'G'; when you find in a questioned document a number of 'G's' occurring in the middle and all finished with a straight down stroke and no loop, and you find in the admitted documents the 'G' finished with a loop in all cases, except where it is a double 'G' in the words 'Fort Bragg', does that not convey to you some suspicion of the genuineness of the suspected document?"

"A. Yes, if that's the only thing I observed, but when I observed that and observed many other things on the other side—

"The Court: But it does convey to you a suspicious circumstance which has been overcome by a preponderance of other facts?"

On further cross-examination of this witness, counsel for respondent was asking if it were not a suspicious fact that a penman varied from his usual habit in making a capital "E." To this question the witness was explaining that the variance in forming letters might be due to the writer's haste, in one instance, and to his cautious or more deliberate acts another time. The court interrupted his examination at this point by saying: "Well, do I understand you to say that the questioned documents, in your opinion, were written cautiously?"

[10-12] No objection was made by counsel to any of these questions or statements by the court at the time they were made or at any time during the trial of the action. Neither was any motion or other action made by counsel for appellant to strike out any of these questions or state-

ments, nor was any request at any time made of the court to instruct the jury to disregard the same. It has repeatedly been held that any exception to an improper remark made by a trial judge during the trial of an action in order to avail the party claiming injury thereby must have been taken by such party at the time the remark was made or at some time thereafter before the close of the trial. *Hughes v. Hartman*, 206 Cal. 199, 206, 273 P. 560; *Loeb v. Kimmerle*, 215 Cal. 143, 154, 9 P.(2d) 199; *Price v. Northern Electric Ry. Co.*, 168 Cal. 173, 182, 142 P. 91; *Compton-Gardena Milling Co. v. McCartney*, 69 Cal. App. 708, 231 P. 764; and *Franceschi v. Nardi*, 77 Cal. App. 78, 246 P. 130. This is the rule even in criminal cases. *People v. MacDonald*, 167 Cal. 545, 550, 140 P. 256. The reason of this rule as stated in these cases is that if the attention of the trial court is directed to the improper statement, an opportunity is thus given the court by proper instructions to the jury, or otherwise, to cure any injury occasioned by such remark. And it is further held that in the absence of such action on the part of the complaining party he is held to have waived any right to except to the improper remark or action of the court. It is equally well established that in cases where it is apparent that it would be fruitless on the part of the injured party to apply to the trial court to rectify the wrong committed by the improper remark, no duty rests upon him to make any effort to correct the error. However, we do not regard the instant case as coming within this exception to the general rule. A reading of the record in this case does not justify the slightest inference that the trial judge in this action would not have responded to any reasonable request on appellant's part, either to withdraw any objectionable remark or to instruct the jury to disregard the same. From what we have said we do not wish to be understood as holding that the questions of the trial judge, or any remark made by him, were prejudicial to the rights of appellant, or in any way deprived him of the right to a fair trial. Counsel for appellant apparently did not regard the questions asked, nor any of the statements made by the trial judge detrimental to his client's cause at the time they were asked or made, as he offered no complaint to or even request for the court to instruct the jury to disregard them. In our opinion, no inference un-

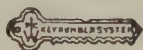
favorable to the appellant could reasonably be drawn from said questions as asked by the court, or from any of the statements complained of.

[13, 14] The further contention is made by the appellant that the evidence in this case so greatly preponderates in his favor as to virtually present a case where the evidence is without conflict. It is true there is ample evidence in the case which would have supported a verdict in appellant's favor, had such a verdict been rendered by the jury. We are not prepared to say, however, that the preponderance of the evidence is in favor of appellant, although we must admit that there is considerable apparently credible evidence in his favor. A number of substantial and creditable witnesses who had known Golden for years and were familiar with his handwriting testified that the instrument claimed by appellant to be the last will of Golden was in the handwriting of Golden. Among these witnesses was the president of the bank at Fort Bragg, who was so positive that the signature to this instrument was the genuine signature of Golden that he said he would not hesitate to have cashed a \$5,000 check on such signature. Other witnesses were equally positive, including a handwriting expert who had made a study of the document offered as the will of the deceased, as well as of exemplars of the deceased's signature, and pronounced the document genuine. On the other hand, a handwriting expert equally well qualified as the one testifying in appellant's favor gave as his opinion, after devoting time and study to the question, that the purported will was a forgery. Hundreds of exemplars of Golden's true signature were admitted in evidence and submitted to the jury and the trial judge, along with the disputed document. There were also circumstances shown by the evidence which are claimed to have thrown doubt upon the claim of appellant. The manner in which he received the purported will and his claim that he had lost it and did not find it until some two months after the death of Golden presents a most unusual story. By the will, if genuine, he would come into the possession of some \$10,000 on Golden's death, a considerable sum of money to one in appellant's financial circumstances. He did not even tell his wife, with whom he was living on friendly terms, of their prospective good fortune. Even after Golden's death, when

he was making an intensive search for the document, he did not tell his wife—the one person perhaps more than any other who could have assisted him in his search—until over a month after Golden's death that he had lost the will or ask for her assistance in finding it.

Confronted with this state of the evidence, can this court say that there is no substantial evidence to support the verdict of the jury? The answer must be in the negative. The case then upon this point is governed by the well-established and often-reiterated rule that where there is a substantial conflict in the evidence, the verdict of the jury must be upheld. We see no escape from this conclusion. The judgment therefore is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.



9 Cal.App.2d 205

ANDERSON et al. v. CITY RY. CO. et al.
Civ. 10279.

District Court of Appeal, Second District,
Division 2, California.

Sept. 19, 1935.

1. Attorney and client ☞64

Where attorney who was not plaintiffs' attorney of record joined in stipulation on behalf of plaintiffs, tried case for plaintiffs in presence of and without objection from them, appeared for plaintiffs in opposition to motion for new trial without objection, acted for plaintiffs in every subsequent step taken in their behalf, and had been specifically described by plaintiffs in writing as their attorney, court and defendants were entitled to assume that such attorney was attorney for plaintiffs and authorized to act in their behalf at hearing on motion for new trial.

2. Evidence ☞21

Court takes judicial notice of general custom for attorneys to employ other attorneys to assist in legal work and to appear in court without employed attorneys being made attorneys of record in case.

3. Attorney and client ☞75(1)

Statutory notice to adverse party when attorney of record is changed in case is for

protection of adverse party and may be waived by him (Code Civ. Proc. § 285).

4. Attorney and client ☞75(1)

Party effecting change in attorneys of record in case cannot object to his own failure to give statutory notice to adverse party (Code Civ. Proc. § 285).

5. Appearance ☞20

Statutory notice of hearing on motion for new trial was waived by appearance of attorney for plaintiffs who was authorized to appear for them and bind them in case (Code Civ. Proc. § 661).

Appeal from Superior Court, Los Angeles County; Benjamin F. Bledsoe, Judge pro tem.

Action by Mabel P. Anderson and another against the City Railway Company and others. From an order granting defendants' motion for a new trial, plaintiffs appeal.

Order affirmed.

L. J. Styskal, of Los Angeles, for appellants.

Gibson, Dunn & Crutcher (by Philip C. Sterry), of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This appeal is from an order granting defendants' motion for a new trial and is based upon the primary contention that a certain Mr. Doody was not the attorney of the plaintiffs authorized to appear for and bind the plaintiffs upon the hearing of said motion. At the calling of the case for trial, Mr. Doody appeared with Mr. Tapley on behalf of the plaintiffs and joined Mr. Tapley in a written stipulation on behalf of the plaintiffs for a judge pro tempore to preside at the trial. Thereupon Mr. Doody proceeded in the presence of the plaintiffs and without objection from them to try the case for the plaintiffs entirely alone. Judgment went for the plaintiffs. Thereafter the defendants made said motion for a new trial. At the hearing of this motion Mr. Doody appeared for the plaintiffs and argued and briefed the plaintiffs' opposition to the motion, without objection either from Mr. Tapley or the plaintiffs, and acted for the plaintiffs in every subsequent step taken in their behalf, including the filing of his affidavit that he was "one of the attorneys of record for plaintiffs" as a basis for procuring for

them an extension of time for settlement of the transcript on appeal (subsequently abandoned) from the order granting a new trial, signed said notice of appeal in conjunction with Mr. Tapley as "attorneys for plaintiffs," and was specifically described by plaintiffs in writing as "attorney for plaintiff" when L. J. Styskal was subsequently substituted as attorney in place of Mr. Doody and Mr. Tapley. The plaintiffs now contend that Mr. Doody was not technically an "attorney of record" and that they are not bound by his appearance for them at the hearing on the motion for a new trial.

[1-4] It will be observed that the merits of the order granting a new trial are not attacked on this appeal. It is our decision that under the above set of facts the court and the defendants were entitled to assume that Mr. Doody was attorney for the plaintiffs and authorized to act in their behalf. *Pacific Paving Co. v. Vizelich*, 141 Cal. 4, 74 P. 352. As said in the case of *Raskin v. Superior Court*, 138 Cal. App. 668, 33 P. (2d) 35, 36: "We will take judicial notice of the fact that in California it is, and for a long time has been, a general custom sanctioned by recognition of the courts for attorneys at law singly and by firms to employ attorneys at law to assist in legal work placed in their care, including appearances in court without the formality of being made attorneys of record." While section 285 of the Code of Civil Procedure provides that when an attorney is changed, written notice must also be given to the adverse party, such notice is for the protection of the adverse party and may be waived by him. *Livermore v. Webb*, 56 Cal. 489. The party effecting the change cannot object to his own failure to give notice.

[5] In line with the above contention, the plaintiffs' first ground of appeal is that the court erred in making the order granting a new trial for the reason that the notice of hearing of said motion was not served on plaintiffs in accordance with section 661 of the Code of Civil Procedure. The answer is that Mr. Doody, the attorney for the plaintiffs, authorized to appear for them and bind them, appeared for the plaintiffs at the hearing of the motion for a new trial and the plaintiffs by so appearing waived notice of the hearing. *Hammond Lumber Co. v. Bloodgood*, 101 Cal. App. 561, 281 P. 1101; *Morel v. Mor-*

el, 203 Cal. 417, 264 P. 760; *Acocck v. Halsey*, 90 Cal. 215, 27 P. 193.

The plaintiffs next contend that the court erred in hearing the motion for a new trial on the 13th day of October or any day other than October 27th, the date which had been given by mail by the clerk of the court in accordance with section 661 of the Code of Civil Procedure. But, as already stated, the notice of the hearing was waived.

It is the plaintiffs' last contention that the court erred in making the order for the reason that no proof of service of the notice of intention to move for a new trial was of record at the time the hearing of such motion was held. But this contention likewise is fully covered by what we have already said. The appeal is without merit.

Order affirmed.

We concur: WOOD, J.; FRICKE, Justice pro tem.



9 Cal.App.2d 197

PEOPLE v. BERKELEY.

Cr. 312.

District Court of Appeal, Fourth District,
California.

Sept. 16, 1935.

1. Criminal law ☞1159(3)

Determination of jury on conflict in testimony of different witnesses introduced by same side is as conclusive on reviewing court as if conflict existed in testimony of witnesses called by opposing sides of controversy.

2. Criminal law ☞1159(2)

Question of weight of evidence is solely for jury and its determination on such question is conclusive on appeal.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Robert Berkeley was convicted of first degree robbery, and he appeals.

Affirmed.

Roger E. Johnson, of Whittier, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

JENNINGS, Justice.

The defendant was accused by information of the crime of first-degree robbery. Upon arraignment he pleaded not guilty to the charge and was tried before a jury which returned a verdict finding him guilty of the offense. A motion by the defendant for a new trial was made and denied. Judgment was thereupon pronounced whereby it was ordered that he be punished by confinement in the state prison. This appeal is taken from the judgment of conviction.

[1,2] Appellant contends that the verdict of conviction upon which the judgment is based is lacking in evidentiary support. Appellant concedes that the rule is well settled that, in a criminal action, the verdict of a jury which is based on conflicting evidence may not be disturbed by an appellate court. He also concedes that the evidence produced during the trial of this action was conflicting. These concessions which are fully justified by the law and by the transcript herein would appear to demand affirmance of the judgment. It is, however, insisted that the evidence produced by the prosecution was so conflicting that its practical effect was to substantiate appellant's defense of an "alibi."

The contention is entirely lacking in merit. The same argument was unsuccessfully urged in the following cases: *People v. Matezusi*, 11 Cal. App. 465, 105 P. 425; *People v. Metzler*, 21 Cal. App. 80, 130 P. 1192; *People v. Hoosier*, 24 Cal. App. 746, 142 P. 514. It was observed in the last of the above-cited decisions that the effect of a disagreement in the testimony of different witnesses introduced by the same side is simply that a conflict in the evidence is thereby created and that the determination of a jury upon such conflict is as conclusive upon a reviewing court as if the conflict existed in the testimony of witnesses called by the opposing sides of the controversy. Appellant's contention that the effect of the conflict in the testimony of certain witnesses called by the prosecution was to support his defense of "alibi" is a contention which relates solely to the weight of evidence admittedly conflicting. It is too well settled to require

the citation of additional authorities that the question of the weight of evidence is one solely for the jury and its determination of the question is conclusive on appeal.

The judgment is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.



9 Cal.App.2d 220

REDMOND et ux. v. ALLEY et al.

Civ. 10328.

District Court of Appeal, Second District,
Division 2, California.

Sept. 19, 1935.

1. New trial ⇐72

In action for death of party struck by automobile while about to push stalled automobile to curb, action of trial court in granting new trial because verdict for defendant was against weight of evidence held not abuse of discretion.

2. New trial ⇐72

Where verdict appears to trial court to be against weight of evidence, it is trial court's duty to set verdict aside on motion for new trial.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Harry Redmond and wife against Thelma Cortez Alley and another. From an order granting a new trial, the defendants appeal.

Order affirmed.

Sybil S. Tipton and Elmer E. Sawyer, both of Los Angeles, for appellants.

Freston & Files and Ralph E. Lewis, all of Los Angeles, for respondents.

FRICKE, Justice pro tem.

Appeal from order granting a new trial.

William J. Redmond, son of respondents, was riding in the automobile of Mary E. McCardle. About 1:30 a. m. on May 26, 1934, on Melrose avenue near North McCadden place, in the city of Los Angeles, the car appeared to have run out

of gasoline and the deceased got out and was about to push the car so it could be moved to the curb, when he was struck by an automobile driven by appellant Alley, causing fatal injuries.

[1] Appellants concede for the purposes of this appeal that Miss Alley was guilty of negligence, but deny that such negligence was a proximate cause of the death of deceased, and contend that deceased was guilty of contributory negligence. The evidence upon which appellants claim that the jury was justified in finding that there was contributory negligence consists of the testimony of one John C. Quinn that he drove past the stalled car; that he saw the deceased standing at the side of the car; that as he, Quinn, approached, deceased stepped back toward the rear of the car and held up his hand as if to hail him, but that he did not stop; and that shortly thereafter he heard a crash and went back. Miss McArdle testified that the deceased was about to push the car when the crash occurred. The only other eyewitness to the actual collision was appellant Alley, who testified that she did not see the deceased until her car was upon him and that when she saw him he was at the side of the automobile. In the light of this evidence and the attendant circumstances, which we do not consider necessary to set forth, tending to prove that the negligence of Miss Alley was the proximate cause of the death of William J. Redmond, and in view of the conflict of the evidence on the question of contributory negligence on the part of the deceased, we would not hold on appeal that the trial court abused its discretion in setting aside the verdict as against the weight of the evidence.

Appellants also contend that there is no evidence on the issue of liability of appellant Vogel. The latter testified that at 9 o'clock on Thursday, May 24, 1934, Miss Alley, who had been with him during the evening, left him driving his car with his consent, and that on Friday afternoon he

telephoned and told her to bring the car to him at his brother's house at about a quarter to 9; that she did not appear there at that time; and that he later telephoned her to bring the car over right away, but that she did not bring it and he did not see the car until after the accident. He also testified that Miss Alley was working for different studios and that he loaned her the car to get around and secure employment. At 1 o'clock, about half an hour before the accident, Miss Alley telephoned Mr. Vogel and he told her to return the car, and she was on her way to his home to return the car when the accident occurred. In other words, at the time of the accident Miss Alley was driving the car not only with his permission but at his request. The fact that she had not returned the car on previous requests is immaterial.

It does not, however, necessarily follow that the jury in returning its verdict in favor of Miss Alley and Mr. Vogel based their decision upon a lack of permission on his part to her operation of the automobile. It is more reasonable to believe that having found in favor of Miss Alley they found also in favor of Mr. Vogel, since no liability could attach to him if the actual driver was not liable.

[2] Where the verdict appears to the trial court to be against the weight of the evidence, it is not only within its discretion, but it is its duty to set the verdict aside on motion for a new trial. *Lewis v. Southern California Edison Co.*, 116 Cal. App. 44, 53, 2 P.(2d) 419, and cases cited; *Wulbern v. Gilroy Express*, 116 Cal. App. 222, 225, 2 P.(2d) 508; *Malloy v. Hughes*, 125 Cal. App. 573, 580, 13 P.(2d) 1062; *Chorn v. Pacific Gas, etc., Co.*, 135 Cal. App. 195, 199, 26 P.(2d) 726.

The order granting a new trial is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

PEOPLE v. COLTRIN. *

Cr. 311.

District Court of Appeal, Fourth District,
California.

Aug. 16, 1935.

Hearing Granted by Supreme Court Sept.
12, 1935.

1. Abortion ⇨11

Homicide ⇨254

Evidence *held* to sustain conviction of murder in the second degree and abortion.

2. Abortion ⇨9

Homicide ⇨156(1)

In prosecution for murder and abortion, prosecution had burden of proving that certain acts had been done resulting in abortion, and that these acts were performed with intention of causing abortion.

3. Criminal law ⇨371(1)

Where offense is of such nature that proof of act with which defendant is charged is not in itself proof of the required criminal intent, evidence of other offenses of similar nature committed by defendant is admissible for purpose of proving intent.

4. Criminal law ⇨371(4), 680(1)

In prosecution for murder and abortion, admission of testimony during main case for prosecution of two witnesses who testified that defendant had performed abortion on them *held* not prejudicial error, since prosecution must prove intent with which act was done, and order of proof is largely in discretion of trial court.

5. Criminal law ⇨783(1)

Instruction regarding purpose of testimony of commission of abortions by defendant other than that of which he was charged, stating that such testimony was introduced to corroborate evidence tending to support alleged offense for which defendant was on trial by showing defendant's intent and motive *held* not reversible error (Const. art. 6, § 4½).

6. Criminal law ⇨406(1)

In prosecution for murder and abortion, admission of evidence that defendant on being asked to come to district attorney's office in regard to abortion inquired "Which one?" *held* not reversible error, since statement was in nature of admission.

7. Criminal law ⇨404(1)

In prosecution for murder and abortion, admission of uterus of deceased *held* admissible to prove absence of laceration thereon which defendant had testified was present at time of his examination.

8. Abortion ⇨10

Homicide ⇨203(5)

In prosecution for murder and abortion, statement made by deceased shortly before death *held* not admissible as dying declaration where deceased at time stated that she thought she was going to get well.

9. Abortion ⇨9

Homicide ⇨171(4)

In prosecution for murder and abortion, statement made by deceased before her death that she had taken medicine more than week before visiting defendant *held* not admissible as showing that deceased was not pregnant at time of visit.

10. Criminal law ⇨863(1)

In prosecution for murder and abortion, where jury returned to courtroom after case had been submitted to them and juror inquired as to relationship between counts, statement of court that if jury believed evidence introduced by people to moral certainty and beyond reasonable doubt, that evidence would support indictments on both counts *held* not reversible error, notwithstanding constitutional provision that judges should not charge jury with respect to matters of fact (Const. art. 6, § 19).

11. Criminal law ⇨200(1)

In prosecution for murder and abortion, where judgment of guilty was first pronounced on abortion charge and then on murder charge, order in which verdicts were read *held* immaterial in determining whether defendant was twice placed in jeopardy by imposing two punishments for one act (Pen. Code, § 654; Const. art. 1, § 13).

12. Criminal law ⇨202(1)

Where victim dies following conviction on abortion charge, subsequent prosecution for murder is not barred (Pen. Code, § 654; Const. art. 1, § 13).

13. Criminal law ⇨1209

Where act involved in one charge is necessarily involved in another and is merely incidental to that charge, but one offense is committed and it cannot be carved into two offenses in order to inflict double punishment (Pen. Code, § 654; Const. art. 1, § 13).

14. Criminal law ⇨195(1)

Where two offenses are entirely separate and distinct, and one is not necessarily included in other, prosecution for one is no bar to prosecution for other, even though same testimony may be applicable to both (Pen. Code, § 654; Const. art. 1, § 13).

15. Criminal law ⇨202(1)

Conviction of defendant of both abortion and second-degree murder *held* not invalid on

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 55 P.2d 1161.

ground of double jeopardy, since two offenses were separate and distinct, not involving one act and each was dependent on evidence not required in the other (Pen. Code, § 654; Const. art. 1, § 13).

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Francis D. Coltrin was convicted of abortion and of murder in the second degree, and he appeals.

Affirmed.

Sharpless Walker, and Otto A. Jacobs, both of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., and John O. Palestine, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was charged with the crime of abortion and, in a second count, with the crime of murder. He was convicted of abortion on the first count and of murder in the second degree on the second count and sentenced on both, the sentences to run concurrently. This appeal is from the judgments and from orders denying motions for a new trial.

It is contended that the evidence is not sufficient to sustain the verdict. The appellant is a physician seventy-seven years of age, and the two charges arose out of his treatment of a girl sixteen years old and her subsequent death. The defense was that the appellant merely made an examination of the girl to determine whether or not she was pregnant; that he found she had previously aborted; and that all he did was to clean up and treat the condition he found.

Another doctor testified that the girl came to him on January 19, 1935; that he made a complete examination of her, with a Friedman test, and found that she was a perfectly healthy girl who was six weeks pregnant; that he saw her again on January 20 and January 24; that she admitted to him that she had taken some medicine and drugs, but that on these three occasions there was no evidence of any interference, either medical or surgical, which would cause a miscarriage; that he himself used no medicine and no instruments but merely determined her condition; and that, in his opinion, an abortion was not necessary to save her life. The mother of the girl testified that on January 30, 1935, she went with the

girl to the office of the defendant; that she told him the girl was in trouble and wanted to have something done; that the defendant replied he thought he could do something; that she asked what he charged for an operation like that to which he replied \$50; that after some talk he agreed to do it for \$35 and told them to come back on February 4, 1935, at 8:30 a. m.; that they returned at that time and she told the appellant she only had \$20; that the appellant accepted this amount with the girl's watch; that when they went there the girl was suffering no pain and was not flowing; that the appellant administered a hypodermic and took her daughter to another room; that about an hour later she went into this room and her daughter was on an operating table; that the girl was then removed to a bed to remain until she became conscious; that fifteen or twenty minutes later the appellant administered another hypodermic; that the girl was bleeding and a napkin was placed upon her; that she was taken home about 1 o'clock; that the girl was suffering pain in the abdomen from the time she was brought home; and that the next morning another doctor was called.

The girl was taken to the hospital on February 9 and died on February 14, 1935.

A doctor who performed an autopsy testified that he found a piece of placental tissue, a tissue which results from conception, in the uterus; that death came from peritonitis; that this girl had been "operatively manipulated" causing this infection; and that, in his opinion, as a result of the examination, an instrument had been used and peritonitis was caused by "instrumentation." Another doctor, who treated the girl from February 9 until her death and who assisted in the autopsy, testified that the cervical canal was unduly enlarged, congested, red, and gave the appearance of trauma, a bruising of the tissues in that area. He expressed an opinion that an instrument had been inserted, basing the same upon the fact that the living tissues of the cervix were traumatized. Both of these doctors expressed the opinion that an abortion was not necessary to save the girl's life.

The defendant testified that on January 30, the girl and her mother came to his office; that the mother told him she had just discovered that the girl was in a deli-

cate way and wanted to know if there was anything he could do or would do that could be safely done to help her out of it; that he told her to bring the girl in on February 4 and he would make an examination and see whether or not she was pregnant, and if she was what might be the best thing to do about it; that he told her the charge would be \$35; that this charge was for an examination to ascertain whether or not she was pregnant; that the mother told him she knew her daughter was pregnant but that this did not mean anything to him, as she might be mistaken; that on February 4 the mother gave him \$20 and a watch that belonged to the girl; that he gave the girl a hypodermic injection and then an anaesthetic; and that he then made an examination to find out whether or not she was pregnant. He then testified that in making the examination some blood and a blood clot came out on his hand so he inserted a speculum to enable him to look at the cervix; that he found a tear or laceration in the uterus about an inch long and knew at once that "there had been some meddling there"; that he decided to explore the uterus to see if she had aborted and if it was a complete abortion; that he did not find any part of the fetus; and that he then "gave it up" and merely irrigated the parts and did what he could to prevent a possible infection. While at the trial the appellant denied he had intended to perform an abortion in case he found the girl pregnant, his testimony before the grand jury was admitted in which he frankly stated that he intended to do so and that he told them to come on February 4 for that purpose.

The appellant's nurse testified that she was present when the appellant examined the deceased; that the appellant "inserted his two fingers and his hand was full of blood"; that the appellant then put the girl under an anaesthetic and inserted a speculum and opened it up and called her attention to a laceration which she says she observed; that the appellant then took a little instrument and took out some blood clots and did nothing more except to wash the patient and put some medicine in her. The two doctors who performed the autopsy testified that at that time they found no such laceration as that described by the appellant and produced the uterus which had been taken from the girl, which showed no such laceration. There was

evidence that such a laceration as that described by the appellant if it had existed on February 4 would have been visible on February 14, and that the uterus when introduced in evidence was in the same condition as when taken from the body except that it had been cut open to permit inspection and except for the action of the preservative in which it was kept, and that neither of these would have affected the laceration in question. The defendant himself admitted before the grand jury that the laceration he observed on February 4, 1935, would not have healed before the death of the patient on February 14 and would still have been noticeable at that time.

[1] While the appellant insists that there is no evidence to show that the girl was pregnant on the morning of February 4, or that he did anything other than make an examination and treat the condition he found, this contention rests upon a conflict in the evidence at best, and the brief summary of the evidence above set forth, with the reasonable inferences therefrom, is sufficient to support the verdict. *People v. Knowles* (Cal. App.) 46 P.(2d) 788; *People v. De Vaughn*, 2 Cal. App. (2d) 447, 38 P.(2d) 192.

It is next urged that the court committed prejudicial error in admitting the testimony of two witnesses who testified to the effect that the appellant had performed abortions upon them, respectively, on September 7, 1934, and on December 20, 1934. It is further urged that the district attorney should have stated the purpose for which this evidence was offered, that the trial court should have admonished the jury at the time that it was admitted for a special purpose, that the argument relating thereto should have been limited to this special purpose, and that the court at the close of the case should again have instructed the jury that it was admitted only for a special purpose. It is further argued that this evidence was not admissible on the question of intent because the appellant freely admitted that he had intended to perform such an operation had he found it necessary and that, in any event, it would only become admissible as rebuttal after evidence for the appellant was introduced.

[2-4] While the appellant admitted before the grand jury that he intended to commit an abortion on this occasion, he

refused to admit this at the trial and stated that he had only performed certain acts for another purpose. His intention in performing these acts was directly in issue. It was incumbent upon the prosecution not only to prove that certain acts had been done which resulted in an abortion, but also that these acts were performed not for a lawful purpose but with the intention of causing an abortion. *People v. Josselyn*, 39 Cal. 393; *People v. Richardson*, 161 Cal. 552, 120 P. 20; *People v. Lee*, 81 Cal. App. 49, 252 P. 763; *People v. Browning*, 132 Cal. App. 136, 22 P.(2d) 784. It is well settled that where an offense is of such a nature that proof of the act with which the defendant is charged is not in itself proof of the required criminal intent and where additional proof of such intent is necessary to prove the crime charged, evidence of other offenses of a similar nature committed by the defendant is admissible for the purpose of proving intent. *People v. Morani*, 196 Cal. 154, 236 P. 135; *People v. Northcott*, 45 Cal. App. 706, 189 P. 704; *People v. Hickok*, 56 Cal. App. 13, 204 P. 555; *People v. Judson*, 128 Cal. App. 768, 18 P. (2d) 379. Since it was incumbent upon the prosecution to prove the intent with which the act was done, and especially since the order of proof is largely in the discretion of the trial court, it was not prejudicial error to receive this evidence during the main case for the prosecution. *People v. Northcott*, supra; *People v. Sindici*, 54 Cal. App. 193, 201 P. 975. The appellant did not ask the court to admonish the jury at the time this evidence was received that it was received for a special purpose but, at the close of the case, the court instructed the jury to that effect.

[5] The appellant complains of the following instruction given by the court, "Testimony has been introduced by the prosecution in this action tending to prove other alleged acts of abortion by the defendant. This testimony was admissible only when the defendant claimed he had not performed the operation following an agreement to do so with the mother of Charlotte Valentine, for the reason that the said Charlotte Valentine had a miscarriage before she came to his office on February 4th, 1935. To rebut this contention of defendant, such testimony was admitted. This testimony was not introduced to prove distinct offenses, but was introduced to corroborate the evidence

tending to support the one specified alleged offense for which the defendant is now on trial herein, as a felonious intent is an essential ingredient of the crime of abortion as charged, and said testimony was introduced for the purpose to show intent and motive on the part of said defendant," and the refusal of the court to give this instruction, "You are instructed that in this case the defendant cannot be convicted of any other offense than the offenses upon the person of Charlotte Valentine, as charged in the indictment herein, or offenses against said person included in said charges."

While the first of these instructions is far from a model, we think it sufficiently informed the jury that the evidence of two other offenses of a similar nature, which was received, was to be considered only on the question of the intent of the appellant and that he was not to be convicted on account of other offenses, but that the offense with which he is here charged was alone to be considered by him. This is especially true when the instruction complained of is considered with several instructions which both preceded and followed it, in which the court definitely limited the matter to the offense charged in the indictment. In our opinion, any technical error in connection with this instruction may not be held sufficient to justify a reversal in view of article 6, § 4½, of the Constitution.

[6] Error is assigned in the admission of the testimony of another witness, a deputy sheriff, who testified that on February 11, 1935, he went to the appellant's office and asked him to accompany him to the district attorney's office, that the appellant inquired as to why he was wanted, and that when told it was in regard to an abortion, he replied, "Which one?" This statement by the appellant was in the nature of an admission and tended to indicate a consciousness of guilt. We see no reversible error in its admission.

[7] It is next urged that the court erred in admitting in evidence the uterus of the deceased, it being urged that its only purpose was to prejudice the jury. It had another purpose since the appellant and his nurse testified that they observed a laceration thereon which did not there appear at the time of the autopsy or at the time of the trial. The defendant's rights were amply protected in connection

with any changes that had occurred in the condition of the exhibit.

[8,9] It is strenuously urged that the court erred in refusing, prior to the trial, to require the district attorney to furnish to the appellant a statement made by the girl in question shortly before she died, and again in refusing a request of the appellant during the trial to have this statement admitted in evidence. The statement was taken on February 11, 1935, at the hospital and was taken down in shorthand. The appellant contends that it was in the nature of a dying declaration and also that it was admissible as showing the condition of the girl at the time she came to him on February 4. The statement was not admissible as a dying declaration since the girl at that time stated she thought she was going to get well. The appellant's contention that this statement was admissible as showing the condition of the girl at the time she came to him on February 4 is based upon a portion thereof in which the girl admitted that she had taken some capsules and some medicine. It appears from the statement that these were taken by her more than a week before February 4 and nothing in the statement would even indicate that she was not pregnant on the last-named date. It further appears that appellant's contention in this matter is purely a technical one since the statement in its entirety, if admitted in evidence, instead of being helpful to him would necessarily have had a quite contrary effect.

[10] It is contended that the court was guilty of prejudicial error in commenting on the evidence after the case had been submitted to the jury. The jury returned to the courtroom and asked that certain instructions be reread, which was done. Thereafter one of the jurors asked, "Could you tell us the relationship between the first count and the second?" The court reread both counts of the indictment and certain instructions with reference to each count and then said: "It might be possible that some of the jurors are confused by the fact that there are two counts, one charging murder and one abortion. I will say that under our code not only murder is a felony, of course, but abortion is a separate and distinct offense; it also is a felony, and under the indictment in this case if the jury believes the evidence introduced by the people to a moral certainty and beyond a reasonable

doubt, that evidence will support the indictments on both counts." This statement was in answer to the juror's question and amounts to a statement that the evidence on behalf of the prosecution, if believed by the jury to a moral certainty and beyond a reasonable doubt, was legally sufficient to support the conviction on both counts. No attempt was made to comment on the weight of the evidence or express any view that might be held by the court. Whether or not the statement was proper, under the recent amendment to the Constitution (art. 6 § 19), we are unable to regard it as reversible error under the circumstances of this case.

After reading the entire record, we cannot see how the jury could have come to any other conclusion with respect to the guilt of the appellant and, with that in mind, we are unable to say that any error or irregularity appearing is sufficient to have resulted in a miscarriage of justice.

[11] The final contention is that in pronouncing sentence upon both counts the court violated section 13 of article 1 of the Constitution and section 654 of the Penal Code relative to placing a person twice in jeopardy and imposing two punishments for one act. In this connection it is also argued that since judgment was first pronounced on the abortion charge the court was without power to pronounce any judgment on the murder charge. Irrespective of the merits of the first of these contentions we think the order in which the verdicts were read, and in which the judgments were pronounced, is not material (*People v. Deggen*, 70 Cal. App. 567, 234 P. 129) and that, in any event, the sentence on the more serious charge may be sustained under the authorities which will be hereafter cited.

[12] In most cases where an abortion has been committed and where the victim has died, the prosecution and conviction have been upon the greater charge alone. It seems clear under the authorities that where a defendant was convicted on an abortion charge and where the victim thereafter died, the first conviction would not be a bar to a subsequent prosecution for murder. *People v. Wilson*, 193 Cal. 512, 226 P. 5; *People v. McKee*, 80 Cal. App. 200, 251 P. 675. While a prosecution on both of these charges in one action after the death of the person involved is unusual, we think the same principles

are applicable and that a prosecution for the one is not a bar to a prosecution for the other.

[13, 14] The constitutional provision referred to relates to a second jeopardy for the same offense. Section 654 of the Penal Code does not apply to statutes which do not make an act or omission punishable in different ways, but which name different acts and different offenses, and punishes each act separately. *People v. Mehra*, 73 Cal. App. 162, 238 P. 802. If the act involved in one charge is necessarily involved in the other and is merely incidental to that charge, but one offense is committed, and it cannot be carved into two offenses in order to inflict a double punishment. *People v. Mazzola*, 99 Cal. App. 682, 279 P. 211. But where the two offenses are entirely separate and distinct and the one is not necessarily included in the other, a prosecution for the one is no bar to a prosecution for the other even though the same testimony may be applicable to both. In *re O'Connor*, 80 Cal. App. 647, 252 P. 730, 732. In that case, the court said: "While a single act may be an offense against two statutes, and thus constitute two crimes, if each statute requires proof of a fact additional to those involved in the other, an acquittal or conviction of either does not result in the defendant having been in jeopardy for the other." In *People v. Kerrick*, 144 Cal. 46, 77 P. 711, 712, the court said: "To be 'necessarily included' in the offense charged, the lesser offense must not only be part of the greater in fact, but it must be embraced within the legal definition of the greater as a part thereof. 'To entitle a defendant to the plea of autrefois convict or acquit, it is necessary that the offense charged be the same in law and fact.' *People v. Helbing*, 61 Cal. 620." In *People v. Day*, 199 Cal. 78, 248 P. 250, 252, the court said: "It may be conceded that, if the two counts stated precisely the same offense, an acquittal upon one count would operate as an acquittal upon the other count. * * * It is not the great similarity in most of the facts constituting separate offenses, but the presence of a fact necessary in one offense and absent in another, that determines whether offenses are separate." Among other cases throwing some light on the matter before us may be cited the following: *People v. Brain*, 75 Cal. App. 109, 241 P. 913; *People v. Johnson*, 82 Cal. App. 411, 256 P. 273; *Peo-*

ple v. McFarlan, 126 Cal. App. 777, 14 P. (2d) 1066.

[15] The act of committing an abortion and the act of killing a person while attempting to do this are not merely the same act made punishable in different ways. Not only are these two offenses separate and distinct in a legal sense and each dependent upon evidence not required in the other, but as a practical matter it cannot be said that the two charges involve but one act. The act of committing an abortion may be done without causing the death of the party operated upon. The act which causes the death of the same person is usually another act, careless or otherwise, which, while it may be committed in connection with the first and about the same time, involves a further and additional element. The precise question here raised seems not to have been decided in this state, but an application of the above-mentioned rules to the facts of this case leads us to the conclusion that in pronouncing sentence on both of these counts the court did not violate either the constitutional provision or the statute relied upon.

The judgments and orders appealed from are affirmed.

I concur: JENNINGS, J.

MARKS, Justice.

I concur in that portion of the judgment of this court which affirms the judgment of guilty of murder in the second degree and the order denying the motion for new trial made on conviction of that offense. I cannot conclude that the defendant can be convicted of the offense of murder in the second degree and the additional crime of abortion where the death occurred prior to the institution of the prosecution and the one act of defendant on the same woman caused both the abortion and the death.

Of course, it is true that an abortion can be performed without death ensuing. In the instant case it is undoubtedly true that death was caused by infection occurring during the criminal act. It still remains true that defendant committed but one criminal act which was the direct cause of the death. A man may stab another and not cause death. If his weapon be clean and poisonous germs be introduced into the wound and death from

blood poisoning follow within a year and a day, he should be prosecuted for murder and not for that offense and assault with intent to commit murder. The greater offense should be held to include the latter.



9 Cal.App.2d 147

LAWAND v. CALIFORNIA PRODUCTS CO.
Civ. 1399.

District Court of Appeal, Fourth District,
California.
Sept. 12, 1935.

Hearing Denied by Supreme Court
Nov. 4, 1935.

1. Negligence ⚡32(3)

Owner of wine-making plant was required to furnish employee of company which had contracted to haul grapes to plant reasonably safe place to unload grapes; but such duty did not extend to protection of such employee in excursion to another point on premises, unless purpose of excursion had some reasonable connection with work in which he was engaged or was expressly or impliedly invited by owner of premises.

2. Negligence ⚡32(3)

Invitation to invitee upon particular part of premises to make excursion to another point on premises may be implied from circumstances, and duty of owner or occupant to such invitee is as onerous when invitation is implied as when it is express.

3. Negligence ⚡32(2)

Invitation to use premises of another is inferred where there is common interest or mutual advantage, while license is inferred where object is mere pleasure or benefit of person using premises.

4. Negligence ⚡32(3)

Where employee of transfer company, which had contracted to haul grapes to defendant's wine-making plant, left place at which he was stationed to unload grapes at defendant's plant, to wash grape juice from hands and pitchfork handle at water hydrant located at another point on premises, owner of plant was not liable to employee for injuries caused by unsafe condition of such other part of premises, since employee was not invitee.

Action by Farris J. Lawand against the California Products Company. Judgment for plaintiff, and defendant appeals.

Reversed.

Sutherland, Dearing & Jertberg, of Fresno, for appellant.

B. M. Benson, of Fresno, for respondent.

JENNINGS, Justice.

It is agreed by counsel for the respective parties in the above-entitled action that the single question presented on this appeal is whether or not the plaintiff, at the time when and the place where the injury complained of occurred, bore to the defendant the relationship of an invitee to whom the defendant owed the duty of keeping its premises in safe condition.

The action was instituted by plaintiff for the purpose of recovering from the defendant damages to compensate him for certain personal injuries which he suffered while he was on premises which were then being used by defendant in the business of making wine. The action proceeded to trial before the court and a jury selected for the purpose. At the conclusion of plaintiff's case, the defendant moved the court for a nonsuit, which was denied. When all evidence on behalf of both parties had been submitted and both sides had rested, defendant moved the court to direct a verdict in its favor. This motion was denied. The case was submitted to the jury, which returned a verdict in plaintiff's favor in the amount of \$1250. Thereafter the defendant moved the court to enter judgment in its favor notwithstanding the verdict. This motion was denied. Judgment was thereupon entered in conformity with the verdict. The defendant moved the court for a new trial, which was denied. The defendant presents this appeal from the judgment.

The solution of the single problem here presented requires consideration of the evidence which was produced during the trial of the action. The evidence, as shown by the reporter's transcript, indicates that at some time prior to November 16, 1933, the Gouldy Transfer Company had entered into a contract with appellant whereby the Transfer Company agreed to transport grapes by means of trucks from various ranches in Fresno county to appellant's plant which was located in the city of Fresno.

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

no; that respondent was an employee of the transfer company and on the above-mentioned date was engaged in unloading grapes from the trucks of his employer to a platform on appellant's premises; that respondent had been directed by his employer to remain at appellant's plant for the purpose of unloading the various trucks in which the grapes were being transported; that in doing the work assigned to him respondent used a pitchfork; that, in the process of unloading, juice from the grapes was deposited on the clothing and hands of the person engaged in the task and on the handle of the pitchfork and caused the worker's hands and the handle of the fork to become sticky; that it was respondent's habit to wash his hands and the fork handle after he had finished unloading each truck load of grapes; that in so doing he had used a water faucet which was located on appellant's premises in front of the building in which appellant's plant was housed and approximately 15 feet distant from the truck; that on the date of the accident the above-mentioned faucet was being used, whereupon respondent inquired of one of appellant's employees where he might wash his hands and was told that he might use another faucet which was located in appellant's plant at the east side of the building; that respondent proceeded toward the latter faucet and in so doing walked along a passageway constructed of 2x6 cross boards 36 inches long placed side by side; that as respondent was walking along the above-described passageway the pressure of his feet caused one of the boards to tip upward leaving an opening into which his right foot slipped; that beneath the flooring of the platform there was a machine known as a screw conveyor; that respondent's right foot came in contact with the blades of the machine as a result of which he suffered the injuries for which he sought compensatory damages.

[1] In considering whether or not the above-mentioned facts show that, at the time when and the place where the respondent sustained the injuries for which damages were awarded, he occupied the favored position of an invitee to whom appellant owed the duty of maintaining the premises in a safe condition, it may be assumed that so long as respondent remained at the place where his work required him to be he was an invitee. It is our understanding that it is so conceded by appellant. The undis-

puted evidence indicated, however, that at the time the accident occurred respondent had left the place where his duties required him to be and that he was in the main part of appellant's plant. The purpose of this excursion was to enable respondent to wash his hands which had become sticky by reason of the presence on them of grape juice which had flowed down the handle of the pitchfork during the unloading of the truck load of grapes which had just been completed. Admittedly, there was a water hydrant much nearer to the unloading place than the one to which respondent was proceeding at the time he suffered the injuries. It was also admitted that theretofore respondent had used the former hydrant. He testified, however, that his reason for not using the more convenient hydrant was because the hose which was attached to it was then in use and that he then inquired of one of appellant's employees where he might wash his hands and was directed to the more distant hydrant. The problem presented for solution is therefore whether respondent continued to occupy the status of an invitee when he left the unloading point and embarked upon the excursion heretofore described for the purpose stated. Manifestly, the admitted fact that respondent occupied the position of an invitee at the unloading point does not necessarily compel the conclusion that he continued to occupy this status when he voluntarily left this place and went to another part of appellant's premises which was not shown to have any necessary connection with the work of unloading. Although it is settled that appellant was required to furnish respondent with a reasonably safe place to work, this duty was limited to the particular place where the purposes of respondent's employment required him to be. The duty did not extend to his protection in an excursion to another point on the premises unless the purpose of the excursion had some reasonable connection with the work in which he was engaged or unless he was expressly or impliedly invited by appellant to make the excursion. *Schmidt v. Bauer*, 80 Cal. 565, 22 P. 256, 5 L. R. A. 580; *Kennedy v. Chase*, 119 Cal. 637, 52 P. 33, 63 Am. St. Rep. 153; *Jacobson v. Northwestern Pac. R. Co.*, 175 Cal. 468, 166 P. 3; *Powers v. Raymond*, 197 Cal. 126, 239 P. 1069; *Lindholm v. Northwestern Pac. R. Co.*, 79 Cal. App. 34, 248 P. 1033; *State Compensation Ins. Fund v. Allen*, 104 Cal. App. 400, 413, 285 P. 1053.

We do not understand that respondent contends that he was expressly invited to make the excursion which resulted in the personal injuries for which he sought compensation. Such contention would be unavailing. Although respondent testified that an employee of appellant pointed to the more distant hydrant and told him that he could wash his hands there, no evidence was produced which tended to show that this employee had any authority or right to extend an express invitation to respondent to go to that place.

[2] It is, however, settled that an invitation may be implied from the circumstances shown by the evidence and that the duty of an owner or occupant is as onerous when the invitation is implied as when it is express. *Schmidt v. Bauer*, supra; *Aguilar v. Riverdale C. C. Ass'n*, 104 Cal. App. 263, 266, 285 P. 889; *Hall v. Southern Cal. Edison Co., Ltd.*, 137 Cal. App. 449, 30 P.(2d) 1013.

[3] Under the peculiar circumstances of the instant case, it must appear that the purpose of respondent in proceeding to the more distant hydrant was one of common interest or mutual benefit to appellant and respondent if the award of damages for respondent's injuries is to be sustained. *Aguilar v. Riverdale C. C. Ass'n*, supra. This principle was correctly stated in *Buckingham v. San Joaquin Cotton Oil Co.*, 128 Cal. App. 94, at page 98, 16 P.(2d) 807, 808, in the following language: "An invitation to use the premises of another is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using them."

[4] Respondent contends that the purpose of respondent in making the excursion during which he sustained the injuries for which he sought compensation was one of mutual advantage to both parties. That it was of advantage to respondent is obvious. It is not so clear that it was of any advantage to appellant. Respondent urges that the natural result of the removal of the sticky grape juice from his hands would have been to render him more efficient in

doing the work in which he was engaged and that thereby he could have more expeditiously performed the task assigned to him. From this it is argued that the washing of his hands was advantageous to appellant. To this argument appellant replies that it was a matter of no concern to it whether or not respondent ever washed his hands. The record sustains appellant's position. Respondent instituted this action to recover damages to compensate him for injuries which he alleged were sustained because of appellant's negligence in failing to maintain its premises, whereon respondent worked, in safe condition. No claim was made that appellant was guilty of any act of positive negligence. The only claim was that appellant had failed to do something which it should have done. Since there was no contractual relationship between the parties respondent was compelled to contend that he was an invitee of appellant on its premises. Whether or not he occupied the status of an invitee at the time of his injury depended, finally, on the proper analysis of the purpose of his visit to the water hydrant which was located near the east wall of appellant's plant. If it may reasonably and fairly be declared that this purpose was one that was mutually advantageous to the parties the jury's implied finding that respondent was an invitee when he was injured was correct and the award of damages must be affirmed. Upon respondent, however, rested the burden of showing this mutuality of advantage. It is our opinion that respondent did not sustain the burden and that consequently the implied finding is fatally lacking in evidentiary support. As between the parties to this action we entertain the opinion from the facts disclosed by the record that the purpose of respondent's excursion was one that related solely to his own comfort and convenience. Since this is true, it necessarily follows therefrom that the judgment from which this appeal has been taken must be reversed.

The judgment is therefore reversed.

I concur: MARKS, Acting P. J.

BARNARD, P. J., being absent, does not participate in this opinion.

9 Cal.App.2d 165

PEOPLE v. HENSON et al.

Cr. 2774.

District Court of Appeal, Second District,
Division 2, California.

Sept. 13, 1935.

Larceny ☞65

Evidence held sufficient to support conviction of grand theft.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Mrs. Marion Henson and Lillian Jefferson were convicted of grand theft, and defendant Lillian Jefferson appeals.

Affirmed.

John S. Cooper, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

FRICKE, Justice pro tem.

The information charges the grand theft from the person of one John Patrick of the sum of \$9. Omitting the details of the meeting between the white complainant and the colored defendant Henson, and his object in occupying a bedroom with her, it appears that the complainant hung his coat, vest, and trousers on the back of a chair, and that while his attention was elsewhere than upon his clothing he heard a rustling of paper, turned his head, and saw defendant Jefferson reach into his inside pocket and remove his wallet. His efforts to interfere were blocked by defendant Henson, who, after the complainant had succeeded in getting his clothes on, drew a knife and ordered him to keep his hand out of his pocket. Complainant had some of his money in his hand, and Jefferson pried his fingers loose, removed the money, and handed it to defendant Henson. Complainant escaped by jumping through a closed window. He testified that the money was taken from him forcibly and against his will.

Appellant's sole contention, that there was no theft from the person and hence that the crime amounted to but a petty theft, is predicated upon the theory that the money was taken from complainant's clothes while they hung on the chair. Even if we assume that some money was thus taken, the testimony of complainant

that the money was forcibly taken from his hand is ample to sustain the conviction of grand theft.

The judgment and order denying a new trial are affirmed.

We concur: CRAIL, P. J.; WOOD, J.



8 Cal.App.2d 613

**CONNER v. EAST BAY MUNICIPAL
UTILITY DIST. et al.**

Civ. 9556.

District Court of Appeal, First District,
Division 1, California.

Sept. 4, 1935.

Hearing Denied by Supreme Court
Oct. 3, 1935.

Appeal and error ☞832(4)

Rehearing will not be granted because of refusal to give instructions, where suggestion that refusal was error is made for first time in petition for rehearing.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

On application for rehearing.

Rehearing denied.

For former opinion, see 47 P.(2d) 774.

Crosby & Crosby, of Oakland, for appellants.

Clark, Nichols & Eltse, of Berkeley, for respondent.

PER CURIAM.

In denying the petition for rehearing herein, it may be said that in our opinion the state of the evidence in the case is such that the refusal of the trial court to give the two instructions set out in appellant's petition did not result in a miscarriage of justice, and consequently in no event would such refusal constitute grounds for reversal of the judgment. Const. Cal., art. 6, § 4½. Moreover, the suggestion that the refusal to give these two instructions was error is made for the first time in the petition for rehearing, and it has been repeatedly declared that a rehearing will not be granted under such

circumstances. *Estate of Edwards*, 126 Cal. App. 152, 14 P.(2d) 318, 15 P.(2d) 194; *Mann v. Brison*, 120 Cal. App. 450, 7 P.(2d) 1110, 9 P.(2d) 257; *Pasadena Ice Co. v. Reeder*, 206 Cal. 697, 275 P. 944, 276 P. 995; *In re Novotny's Estate*, 94 Cal. App. 782, 271 P. 923, 273 P. 58; *People v. New York Indemnity Co.*, 113 Cal. App. 487, 298 P. 849.

Rehearing denied.



9 Cal.App.2d 125

Ex parte WEST.
Cr. 2779.

District Court of Appeal, Second District,
Division I, California.
Sept. 7, 1935.

Habeas corpus ☞4

Affirmance of conviction by District Court of Appeal cannot be attacked on habeas corpus for error reviewable on appeal; remedy being to file application for hearing upon such grounds in Supreme Court.

Application for writ of habeas corpus in behalf of L. Monte West.

Writ denied.

F. H. Bowers, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and A. H. Van Cott and Jere J. Sullivan, Deputy Dist. Attys., all of Los Angeles, for respondent.

YORK, Justice.

This matter comes before this court pursuant to a writ of habeas corpus, after a conviction had in the superior court was affirmed by the District Court of Appeal, *People v. West*, 3 Cal. App. (2d) 568, 40 P.(2d) 278, which decision has now become final.

Obviously, if the two counts in the amended indictment charged an identical offense in identical language, the defendant could not be convicted upon both counts. The proper method of procedure, if an identical offense was charged in identical language, would have been to dismiss one

count, but as this is not the fact in this case, it was left to the court without a jury to decide if defendant was guilty of a violation of law, as charged in either of said counts. The court found defendant guilty as charged in the second count of the indictment, which count was not in the identical language of the first count, in that there was some difference in the phraseology of the two counts, as set forth in the indictment, and those differences are in accord with the several descriptions of the offenses, as set forth in the Penal Code. It would appear that the jury concluded that the second count of the indictment more correctly stated the offense committed than did the first count.

Count 1 of the amended indictment charged a violation of subdivision 3, § 424 of the Penal Code of California, and alleged that defendant "on or about the 30th day of June, 1934, * * * did unlawfully and knowingly keep a false account in a record of the County Treasurer of the county of Los Angeles relating to the receipt, safekeeping, transfer, and disbursement of public moneys of the county of Los Angeles, to wit, a daily balance sheet, by omitting to correctly reflect the absence of eight hundred fifteen dollars (\$815.00) in cash, * * * and he, the said L. Monte West, did then and there aid, abet, encourage, advise and assist the said H. L. Woodruff in the commission of said offense."

Count 2 of the amended indictment charged a violation of subdivision 4, § 424 of the Penal Code, and charged that he did "unlawfully and fraudulently falsify and conceal an account in the record of the county treasurer of the county of Los Angeles, relating to the receipt, safekeeping, transfer and disbursement of public moneys of the county of Los Angeles, to wit, a daily balance sheet, by omitting to correctly reflect the absence of eight hundred fifteen dollars (\$815.00) in cash, * * * and he, the said L. Monte West, did then and there aid, abet, encourage, advise and assist the said H. L. Woodruff in the commission of said offense."

As to the finality of the conviction, we quote the rule laid down in the Matter of the Application of Smith, 161 Cal. 208, 118 P. 710, in which the petitioner having been convicted of robbery and the judgment having been affirmed by the District Court of Appeal, the Supreme Court refused to

discharge him on habeas corpus, holding that: "Every ground of his present petition was reviewable on that appeal but they were not mentioned in the decision, and they cannot now be urged in a collateral attack upon the judgment."

If the decision of the District Court of Appeal affirming the conviction of the defendant was error in the particulars claimed in the petition for the writ before us, the remedy was to file an application for hearing upon such grounds in the Supreme Court, rather than by petition for the writ of habeas corpus addressed to this court. In *re Northcott*, 71 Cal. App. 281, 283, 235 P. 458.

Petitioner is remanded to custody.

I concur: CONREY, P. J.

I concur in the judgment: HOUSER, J.



9 Cal.App.2d 136

LANDRETH v. DUCOMMUN.
Civ. 10290.

District Court of Appeal, Second District,
Division 2, California.
Sept. 11, 1935.

Appeal and error ⇐117

Order relieving defendant from failure to serve draft of proposed bill of exception within prescribed time held not appealable (Code Civ. Proc. § 473).

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by N. E. Landreth against E. F. Ducommun also known as Edward F. Ducommun. From an order relieving defendant from his default in failing to serve draft of proposed bill of exceptions within time prescribed by law, plaintiff appeals.

Appeal dismissed.

Arthur F. Larrabee and C. E. McDowell, both of Los Angeles, for appellant.

Reay, Scharf & Reay and Oliver O. Clark, all of Los Angeles, for respondent.

CRAIL, Presiding Justice.

Judgment was entered in the trial court in favor of the plaintiff. The defendant gave notice of appeal, but did not prepare the record for use upon the appeal within the time prescribed by law. Thereafter, and on August 1, 1934, the court granted a motion of the plaintiff to terminate proceedings for preparation of the transcript on appeal. Thereafter and within the time prescribed by law, upon the application of defendant for relief under section 473 of the Code of Civil Procedure, the court made an order relieving the defendant from his default in failing to serve a draft of the proposed bill of exceptions within the time prescribed by law and setting aside the order of August 1st, 1934. It is from this order that the plaintiff takes this appeal.

The order is not an appealable order. *Buis v. Lindauer Corp.*, 116 Cal. App. 558, 3 P.(2d) 18; *McWilliams v. Hudson*, 98 Cal. App. 185, 276 P. 598, 277 P. 529. The plaintiff may raise the question of the invalidity of the order when and if the defendant's appeal from the judgment is prosecuted.

Motion to dismiss the appeal is granted.

We concur: WOOD, J.; FRICKE, Justice pro tem.



9 Cal.App.2d 129

FERRAN v. MULCREVY et al.
Civ. 9926.

District Court of Appeal, First District,
Division 1, California.
Sept. 11, 1935.

Hearing Denied by Supreme Court
Nov. 4, 1935.

1. Appeal and error ⇐1180(1)

Judgment which has been reversed is without any validity or force, and parties stand in same position as if no judgment had been rendered and are entitled to same rights they had originally.

2. Appeal and error ⇐1180(1)

Where judgment notwithstanding verdict was entered for defendant following verdict for plaintiff, reversal of such judgment by Supreme Court held to entitle plaintiff to have judgment entered in his favor in conformity

with verdict (Code Civ. Proc. § 629, and § 664, as amended by St. 1933, p. 1882, § 121).

Appeal from Superior Court, City and County of San Francisco.

Petition by Phillip Ferran for a writ of mandate directed to H. I. Mulcrevy, Superior Court of the state of California, in and for the City and County of San Francisco, and C. J. Goodell, judge, to compel the entry of a judgment in favor of petitioner.

Peremptory writ of mandate issued.

Thomas C. Ryan, of San Francisco, for petitioner.

A. B. Dunne and Dunne & Dunne, all of San Francisco, for respondents.

KNIGHT, Justice.

While standing between the double tracks of the Southern Pacific Company at Lomita Park station in San Mateo county, waiting to board a northbound train, the petitioner, Phillip Ferran, was struck on the elbow by the overhang of the locomotive of a southbound train, and on account of the injuries he sustained he brought an action for damages against said company and John E. Monroe, the locomotive fireman. At the trial a jury awarded Ferran a verdict, but under the authority of section 629 of the Code of Civil Procedure the defendants in the action moved for judgment in their favor notwithstanding the verdict reserving the right to apply for a new trial in the event the motion was denied; and the trial court granted the motion. Judgment in favor of defendants was entered accordingly. Ferran appealed, and the District Court of Appeal affirmed the judgment as to Monroe, but reversed it as to the Southern Pacific Company, with directions to the trial court to enter judgment in favor of Ferran and against said company in accordance with the verdict. The defendants then petitioned for and were granted a hearing by the Supreme Court, and subsequently the judgment of the trial court was reversed as to both defendants [Ferran v. Southern Pac. Co. [Cal. Sup.] 44 P.(2d) 533, 536], but the Supreme Court decision embodied no directions to the trial court as to the nature of the proceedings that should be thereafter taken in the case, the language used being simply: "The judgment is reversed." Ferran did not apply for a re-

hearing; but the defendants, deeming themselves aggrieved by the decision, did petition for such rehearing and their petition was denied. Following the filing of the remittitur in the trial court, Ferran requested the judge and the clerk thereof to enter judgment in his favor, in conformity with the verdict of the jury, but his request was denied; and he now seeks by this proceeding in mandamus to compel the entry of such judgment.

[1, 2] The contention made on behalf of respondents in support of their refusal to enter judgment in conformity with the verdict is that in all cases the unqualified reversal of a judgment operates to set the case at large so that there must be a new trial before any other judgment can be entered. We are of the opinion that the general principle thus sought to be invoked has no application to the reversal of judgments such as here appealed from, namely, judgments non obstante veredicto, entered pursuant to the authority granted by said section 629. As held generally, when a judgment is reversed, it is entirely vacated and without any validity or force. The proceeding is left where it stood before the erroneous judgment was entered; and the parties stand in the same position as if no such judgment had been rendered and are entitled to the same rights they had originally. 2 Cal. Jur. 996, 997, and cases cited therein. Consequently, upon the reversal of the judgment in the present case, the proceeding was restored to the state of the record in which it stood before the erroneous judgment was entered; that is, it was incomplete, with a recorded verdict in favor of plaintiff, but with no judgment entered thereon; and since the effect of the reversal also was to place both parties in the same positions they occupied up to the time the erroneous judgment was entered, and to reinvest them with the same rights they originally had, it follows that Ferran was entitled under the provisions of section 664 of the Code of Civil Procedure to have judgment entered in his favor in conformity with said verdict, and thereupon defendants were given the right to assail the judgment and the verdict in the manner provided by statute. Eades v. Trowbridge, 143 Cal. 25, 76 P. 714. The procedure mentioned has been not only universally followed in all cases of this kind, so far as our attention has been called, but it has received express approval in the case of

Lauritsen v. Goldsmith, 99 Cal. App. 671, 279 P. 168.

In further support of this view may be cited the 1933 procedural amendment to section 664 (St. 1933, p. 1882, § 121), which provides: "When a motion for judgment notwithstanding the verdict is pending, entry of judgment in conformity to the verdict shall be automatically stayed until the court has rendered its decision upon the motion." It follows logically therefrom that if pursuant to such motion judgment non obstante veredicto be entered and an appeal be taken therefrom, the statutory automatic stay of entry of judgment in conformity to the verdict continues until the motion is finally determined on appeal, at which time, if the judgment non obstante veredicto be reversed, judgment in conformity with the verdict shall be entered. Moreover, our section 629 is based largely on a similar statute enacted in Minnesota [*Cushman v. Cliff House*, 79 Cal. App. 572, 250 P. 575; *Estate of Easton*, 118 Cal. App. 659, 5 P.(2d) 635]; and in that state the courts have held uniformly that when judgment non obstante veredicto is entered pursuant to an alternative motion for judgment or a new trial, and such judgment is thereafter reversed on appeal, upon the going down of the remittitur the motion for judgment stands denied and the motion for new trial is before the court for disposition [*Wegemann v. Minneapolis St. Ry.*, 165 Minn. 41, 205 N. W. 433; *Kies v. Searles*, 146 Minn. 359, 178 N. W. 811; *Attebury v. Jones*, 161 Minn. 295, 202 N. W. 337].

The obvious effect of adopting the theory advanced in behalf of respondents, that on an appeal such as this an unqualified reversal in itself operates to grant a new trial, would be to hold that it is within the power of a reviewing court in determining such an appeal not only to reverse the judgment but to go further and grant a new trial in the action. But the case of *Lauritsen v. Goldsmith*, supra, holds that it has no such authority; that the reviewing court should order judgment entered by the trial court upon the verdict; and that the power of hearing and determining the motion for a new trial is reserved in and shall thereafter be exercised by the trial court. The decision in that case was sustained by the Supreme Court by the denial of a petition for a hearing of the appeal before that court; and in

view of such decision and of the universal practice heretofore followed in reversals of this kind it may be safely assumed that the giving of express directions in the present case was deemed unnecessary.

None of the numerous cases cited and relied on by respondents are in point because not one of them involved an appeal from a judgment non obstante veredicto entered by the trial court pursuant to the authority granted by said section 629. Some of them concerned judgments entered in conformity with findings made by the trial court in actions tried before the court sitting without a jury, and manifestly in such cases the application of the provisions of section 629 does not arise. The remainder of the cases, most of which were decided prior to the enactment of said section 629, dealt only with judgments entered in conformity with the verdicts; and it is, of course, conceded that in all such appeals an unqualified reversal sets the action at large and remands the cause for a new trial, without any specific directions being given to that effect.

For the reasons stated, it is our conclusion that a peremptory writ of mandate should issue herein as prayed for in the petition, and it is so ordered.

We concur: TYLER, P. J.; CASHIN, J.



NICHOLSON v. CITY OF LOS ANGELES.*
Civ. 10304.

District Court of Appeal, Second District,
Division 2, California.
Sept. 13, 1935.

Hearing Granted by Supreme Court
Nov. 9, 1935.

1. Evidence ⇨8

It is matter of common knowledge that sections of sidewalk are frequently raised by roots of growing trees.

2. Municipal corporations ⇨819(4)

In action for injuries sustained by woman who fell when her heel slipped off elevated section of city sidewalk, where evidence showed that roots of tree ran under raised section of sidewalk, court and jury held warranted in concluding that root was cause of rising of section and that rising was gradual with growth of root.

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 54 P.2d 725.

3. Evidence Ⓒ359(3)

In action for injuries sustained by woman who fell when her heel slipped off elevated section of city sidewalk, photographs taken by civil engineer of city two months after accident showing defect in sidewalk *held* admissible, where city failed to object prior to their introduction, and evidence, including pictures themselves, bore construction that raised portion was no higher when pictures were taken than at time of accident.

4. Appeal and error Ⓒ1048(5)

In action for injuries sustained by woman who fell when her heel slipped off elevated section of city sidewalk, admission of testimony that root of tree ran under sidewalk, given in answer to question as to whether anything had been observed that would cause sidewalk to buckle up, *held* not prejudicial error, since answer stated existence of physical fact rather than opinion.

5. Municipal corporations Ⓒ788(1)

Statute providing that municipality should be liable for injuries to persons resulting from defective conditions of streets, where governing board with authority to remedy such condition had knowledge of defect, *held* not to require actual knowledge of defect to render city liable to injured party (St. 1923, p. 675).

6. Trial Ⓒ395(9)

In action for injuries sustained as result of defect in city sidewalk, finding that sidewalk was constructed by defendant city *held* unnecessary to decision, where action was predicated, not upon sidewalk's faulty construction, but upon defect subsequently developing.

7. Costs Ⓒ18

In action brought in superior court, where damages were recovered in amount within jurisdiction of municipal court, plaintiff *held* not entitled to recover costs (Code Civ. Proc. § 1022).

Appeal from Superior Court, Los Angeles County; Arthur Coats, Judge.

Action by Hattie Nicholson against the City of Los Angeles. Judgment for plaintiff, and defendant appeals.

Affirmed and modified.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Thatcher J. Kemp, Deputy City Atty., all of Los Angeles, for appellant.

Avery M. Blount and Marion P. Betty, both of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Appeal from a judgment in favor of plaintiff and respondent in an action for personal injuries. Respondent, while walking on a sidewalk on Second avenue in the city of Los Angeles, set her heel upon the edge of a section of the concrete sidewalk which had broken away from and was about an inch and a half higher than the next section. Her heel slipped off the elevated section and she was thereby thrown and injured. A Mrs. Gage testified that this defect in the sidewalk had existed for several months to her knowledge, and that she herself had been caused to stumble thereby on several occasions.

[1-3] Photographs by a civil engineer of appellant city, called as appellant's witness, taken about two months after the accident and showing the defect in the sidewalk, were introduced in evidence by respondent. No objection prior to their introduction was made by counsel for appellant, although an objection was made after the photographs had been received in evidence. No motion to strike was made. While the record is silent as to whether the condition of the sidewalk at the time the photographs were taken was the same as at the time of the accident, it is of some significance that the photographs were produced by appellant, and the testimony of the civil engineer who took them was limited to the fact of having taken them, as was also the testimony of an investigator of the board of public works of the city who accompanied him. There was also evidence that the root of an immediately adjoining tree ran under the section of the sidewalk which had risen, and the photographs show this tree. As it is a matter of common knowledge that sections of sidewalk are frequently raised by the roots of growing trees, the court was warranted in concluding not only that such was the cause of the rising of the section of the sidewalk but that the rising was gradual with the growth of the root. Appellant's suggestions that the sidewalk may have risen as the result of an unprecedented storm eighteen days before the accident or that a broken water main or an earthquake a few days before the accident may have caused the defect are not only without support in the evidence but contrary to the

uncontradicted evidence that the defect had existed for several months. Appellant not only failed to make timely objection to the introduction of the photographs, but under the circumstances the photographs were admissible, especially since the evidence, including the pictures themselves, bears the construction that the raised portion was no higher when the pictures were taken than at the time of the accident.

[4] We can see no prejudicial error in the reception in evidence of the fact that the root of the tree ran under the sidewalk. While the question which produced the answer that the root of the tree ran under the sidewalk, "Did you observe anything there that would cause the sidewalk to buckle up or be in that condition?" tended to call for the conclusion of the witness, this was the only testimony on the subject, and the answer, "Yes, the roots of a tree were under it," is rather the statement of the existence of a physical fact than an opinion as to what caused the sidewalk to rise. Even in the absence of this testimony the court would have been warranted in forming the conclusion that the roots of the tree had caused the sidewalk section to rise.

[5] Appellant contends that it is not liable in the absence of actual knowledge or actual notice on its part of the defect. Respondent claims that constructive knowledge or notice is a sufficient basis for liability. The responsibility of appellant is fixed by the Public Liability Act (Gen. Laws 1931, Act 5619; Stats. 1923, p. 675), which provides that municipalities shall be liable for injuries to persons resulting from the dangerous or defective conditions of public streets and highways in all cases where the governing or managing board of such municipality having authority to remedy such condition "had knowledge or notice of the defective or dangerous condition of such street, highway * * * or property, and failed or neglected, for a reasonable time after acquiring such knowledge, or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective con-

dition." This question came before our courts in *Hook v. City of Sacramento*, 118 Cal. App. 547, 5 P.(2d) 643, 645, in which the appellant city made claim that it had neither actual nor constructive notice of the defective condition there involved. The court said that "the statute does not provide that *actual notice or actual knowledge* is a prerequisite to recovery in such a case. The existence of a conspicuous defect or dangerous condition in a sidewalk or street, which had existed for a considerable length of time, will create a presumption of constructive notice thereof." An application for a hearing of this cause in the Supreme Court was denied.

It must be assumed that in adopting the act of 1923 the Legislature was aware of the fact that knowledge and notice may be constructive as well as actual, and the use of the words "knowledge" and "notice" without limitation implies that the knowledge or notice required by the act is not limited to actual knowledge or notice. To now limit the application of the act to those cases in which actual knowledge or notice could be proved by the injured party would be to read into the statute a limitation not contemplated by the legislature. The findings of the court are supported by substantial evidence.

[6] Appellant contends that there is no evidence to support the finding that the sidewalk was constructed by the city of Los Angeles. Since the liability of the city is in no wise dependent upon whether it or some one else constructed the sidewalk, and since the action is not predicated upon any theory of faulty construction but upon a condition which developed thereafter, this finding was unnecessary to the decision and is mere surplusage.

[7] The final point raised is that since the damages recovered were in an amount within the jurisdiction of the municipal court respondent was not entitled to recover the \$42.95 costs included in the judgment. This point is well taken (Code Civ. Proc. § 1022) and is conceded by respondent.

The judgment is affirmed, but modified by striking therefrom the sum of \$42.95 allowed as costs; respondent to recover costs of appeal.

We concur: CRAIL, P. J.; WOOD, J.

9 Cal.App.2d 112

PEOPLE v. ISNARDI.
Cr. 1849.

District Court of Appeal, First District,
Division 2, California.
Sept. 6, 1935.

Criminal law ⇨977(3)

Pronouncement of sentence of conviction of grand theft after extension of twelve days after verdict, granted at request of defendant to enable him to make further showing in support of his motion for new trial, *held* proper within statute providing that court must pronounce judgment not less than two nor more than five days after verdict, but containing provision for extending such time 90 days upon request of defendant (Pen. Code, §§ 1191, 1202).

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

John Isnardi was convicted of grand theft, and he appeals.

Affirmed.

Nathan C. Coghlan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

NOURSE, Presiding Justice.

Defendant was convicted of the felony of grand theft. He appeals from the judgment and from the order denying a new trial.

The sole ground of the appeal is that sentence was pronounced after an extension of twelve days granted for the purpose of hearing defendant's motion for a new trial.

The appellant quotes the first part of section 1191 of the Penal Code, which provides that the court must pronounce judgment not less than two nor more than five days after the verdict, but that the time may be extended "not more than ten days for the purpose of hearing or determining any motion for a new trial. * * *" He then cites cases holding that this portion of the section, taken with section 1202, is mandatory and cannot be waived by consent. He makes no reference to the following portion of section

1191, which reads: "Provided, however, that upon the request of the defendant such time may be further extended not more than ninety days additional."

The appellant concedes that the continuance was granted upon his motion and request to enable him to make further showing in support of his motion for a new trial. This would seem to be sufficient reason for the application of the latter proviso of the Code section. The question is simply one of construction of the Code section in which we are not aided by any prior decision as none of the authorities cited involved an interpretation of this last proviso. The section is given the subject title of "Time for pronouncing judgment." The first clause requires the court to appoint "a time for pronouncing judgment which must not be less than two, nor more than five days after the verdict. * * *" This is followed by a semicolon and the proviso that: "The court may extend the time not more than ten days for the purpose of hearing or determining any motion for a new trial. * * *" Another semicolon follows this clause and then the proviso that "the court may extend the time not more than twenty days in any case where the question of probation is considered. * * *" Again a semicolon follows and then the clause "provided, however, that upon the request of the defendant such time may be further extended not more than ninety days additional."

Throughout the section the "time" referred to is the time for pronouncing sentence. Though a limitation upon such time is fixed in the first clause, three independent provisos follow—first, when a motion for a new trial is made, an extension of ten days may be granted at the request of either party; second, when an application for probation is pending, an extension of twenty days may be granted at the request of either party; and third, when the defendant makes the request, an extension of ninety days may be granted.

It would be hard to conceive of language more favorable to a defendant in a criminal case. He is given the right to a speedy sentence no matter what the circumstances confronting the prosecution may be; it is upon his request alone that this time may be extended under the third proviso of the section. The extension

granted here was at his request and for his benefit, and comes within the terms of the Code section.

The judgment and order are affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.



9 Cal.App.2d 122

Ex parte CASAS et al.

Cr. 290.

District Court of Appeal, Fourth District,
California.

Sept. 6, 1935.

1. Criminal law ☞636(1)

Sections of Penal Code requiring presence of defendant at arraignment, and entry of plea of guilty by defendant in person, relate solely to criminal procedure in superior courts and are inapplicable to procedure in justices' courts (Pen. Code, §§ 977, 1018).

2. Criminal law ☞636(1)

Defendants in criminal case in justice's court must be personally present only during trial and absence from trial is not ground for reversal of judgment in all cases (Pen. Code, §§ 1429, 1434, 1451).

3. Criminal law ☞252(5)

Defendant in criminal case in justice's court need not personally enter plea of guilty, but such pleas may be entered by defendant's attorney for him (Pen. Code, §§ 1429, 1434, 1451).

4. Criminal law ☞252(5)

Presence of defendants in criminal case in justice's court when attorney entered pleas of guilty would constitute consent to entry of pleas by attorney and waiver of any possible error arising therefrom, in absence of express statute requiring pleas of guilty to be entered by defendants personally.

5. Judges ☞51(4)

In criminal cases in justices' courts, proceedings upon filing of affidavit of prejudice are governed by section of Penal Code dealing with that subject, and provisions of Code of Civil Procedure are inapplicable (Pen. Code, § 1431).

6. Judges ☞51(1)

Filing of affidavit of prejudice in criminal case pending in justice's court does not divest court of jurisdiction (Pen. Code, § 1431).

7. Habeas corpus ☞27

Defendants in criminal case in justice's court, who are tried and convicted after filing of affidavit of prejudice, cannot be released on habeas corpus, since filing of affidavit did not divest court of jurisdiction (Pen. Code, § 1431).

8. Judges ☞51(2)

In criminal prosecution in justice's court, question of bias and prejudice of justice of the peace, which was raised by motion and affidavits after affirmance of judgments, was raised too late to support attack on judgments on ground of lack of jurisdiction of justice of peace because of his bias and prejudice, in view of statute providing for change of place of trial in criminal case because of bias and prejudice at any time before trial commences (Pen. Code, § 1431).

9. Habeas corpus ☞92(1)

Court issuing writ of habeas corpus in proceeding to test validity of convictions in criminal action will confine itself to inquiry as to jurisdiction of court in which judgments were pronounced and regularity of process under which petitioners were deprived of their liberty.

Original habeas corpus proceeding by Peter Casas and Mrs. Peter Casas against the Sheriff of Riverside County.

Writ discharged, and petitioners remanded.

David C. Marcus, of Los Angeles, for petitioners.

Earl Redwine, Dist. Atty., and Harry P. Amstutz, Deputy Dist. Atty., both of Riverside, for respondent.

MARKS, Acting Presiding Justice.

Petitioners are before this court on an original proceeding of habeas corpus to test the legality of their confinement by the sheriff of Riverside county. They were found guilty in the justice's court of Temescal township, in Riverside county, of the offense of disturbing the peace and judgments were pronounced upon them. They twice appealed to the superior court of Riverside county. The judgments were affirmed as was an order denying their motions to vacate the judgments.

[1-4] Petitioners present but two reasons for their release which it is necessary to consider here. They maintain, first, that no pleas were ever entered by them; and, second, that as they filed affidavits under section 1431 of the Penal Code set-

ting up bias and prejudice on the part of the justice of the peace of Temescal township, he was without jurisdiction to sit in the case.

The record shows that petitioners were represented in the justice's court by an attorney at law; that they were present in court and were duly arraigned; that their pleas of guilty were entered for them by their attorney.

They maintain that a plea of guilty cannot be entered by an attorney but must be entered by a defendant in person. In support of this contention they cite sections 977 and 1018 of the Penal Code and *In re Brain*, 70 Cal. App. 334, 233 P. 390.

Those two sections of the Penal Code are found in the chapters dealing with criminal procedure in superior courts and relate to that subject only and not to justices' courts. *People v. Aymar*, 98 Cal. App. 1, 276 P. 595. The manner of entering a plea in a criminal case in a justice's court is set forth in section 1429 of the Penal Code. That section, unlike section 1018 of the Penal Code, does not contain the provision that the plea of guilty can be entered by the defendant only. Section 1434 of the Penal Code provides that the defendant must be present before the trial can proceed. Section 1451 of the same Code contains the provision that a new trial in a justice's court may be granted "when the trial has been had in the absence of the defendant, unless he voluntarily absent himself, with full knowledge that a trial is being had." Thus it would seem that it is only during the trial in a justice's court that the defendant should be personally present and that his absence from the trial is not always a ground for a reversal of the judgment. It is our conclusion that in a criminal case in a justice's court a defendant need not personally enter the plea of guilty, but that his attorney may enter it for him. In the instant case petitioners were present sitting beside their attorney at the times he entered their pleas of guilty for them. Even though we had reached the conclusion that the defendants themselves should have entered their pleas, in the absence of an express statute requiring such pleas to be entered by the defendants personally, it should be held that they waived the error and by their conduct consented to the entry of the pleas by their attorney.

[5] Petitioners rely on section 170 of the Code of Civil Procedure and *In re*

Cunha, 123 Cal. App. 625, 11 P.(2d) 902, 18 P.(2d) 979; *Cadenasso v. Bank of Italy*, 214 Cal. 562, 6 P.(2d) 944; and *Briggs v. Superior Court*, 215 Cal. 336, 10 P.(2d) 1003, in support of their contention that the justice of the peace had no jurisdiction to sit in the case when an affidavit of prejudice was filed alleging that he was biased and prejudiced against them. The three cited cases were decided under the provisions of section 170 of the Code of Civil Procedure which does not apply to criminal cases in justices' courts. In such cases the proceedings upon the filing of such affidavit are governed by section 1431 of the Penal Code. *People v. Radich*, 111 Cal. App. 779, 294 P. 1.

[6, 7] It seems to be settled that the filing of an affidavit of prejudice in a criminal case pending in a justice's court does not divest such court of its jurisdiction over the case and that defendants who are tried before the justice and convicted after the filing of such affidavit cannot be released on habeas corpus. *Ex parte Wright*, 119 Cal. 401, 51 P. 639; *Lowrey v. Hogue*, 85 Cal. 600, 24 P. 995; *Miles v. Justice's Court*, 13 Cal. App. 454, 110 P. 349; *People v. Radich*, supra.

[8] Petitioners were arrested, entered their pleas of guilty, and were sentenced in November, 1934. They appealed from the judgments pronounced upon them, which were affirmed by the superior court of Riverside county. Subsequently, in March, 1935, petitioners moved in the justice's court of Temescal township to vacate the judgments because of the bias and prejudice of the justice of the peace. The motion was supported by affidavits of prejudice which were then filed for the first time. Section 1431 of the Penal Code provides that a change of the place of trial in a criminal case because of the bias and prejudice of the justice of the peace "may be had at any time before the trial commences." The question of bias and prejudice was raised entirely too late for the judgments to be attacked on that ground in a proceeding of this kind or at all. *Ex parte Wright*, supra; *Bank of Italy v. Cadenasso*, 206 Cal. 436, 274 P. 534.

[9] It is well established that in a habeas corpus proceeding to test the validity of convictions in a criminal action the court issuing the writ will confine itself to an inquiry as to the jurisdiction of the court in which the judgments were pronounced

and the regularity of the process under which petitioners were deprived of their liberty. In re Cutler, 1 Cal. App. (2d) 273, 36 P.(2d) 441; In re Gutierrez, 1 Cal. App.(2d) 281, 36 P.(2d) 712. Those cases and the authorities cited probably furnish us sufficient grounds for remanding the petitioners without consideration of the other questions we have discussed.

The writ is discharged, and petitioners are remanded to the custody of the sheriff of Riverside county.

I concur: JENNINGS, J.

BARNARD, P. J., being absent, has not participated in this decision.



9 Cal.App.2d 156

PEOPLE v. COLLINS.

Cr. 2758.

District Court of Appeal, Second District,
Division 2, California.

Sept. 13, 1935.

1. Criminal law ☞1159(2, 4)

In criminal case District Court of Appeal could not pass on credibility of witnesses or determine weight to be accorded their testimony, since jurisdiction of the court in criminal cases is limited to review of questions of law (Const. art. 6, § 4).

2. Criminal law ☞1111(1)

Final opinion of trial court, as expressed in judgment and in order denying new trial, with regard to evidence, *held* controlling on appeal, as against contention oral opinion, expressed at conclusion of motion for new trial before court heard from prosecution, controlled.

Appeal from Superior Court, Los Angeles County; Walter Desmond, Judge.

Henry Collins was convicted of murder, and he appeals.

Judgment affirmed.

M. H. Broyles, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

[1] This is an appeal from a conviction of murder. The first contention of the appellant is "that the judgment on the verdict is contrary to the evidence and the law." Under this point he argues that the weight of evidence is with the appellant and that the testimony of one of the witnesses for the state was impeached by two of the witnesses for the appellant. Under the Constitution the jurisdiction of this court in criminal cases is limited to the review of "questions of law alone." Const. art. 6, § 4. It is, therefore, not the province of this court to pass upon the credibility of witnesses or to determine the weight to be accorded their testimony. 8 Cal. Jur. 582, and cases cited. There is substantial evidence to sustain the verdict.

[2] Appellant finally contends that the oral opinion of the trial court with regard to the evidence, expressed at the conclusion of the appellant's motion for a new trial, should be adopted as controlling on appeal. This oral expression was made by the court before it had heard from the prosecution. The final and controlling opinion of the court is expressed in the judgment and in the order denying the motion for a new trial.

Judgment affirmed.

We concur: WOOD, J.; FRICKE, Justice pro tem.

9 Cal.App.2d 115

STAHLER v. SEABOARD MORTGAGE CORPORATION et al.

Civ. 5345.

District Court of Appeal, Third District,
California.

Sept. 6, 1935.

1. Appeal and error ⇨1011(1)

Where trial court has heard conflicting evidence and has weighed testimony and determined weight of evidence, appellate court will not go beyond conclusion reached by trial court.

2. Appeal and error ⇨1024(4)

Order denying defendant's motion to set aside judgment would not be disturbed on appeal where motion was based on ground that defendant had not been served with summons and complaint, as to which there was clear conflict of evidence.

Appeal from Superior Court, Los Angeles County; K. Van Zante, Judge.

Suit by Helena J. Stahler against the Seaboard Mortgage Corporation and Maurine Wissmath and others. Judgment for plaintiff, and from an order denying motion of the last-named defendant to vacate and set aside judgment against her, the last-named defendant appeals.

Order affirmed.

Arthur J. Wissmath, of Los Angeles, for appellant.

Robert Mitchell, of Los Angeles, for respondent.

Mr. Justice pro tem. MONCUR delivered the opinion of the court.

This is an appeal from an order of the trial court denying a motion by defendant and appellant, Maurine Wissmath, to vacate and set aside a judgment entered against her, which motion was based upon the grounds that the service of summons and complaint in said action was false and that no service whatever had been made upon her of the summons and complaint in said action; also extrinsic fraud alleged to have been practiced upon the court and that the court had no jurisdiction to render the judgment and decree against the defendant as hereinafter mentioned.

It appears from the record that on September 16, 1926, defendant Seaboard Corporation executed a note in the sum of

\$3,250 to plaintiff, payable three years after date, with the usual conditions for the payment of interest. Contemporaneous with the execution of said note there was also executed by defendant Seaboard Mortgage Corporation a mortgage to secure the payment of said note, which mortgage was recorded September 17, 1926, in the records of Los Angeles county; that by written instrument dated April 23, 1930, and recorded June 28, 1930, in the official records of Los Angeles county, it was agreed by and between plaintiff and Seaboard Mortgage Corporation that the time of payment of said note and mortgage be extended to three years from September 16, 1929. It further appears that by deed dated July 22, 1932, and recorded July 23, 1932, executed by defendant Seaboard Mortgage Corporation, the property described in said mortgage was transferred to defendant and appellant, Maurine Wissmath, who, at the time of the filing of the complaint, it is alleged was the record owner of said property.

Default being made in the payment of interest and in the payment of taxes upon the mortgaged property, plaintiff commenced this action to foreclose the mortgage against the defendant Seaboard Mortgage Corporation, Maurine Wissmath, Arthur J. Wissmath, and fictitiously named defendants. The defendant corporation appeared in the action, but its only allegation of denial which is material to the matter herein is that it alleges that defendant corporation admits that Maurine Wissmath is the owner of the property mentioned in plaintiff's complaint.

The return of the summons shows that defendants, except those fictitiously named, were served as follows: Seaboard Mortgage Corporation, August 3, 1932; Maurine Wissmath, Los Angeles, August 3, 1932; Arthur J. Wissmath, August 3, 1932; the affidavit of service is made by one W. E. Malott. Default of defendants Maurine Wissmath and Arthur J. Wissmath for failure to appear was entered on August 15, 1932.

[1,2] Decree of foreclosure was made and entered upon the complaint of plaintiff and of defaulting defendants September 22, 1932. By motion dated March 2, 1933, defendant Maurine Wissmath moved the court to quash the service of summons, to set aside the judgment of default, and to vacate and set aside the judgment and

decree rendered against her by the court in said action upon the grounds hereinbefore stated. This motion was heard upon affidavits and upon oral testimony.

From the affidavits submitted, it appears that there was a clear conflict of evidence as to whether the moving defendant Maurine Wissmath was served with summons in the foreclosure action and had notice of the pendency of said action. The trial court heard and considered the affidavits and the evidence, and under well-settled principles of law which have been so repeatedly announced by the appellate courts of this state, it is deemed that no citations of authority are necessary to show that where the trial court has heard the evidence where there are conflicts and has weighed the testimony and determined the weight of the evidence, it is not the province of the appellate courts to go beyond the conclusion reached by the trial court.

A reading of the record in this case discloses to our minds that there is no merit in this appeal.

It is ordered that the order denying the motion appealed from be and the same is hereby affirmed.

We concur: THOMPSON, J.; PULLEN, P. J.



9 Cal.App.2d 166

KOHLHAUER v. BRONSTEIN.

Civ. 10318.

District Court of Appeal, Second District,
Division 1, California.

Sept. 16, 1935.

1. Appeal and error ☞981

New trial ☞108(1)

New trial should not be granted on ground of newly discovered evidence unless evidence is sufficiently strong to render different result probable, but such question is addressed to sound discretion of trial court and its decision will not be disturbed except for manifest error.

2. New trial ☞108(1)

On motion for new trial for newly discovered evidence, trial court must weigh evidence for both parties, and if satisfied that verdict

is contrary to evidence or that addition of newly discovered evidence might reasonably be expected to produce different result, court may grant new trial.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by William Lawrence Kohlhauser against Ben Bronstein. Judgment for defendant who appeals from an order granting plaintiff's motion for a new trial.

Order affirmed.

Gibson, Dunn & Crutcher and Philip C. Sterry, all of Los Angeles, for appellant.

Gretchen Wellman and George P. Kinkle, both of Los Angeles, for respondent.

CONREY, Presiding Justice.

This action was brought by the plaintiff to recover damages for personal injuries received as the result of a collision between an automobile driven by the defendant and a motorcycle driven by the plaintiff. Trial of the case before a jury resulted in a verdict in favor of the defendant. Thereafter the court granted plaintiff's motion for a new trial on the ground of insufficiency of the evidence to sustain the verdict "and other grounds of the motion," which included newly discovered evidence. Defendant appeals from that order. The stated ground of appeal is that the court erred in granting the motion for a new trial. Appellant in his brief argues that this is so for the reason that the evidence by an overwhelming preponderance thereof conclusively establishes the fact that the defendant was not guilty of negligence proximately causing injury to the plaintiff and that the collision between defendant's automobile and the plaintiff's motorcycle was proximately caused by the negligence of the plaintiff and that the court erred in granting the motion for a new trial upon the ground of the insufficiency of the evidence; and for the further reason that the affidavits filed in support of the motion for a new trial and particularly in support of that portion thereof based on the ground of newly discovered evidence are insufficient, being merely cumulative and of an impeaching character, and that in granting the motion for a new trial upon the ground of newly discovered evidence the learned court was guilty of manifest abuse of discretion.

Now comes the respondent and moves to dismiss the appeal or to affirm the judgment; one of the grounds of the motion being that the questions upon which the decision of the cause depends are so unsubstantial as not to need further argument.

Giving to the brief of appellant all the consideration that it will bear, we are of the opinion that the motion to affirm should be granted. It is true that the record of the trial furnishes scarcely a scintilla of evidence of negligence on the part of the defendant. Also the evidence of contributory negligence of the plaintiff is substantially conflicting, to an extent which would have furnished a legal foundation for a verdict either for or against contributory negligence. Assuming that on such record it would have been the duty of the court to deny a new trial, we are met with additional facts in the form of affidavits showing newly discovered evidence pertinent to the issues of the case, and especially pertinent to the defendant's negligence. Appellant insists that these affidavits are insufficient to justify a new trial, and that they are merely of a cumulative and impeaching character. We are of the opinion, however, that these affidavits import into the case additional facts which, more than any of the evidence received at the trial, tend to establish negligence on the part of the defendant. Indeed, appellant admits that this is so, but argues that this newly offered evidence does not tend to establish plaintiff's freedom from negligence, and therefore is not a statement of facts which would render a different result probable.

[1, 2] On the hearing for the motion for a new trial the court had before it not only a record upon which there was evidence legally sufficient to have justified a finding in favor of the plaintiff on the charge of contributory negligence, but also an offer of additional and newly discovered evidence, which together with the other evidence in the case probably would be sufficient in law to sustain a finding of negligence on the part of the defendant. It has been said that a new trial should not be granted upon the ground of newly discovered evidence, unless the showing as to such newly discovered evidence is sufficiently strong to render a different result probable. But it is also an established rule that the question as to whether such a showing is made is one that is addressed

to the sound legal discretion of the trial court, and the action of that tribunal in regard thereto will not be disturbed, except in cases of manifest abuse. When such a motion is presented to a trial court, it is the right and the duty of the court to weigh and consider the evidence for both parties and determine for itself the just conclusion to be drawn from it, and if the court is satisfied that the finding of the jury is contrary to the weight of the evidence, or that the addition of the newly discovered evidence might reasonably be expected to produce a different result, the court may grant a new trial, and the order so made will not constitute an abuse of discretion. *People v. Radz*, 119 Cal. App. 435, 436, 6 P.(2d) 527; *Malloway v. Hughes*, 125 Cal. App. 573, 580, 13 P.(2d) 1062.

The order is affirmed.

We concur: HOUSER, J.; YORK, J.



9 Cal.App.2d 177

PEOPLE v. LESLIE.

Cr. 2745.

District Court of Appeal, Second District,
Division 1, California.

Sept. 16, 1935.

Assault and battery ☞96(3)

Criminal law ☞713

In assault prosecution, where evidence was conflicting as to whether complaining witness attacked accused, in whose home she was at time of alleged assault, and evidence would support inference that accused had reasonable ground for believing complaining witness intended to do him bodily harm and that there was imminent danger she could do so, refusal to allow defense attorney to argue question of self-defense and to grant instructions on self-defense held prejudicial error.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Herbert Leslie was convicted of simple assault, and he appeals.

Judgment reversed.

Harry Margid, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

ROTH, Justice pro tem.

Defendant was charged with assault by means of force likely to produce great bodily injury upon Emily Morris Zurndorfer, and was found guilty of simple assault by a jury and was sentenced to six months in the county jail. From the judgment and order denying his motion for a new trial, defendant appeals.

The charge arose from the following facts: Between 1 and 2 o'clock in the morning of February 17, 1935, two women named Ardell and Zurndorfer (the latter the complaining witness herein), neighbors of defendant, called on defendant and his wife on their return home from a party which they had attended. The evidence is conflicting as to whether or not the women in question were under the influence of intoxicating liquor at the time. Referring to the complaining witness Zurndorfer at the time of pronouncing the sentence, the trial court said: "I think unquestionably that on that occasion she was to some extent under the influence of liquor * * *." At the time of the entry of the two women, the defendant Leslie, his wife, his stepdaughter, and one Hamilton were playing "hearts." There was an exchange of some pleasantries, and there is a substantial amount of conflicting evidence as to whether or not both women accepted drinks poured by defendant's wife, although it is plain that the complaining witness accepted one such drink which she referred to "as the stuff which was poured." This stuff was gin. During the course of the game, the visitors discussed the party they had attended. According to the complaining witness, defendant, Leslie, was in an ugly mood and turned to Mrs. Ardell and said: "That bastard of a husband of yours ritzed me on the street, the other day; I hate his guts, and that goes for you, too. * * * He said, 'Now, you dirty, lousy, drunken bums, get out of my house!' And I resented it. I said, 'You ought to be ashamed to talk that way to ladies.' And he said, 'Oh yeah?' and with that—and with that he raised his right fist; Mrs. Ardell was near her coat; she was evidently going to grab her coat. * * *

I was across the room, over toward the door where our coats were lying; and, when I said to him 'You ought to be ashamed to talk that way to ladies,' he struck her in the jaw with his right fist, on the left side of her jaw, and she wore a mark there for two weeks. * * * When he hit her, I screamed so loud he was startled by it; and he said, 'I will knock the so-and-so out of you.'

"Q. And what did you say? A. I did not say anything. There was a bottle there, and I said, 'If you come near me, I will let you have it.'

"Q. How big a bottle was it? A. Well, it was about a quart size."

Hamilton, according to this witness, then forced defendant back into the kitchen and the ladies prepared to leave, but as the women were leaving, Hamilton was making apologies for defendant's conduct, when, according to the complaining witness, " * * * And with that Leslie leaped from the kitchen; it was a swinging door; leaped from the door, and, with his right fist—I was facing Mr. Hamilton—he struck me on the right side of my jaw."

According to Hamilton, who undoubtedly was, and, so far as the record shows, may be considered the least interested of all the witnesses, the altercation commenced and took place as follows:

" * * * and Mrs. Morris (another name for Mrs. Zurndorfer) said, 'Come on back here; do not pay any attention to him; he is nothing around here; come on back.' So Mrs. Ardell came back; and she sat down in the chair that had been vacated by Mrs. Leslie. And Mr. Leslie got up and walked around, and he took her by the arm. He said, 'Come on; you get out of here; and I do not want you to come back any more.' And Mrs. Ardell broke away from him and ran across the room; and Mr. Leslie went over by the couch; he kept telling them to go out and stay out. Then Mrs. Morris (the complaining witness) ran across the room from where she was standing and hit—well, she attacked Mr. Leslie and knocked him over on the couch.

"Q. What do you mean by 'she attacked him'? A. She pushed him and knocked him over on the couch and started to pummel him and kick him, and screaming and all that; and Mrs. Ardell was standing over in the corner, screaming

just as loudly as she could * * * and so I got up then; and I went over and I separated them; and I told him, Mr. Leslie, to go on out in the other room. In the meantime, Mrs. Morris ran across the room and grabbed the bottle. She said she was going to come over there and crack his skull and a few things like that. And Mrs. Ardell left. Well, I was afraid something pretty drastic would happen; so I went over and pushed her up against the wall and tried to take the bottle from her; but I was sideways to her, and I could not quite reach it.

"Q. Where was Mr. Leslie at the time?

A. Mr. Leslie was still standing; he had gotten up from the couch, and was standing at the end of it. And I persuaded him to go into the kitchen * * * he went into the kitchen. Then I finally did get the bottle away from Mrs. Morris; and, in the meantime, Mrs. Ardell had come back in the room. So I persuaded them both to go; and, as they left, why, they both told me they were glad to meet me, but they had not had such a swell time; and Mrs. Ardell said she was going to get even with him; she was going to tell her husband, or something * * * as I was doing that, why, I heard some glass cracking, and I looked around and a part of the doorway had gone in, and a couple of windows. Just then Mr. Leslie came out of the kitchen; and he went there to the door, and, just about the time he got to the door, he was met by Mrs. Morris; and she came in; and she had one hand behind her, or something, and he grabbed her by the arm; he turned her around to push her out. She said she was going to come in there and get him, this time. I did not pay much attention to it. It all happened in a flash. So, by the time I got over to the door, some one had separated them; I could not see much; it was pretty dark out there in the court.

"Q. Did you see them fall out of the door? A. Yes, they sort of tripped on the sill, or something like that; I could not see what it was. I was in the middle of the room.

"Q. Who fell out first? A. Mrs. Morris. * * *

"Q. From the time they both fell out of the door there, until the time you got out there, how much time elapsed, approximately? A. Oh, I don't know; about—

it could not have been much more than about a minute at the most."

That the complaining witness had a bottle in her hand at the time the blow is alleged to have been struck is further corroborated by her own testimony as follows: "I screamed loud when he hit her. * * * I thought if he hit my friend for no reason, he would hit me; and I grabbed a bottle, and I said, 'If you come near me, I will let you have it.' * * * With that, his friend, Mr. Hamilton, got between us and pushed him into the kitchen."

There is much more to the complaining witness' version of the affray. The testimony was such that the jury could reasonably conclude that the defendant was drunk, vicious, profane, and aggressive. The recital of all evidence in detail would be of little avail, except to show that the jury had an abundance of evidence upon which to find defendant guilty of simple assault, as it did. The defense version of the affray, however, as it may be pictured from the brief excerpts of testimony given by Hamilton, is amply supported by the testimony of other defense witnesses. If the defense evidence be accepted as the fact, then, so far as the complaining witness was concerned, defendant may have been acting in self-defense, and was entitled to have the jury instructed on that phase of the law. Instructions on the law of self-defense were submitted and requested by the defendant. They were refused by the court. In addition, during the argument to the jury, defense counsel commenced to argue the question of self-defense, when he was interrupted, the trial court saying: "Just a moment. There is no element of self defense or protection of home involved here, and I will ask you not to discuss that feature of the law."

We are unable to say that the result of this case would have been the same had the defendant been allowed to argue the question of self-defense and had the jury been instructed on that phase of the law. Consequently, we feel that the court committed prejudicial error in making the remark quoted, and in omitting to instruct the jury on the law of self-defense.

The court, in its remarks at the time of sentence, referred to the complaining witness as "a comparatively small, frail woman." But we do not understand that the impulse to defend one's self is exclu-

sively dictated by size or sex. An invalid with a loaded automatic in hand can be more dangerous and cause much more terror than an unarmed, heavy-muscled wrestler, and a small, frail woman in an intoxicated condition with a quart sized bottle poised in her hand might call for the application of more heroic treatment than a weaponless male of defendant's size and weight. If the jury believed defendant's evidence, there can be no question but that such evidence would support the inference that defendant had reasonable ground for believing that the complaining witness intended to do him bodily harm and that there was imminent danger that she could do so. Facts and circumstances of such nature make out a good plea of self-defense. *People v. Guidice*, 73 Cal. 226, 15 P. 44; *People v. Iams*, 57 Cal. 115; *People v. Hubbard*, 64 Cal. App. 27, 220 P. 315.

The judgment of conviction and the order denying defendant's motion for new trial are reversed.

We concur: HOUSER, Acting P. J.; YORK, J.



9 Cal.App.2d 133

BAILEY et al. v. AMENT et al.

Civ. 9686.

District Court of Appeal, First District,
Division 2, California.

Sept. 11, 1935.

1. Corporations ⇨376

Surrender by stockholder of his capital stock in corporation without authorization by commissioner of corporations, for purpose of liquidating stockholder's indebtedness to corporation, *held* valid, since approval of commissioner was not required for exercise of corporation's statutory authority to purchase its outstanding stock (Civ. Code, §§ 309, 354, as amended by St. 1929, pp. 1266, 1270, §§ 12, 24).

2. Trial ⇨396(3)

Finding that settlement of stockholder's indebtedness to corporation was made by purchase in good faith, of stockholder's stock *held* not in conflict with issues made by pleadings, notwithstanding allegations in com-

plaint that shares were purchased were not denied by answer.

Appeal from Superior Court, Alameda County; John D. Murphey, Judge.

Action by S. E. Bailey and others against E. N. Ament and others. Judgment for plaintiffs, and defendants appeal.

Reversed.

W. I. Follett, of Oakland, H. W. Brunk, of Berkeley, and R. Robert Hunter, of Oakland, for appellants.

Breed, Burpee & Robinson, of Oakland, for respondents.

SPENCE, Justice pro tem.

Plaintiffs were minority stockholders in the defendant corporation, the Ashby Furniture Company. They brought this action against said corporation and the directors thereof claiming that the purchase by the corporation from defendant E. N. Ament of 2,400 shares of the capital stock of said corporation was illegal. The cause was tried by the court sitting without a jury and resulted in a judgment vacating and setting aside said purchase. Defendants appeal from said judgment.

The purchase in question was made in the year 1931 and citations herein of sections 309 and 354 of the Civil Code refer to said sections as they read at that time Stats. 1929, c. 711, pp. 1266, 1270, §§ 12, 24.

In the complaint, plaintiffs set forth numerous allegations as a basis for their claim of illegality. The trial court found in favor of defendants upon practically all of the issues. It found, however, that the purchase was never permitted or authorized by the commissioner of corporations and sustained the claim of plaintiffs that the purchase was therefore illegal under the provisions of section 309 of the Civil Code.

There were further findings made by the trial court showing that the purchase was made in settlement of the indebtedness of defendant Ament to the defendant corporation. It was found that the board of directors adopted a resolution on February 14, 1931, authorizing said purchase; "that defendant Ament did, pursuant to said resolution, surrender 2400 shares of his capital stock of defendant corporation to said corporation in settlement of his indebtedness in the sum of \$24,000 to said corporation,

and said corporation did thereupon cancel his said indebtedness in the sum of \$24,000 upon its corporate records; thereby withdrawing said sum from capital"; that on July 31, 1931, the board of directors adopted a resolution reciting the fact that defendant Ament had no other adequate assets with which to liquidate his indebtedness to the corporation and approving the above-mentioned purchase from defendant Ament of said 2,400 shares of stock. The trial court also found that at the time of said transfer defendant Ament had no other adequate assets with which to liquidate his indebtedness, and found "that said transfer of said stock was made in good faith in settlement of said Ament's indebtedness to said corporation."

[1] Upon the foregoing findings, appellants contend that said purchase was valid under the provisions of subdivision 8 (a) of section 354 of the Civil Code and that permission from the commissioner of corporations was not required. In our opinion this contention must be sustained. Said section then read, "Every corporation, as such, has power: * * * 8. To purchase and cancel upon its books and restore to the status of authorized but unissued shares any of its outstanding shares as follows: (a) To collect or compromise in good faith a debt, claim or controversy with any shareholder." This is precisely what was done in the present case, and we find no merit in respondents' contention that, "the power authorized by section 354 can only be exercised in the manner provided by 309." While these sections, together with numerous other sections, were re-enacted in the same act in 1929 (Stats. 1929, chap. 711), it does not follow that the powers set forth in section 354 could be exercised only in the manner provided in section 309, viz., with the permission of the commissioner of corporations first had and obtained. As originally enacted, section 354 defined the powers of corporations while section 309 placed a penalty upon directors of corporations for doing certain acts. Thereafter section 309 was amended to permit the directors to do the acts mentioned therein provided they were "first permitted or authorized so to do by the commissioner of corporations." We therefore believe it apparent that permission of the commissioner of corporations was required only for the doing of those acts mentioned in section 309

and that such permission was not required for the purpose of exercising the powers set forth in section 354.

[2] Respondents further urge that the findings of the trial court relative to the settlement of the indebtedness of defendant Ament through the purchase in question were beyond the issues made by the pleadings and must be disregarded. It is true that the complaint alleged the purchase of said shares and that said allegations were not denied by the answer. We are of the opinion, however, that the findings showing that the purchase was made in good faith in settlement of defendant Ament's indebtedness to the corporation were not in conflict with the admissions in the pleadings, but merely showed the true nature and purpose of the transaction alleged. The authorities cited by respondents dealing with findings in conflict with admissions are therefore not in point and we cannot disregard the findings above mentioned which bring the transaction within the provisions of section 354 of the Civil Code.

The judgment is reversed.

We concur: NOURSE, P. J.;
STURTEVANT, J.



8 Cal.App.2d 717

SMITH v. SHEPLER.

Civ. 5347.

District Court of Appeal, Third District,
California.

Aug. 10, 1935.

Hearing Denied by Supreme Court
Oct. 7, 1935.

1. Banks and banking ⇨47 (2)

Indispensable conditions precedent to enforcement of statutory liability of stockholder of failed Florida bank are adjudications of comptroller of insolvency of bank and that it is in liquidation, and the adjudication and order of assessment or requisition on shareholders of bank (Rev. Gen. St. Fla. 1920, §§ 4128, 4162).

2. Banks and banking ⇨63½

Statutory liability of stockholder of failed Florida bank held enforceable in California by liquidator of bank as against contention that liability was to creditors and not part of

assets of bank (Rev. Gen. St. Fla. 1920, §§ 4128, 4162).

3. Courts ⇨8

Florida statute which created claim in favor of creditors of failed banks against stockholders thereof held to create contractual right enforceable in California as against contention statute provided special remedy not enforceable in California (Rev. Gen. St. Fla. 1920, §§ 4128, 4162).

4. Action ⇨66

Foreign plaintiff appearing in California courts must follow California law as to procedure and pleading.

5. Limitation of actions ⇨2(2)

Foreign plaintiff appearing in California courts is subject to California period of limitations except as modified by statute, regardless of period of similar statutes in his jurisdiction (Code Civ. Proc. § 361).

6. Courts ⇨511

In case of nonresident plaintiff, law of jurisdiction where cause arises should apply as to existence of cause of action and substantive law applicable and as matter of comity nonresident should be permitted to press suit in California unless rights of other persons than litigants are adversely affected thereby or public policy of state is opposed to such cause of action.

7. Receivers ⇨210

Receivers appointed under another jurisdiction may be permitted to sue in California as matter of comity wherever rights of California creditors are not prejudiced.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by M. A. Smith, substituted for Charles I. Dwiggin, as liquidator of the First State Bank of Winter Haven, Florida, against Harry L. Shepler. From a judgment for the plaintiff, the defendant appeals.

Judgment affirmed.

Richard J. O. Culver, of Los Angeles, for appellant.

Jesse E. Jacobson, of Los Angeles, for respondent.

Mr. Justice pro tem ROSS delivered the opinion of the court.

Judgment was given in favor of plaintiff liquidator against defendant and appellant, a resident of Los Angeles county, Cal., for \$3,739.08, based on his ownership of 30

shares of stock in First State Bank of Winter Haven, in Florida, of the par value of \$3,000, interest at 7 per cent. being allowed on that sum from August 23, 1929, being the date on which the state comptroller of Florida made his order requiring all stockholders in the bank to pay the full amount of their alleged statutory liability, which could not exceed the par value of their shares. Defendant has appealed on a bill of exceptions duly served and filed.

The facts of the case include the following:

The defendant had owned 15 shares of the stock of said bank for some years; in 1926 he received 15 additional shares as a 100 per cent. stock dividend on which occasion he mailed in his stock certificates and received a new certificate for 30 shares, par value of \$3,000.

On May 15, 1929, the bank became insolvent and was placed in charge of the state comptroller as provided by statute. In June, 1929, by order of court, a liquidator, the original plaintiff herein, was named to act pursuant to the statute.

Section 4128, Revised General Statutes of Florida 1920, provides that: "Stockholders of every banking company shall be held individually responsible equally and ratably and not for one another for all contracts, debts and engagements of such company to the extent of the amount of their stock therein at the par value thereof in addition to the amount invested in such shares."

The Florida Bank Act, section 4162, Revised General Statutes 1920, provides in part that: "Such receiver, under the direction and supervision of the Comptroller * * * may, if necessary, to pay the debts of such bank * * * sue for and enforce the individual liability of the stockholders."

In the instant case, the comptroller in August, 1929, made and issued a written order entitled, "Levy and Assessment on the Shareholders of a State Bank," by which he declared the necessity for the stockholders to pay the full amount of their liability and directed the receiver, or liquidator, to call upon said stockholders to pay. Demand was made upon the defendant and upon his failure to pay this suit was instituted in the California courts.

Appellant questions the right of the comptroller to levy any assessments, and

cites the case of *Wood v. Hamaguchi*, 207 Cal. 79, 277 P. 113, 63 A. L. R. 861, against such an assessment being enforceable in California. Even respondent refers to the action as being brought on an assessment and not on statutory stockholders' liability.

That is not true. The cause of action arises on the liability of the stockholder under the Florida statutes and this is contractual in its nature.

"The doctrine is settled that the liability of stockholders in a banking company for its obligations is primarily contractual, and any acquisition of the stock implies assent of the owner to the statutory conditions under which the corporation is organized." *Chavous v. Gornto*, 89 Fla. 12, 102 So. 754, 755.

The so-called "assessment" by the comptroller cannot be compared to the usual corporation assessment. It would more properly be called a requisition.

The Florida statute is substantially the same as the federal statute fixing the liability of shareholders in national banks and the Florida courts follow federal court interpretations. *Tunncliffe v. Noyes*, 101 Fla. 794, 135 So. 505.

[1] Indispensable conditions precedent to the enforcement of such liability are the adjudications of the comptroller of the insolvency of the bank and that it is in liquidation, and the adjudication and order of the assessment or requisition on the shareholders of the bank. *Page v. Jones* (C. C. A.) 7 F.(2d) 541.

[2] Appellant states that on the authority of *Williams v. Carver*, 171 Cal. 658, 154 P. 472, statutory stockholders' liability **is to the creditors, and is no part of the assets of the bank and cannot be enforced by the superintendent of banks.** This is undoubtedly the construction given by the California courts to the former provisions of section 136 of the Bank Act, although it will be noted that one reason for the decision in *Williams v. Carver*, supra, and in *Williams v. Carver*, 42 Cal. App. 382, 183 P. 669, was that enforcing constitutional liability of stockholders was not embraced within the title of the Bank Act (St. 1909, p. 87). The liability is not penal, but contractual (*Chavous v. Gornto*, supra), and the Florida courts in *McNeill v. Pace*, 69 Fla. 349, 68 So. 177, held that the receiver, now called a liquidator, has authority to enforce it.

[3] Appellant states that the rights claimed under the Florida statute provide for a special remedy not enforceable in California, and cites *Russell v. Pacific Railway Co.*, 113 Cal. 258, 45 P. 323, 34 L. R. A. 747, and other cases. These cases affirm the undoubted rule that a special remedy created in one state cannot be imported into another state, but none of them say that the right which that remedy is made to enforce cannot be enforced in another state under the procedure of the latter state appropriate to such enforcement, except where, as in the *Russell Case*, supra, the special remedy is deemed the exclusive means of enforcing the right. In the instant case, no special remedy has been created by the Florida statute. It is a right that has been created, in contractu, that stockholders in an insolvent bank shall pay to the liquidator on proper demand and authorization the amount of their stockholders' liability to the creditors, the liquidator making such collection for the benefit of all the creditors.

[4, 5] It is true that as to procedure and pleading, the foreign plaintiff appearing in our courts must follow the California law. He is subject to the period of our statute of limitations regardless of the period of similar statutes in his jurisdiction (*Royal Trust Co. v. MacBean*, 168 Cal. 642, 144 P. 139), except as provided by section 361 of the Code of Civil Procedure.

[6] But as to the existence of the cause of action, and as to the substantive law applicable thereto, the law of the jurisdiction where the cause arises should apply, and, as a matter of comity, he should be permitted to press his suit herein unless rights of other persons than the litigants are adversely affected by permitting such action, or where the public policy of this state is opposed to such cause of action.

Appellant quotes *Clarke on California Corporations* to show that statutory or constitutional stockholders' liability has had a detrimental effect, and states that the policy of enforcing it has been frowned on by the courts wherever possible. But it should be noted that, although the people of California voted the provision for stockholders' liability out of the Constitution in November, 1930, and the 1931 Legislature repealed most of the statutory provisions for it, that Legislature retained it as to banking corporations by chapter 196 of Statutes of 1931, at page 338. This statute has been upheld very recently by the District Court

of Appeal, Fourth Appellate District of California, in the case of Rainey, Superintendent of Banks, v. Michel et al., 48 P.(2d) 147.

[7] Receivers appointed under another jurisdiction may be permitted to sue in California as a matter of comity, wherever the rights of local creditors are not prejudiced. *Wright v. Phillips*, 60 Cal. App. 578, 213 P. 288.

A receiver of a Florida bank cannot determine the assessment. The comptroller must do this and his order is conclusive as to the necessity, and upon such order the receiver must make demand and may then enforce payment. *Tunncliffe v. Noyes*, *supra*. This procedure was followed in the instant case. In addition, the evidence showed that claims of creditors required much more than the \$150,000, which was the total par value of the capital stock. The findings are all amply supported by the evidence.

In view of our opinion of the law applicable to the case, it seems that the trial court's rulings on objections to testimony were correct. If it might be said that a few of the replies of the witnesses were conclusions, the answer is that the court could hardly reach any other conclusion than that stated by the witness in each case. There are no errors in pleading, procedure, or admission of evidence that could possibly be deemed prejudicial or to have resulted in a miscarriage of justice.

The judgment is affirmed.

We concur: THOMPSON, J.; PLUMMER, Acting P. J.



9 Cal.App.2d 128

PEOPLE v. HOGUE.

Cr. 2769.

District Court of Appeal, Second District,
Division 2, California.

Sept. 10, 1935.

Appeal and error ☞361(1)

Failure of appellant to file with clerk and present application to trial court stating

grounds of appeal and points on which appellant relied *held* to require dismissal of appeal (Rules of the Supreme and District Courts of Appeal of the state of California, rule 2, § 7).

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Proceeding by the People of the state of California against J. Frank Hogue. From an adverse judgment, defendant appeals.

Appeal dismissed.

Charles B. Taylor, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

The Attorney General moves to dismiss this appeal on the ground that appellant failed to file with the clerk and present an application to the trial court stating in general terms the grounds of the appeal and the points upon which he relies as required by section 7 of rule II of the Rules of the Supreme and District Courts of Appeal of the state of California.

Said rule requires that "the appellant must, within five days after giving notice of the appeal, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies. * * *

The appellant filed with the clerk a notice of appeal which contains the following sentence: "This appeal is taken on questions of law and fact." He also in open court requested that the court order the clerk to prepare a full and complete clerk's transcript, but he did not file with the clerk and present an application to the trial court stating in general terms the grounds of the appeal and the points upon which he relies. His grounds of appeal and the points upon which he relies were not presented at all. Therefore the appeal must be dismissed. *Gonzales v. Superior Court* (Cal. Sup.) 44 P.(2d) 320.

The motion is granted.

We concur: WOOD, J.; FRICKE, Justice pro tem.

PEOPLE v. LEE.

Cr. 183.

District Court of Appeal, Fourth District,
California.

Sept. 5, 1935.

Hearing Denied by Supreme Court

Oct. 4, 1935.

1. Criminal law ☞942(2)

New trial was not required to be granted as matter of law when important witness for prosecution repudiated his testimony and admitted that he committed perjury, though no counter affidavits were filed.

2. Criminal law ☞959

Trial court, in passing on motion for new trial, was bound to consider all evidence produced during trial in addition to affidavits supporting motion.

3. Criminal law ☞1158(1)

On motion for new trial on ground of recanting prosecution witness, weight of recantation was for trial court.

4. Criminal law ☞911, 1156(1)

Trial court is vested with wide discretion in passing on motions for new trial, and its action will be disturbed only when it is clearly made to appear that trial court has capriciously or arbitrarily abused its discretion.

5. Criminal law ☞942(2)

Denial of new trial to defendant convicted of selling narcotics, where prosecution witness who made purchase repudiated his testimony, *held* not abuse of discretion (St. 1929, p. 380, as amended).

6. Criminal law ☞37

If officer or some one acting under his direction induces or persuades person to commit crime which he would not have committed without such inducement, law will not punish person thus lured into commission of offense.

7. Criminal law ☞37, 330

Defense of "entrapment" is positive defense imposing on accused burden of showing that he was induced to commit act for which he is being prosecuted, and invocation of defense necessarily assumes that act charged as public offense was committed.

[Ed. Note.—For other definitions of "Entrap; Entrapment," see Words & Phrases.]

8. Criminal law ☞569

Evidence *held* not to show entrapment of defendant prosecuted for selling narcotics to whom informer was sent by officers to make purchase, though there was no evidence of prior sales, where there was no evidence showing that pressure was applied to cause defendant to make sale and both defendant and

his wife denied that any sale was made or that defendant possessed narcotics (St. 1929, p. 380, as amended).

9. Criminal law ☞1170(2)

Alleged error in excluding inquiry to show that prosecution witness did not understand nature and character of oath *held* harmless, where, if witness' testimony was eliminated entirely, sufficient evidence remained to support conviction (Const. art. 6, § 4½).

10. Criminal law ☞1169(2)

Alleged error in admitting telephone conversation without sufficient preliminary showing of defendant's identity *held* harmless, where witness' entire testimony could be eliminated without rendering conviction unsupported by evidence and conversation was immaterial (Const. art. 6, § 4½).

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Bob Lee was convicted of selling narcotics, and he appeals.

Affirmed.

John L. McNab and Robert Littler, both of San Francisco, and Frank Curran, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

JENNINGS, Justice.

The defendant was accused in two separate informations with having violated the State Narcotic Act (St. 1929, p. 380, as amended). In one information he was charged with having sold a preparation of opium, and in the other he was accused of having sold a preparation of cocaine. The defendant entered a plea of not guilty to both accusations. On the date appointed for the trial it was stipulated between counsel for the defendant and the district attorney that the two actions should be consolidated for trial. Upon the conclusion of the trial before a jury selected for the purpose, verdicts were returned convicting defendant of both offenses. The defendant thereupon moved for a new trial, which motion was denied, and judgment was rendered whereby the defendant was sentenced to be confined in the state prison as punishment for each offense; the two sentences to run concurrently. From the court's order denying his motion for a new trial and from the judgment of conviction the defendant has perfected the present appeal.

The first point which appellant makes on this appeal is that the trial court committed reversible error in denying his motion for a new trial. Proper consideration of this contention requires an examination not only of the evidence which was produced in support of the motion, but also of the evidence which was produced during the trial of the action.

The evidence which was produced in support of the motion for a new trial consisted principally of an affidavit made by a witness who was an important witness for the prosecution during the trial of the case. By this affidavit the witness wholly repudiated his former testimony and admitted that he had committed perjury during the trial. As a proper background upon which to project the picture presented by this affidavit and for the purpose also of considering the effect produced by it upon the entire history of the case, a résumé of the evidence produced during the trial by respondent is at least desirable.

The evidence which tended to show that appellant was guilty of the offenses charged against him consisted of the testimony of the witnesses Blonder, Evans, and Ng Loon. The two first-named witnesses were narcotic inspectors for the state of California. The witness Ng Loon was a Chinaman who stated that he operated a chop suey restaurant in the city of Fresno. The testimony of the above-mentioned inspectors showed that during the early part of March, 1935, they were in the city of Fresno for a number of days for the purpose of investigating the illicit possession and sale of narcotics in that city; that on March 3d or thereabouts they arrested Ng Loon as the possessor of a very considerable quantity of narcotics; that after Ng Loon's arrest they proceeded to use him as an operator for the purpose of uncovering other infractions of the State Narcotic Act; that in pursuit of this program they secured the sum of \$160, represented by certain bank notes whose serial numbers they copied in a memorandum; that they then handed these notes to Ng Loon and made an appointment to meet him in front of the house in which appellant had living quarters at 11:55 a. m. of March 4, 1935; that they met Ng Loon at the appointed time and place and searched him for the purpose of discovering whether he then had any narcotics in his possession; that they did not request that he remove his hat during the search; that they found

no narcotics on his person; that Ng Loon then went to the apartment occupied by appellant, where he remained for about three minutes; that in a short time he reappeared in company with appellant and the two were arrested by the inspectors who returned them to appellant's apartment; that both men were then and there searched, and it was discovered that Ng Loon had a can containing gum opium and an envelope containing a small quantity of cocaine, and that appellant had in his wallet the various bank notes whose serial numbers had been noted by the inspectors as aforesaid; that appellant offered to pay the witness Blonder a sum of money if he would "forget" the matter. The witness Ng Loon testified that on March 4, 1935, he telephoned the appellant and stated that he wanted to purchase some opium and cocaine; that appellant said that he had the aforesaid narcotics; that it was agreed that the witness would meet appellant at his apartment at noon on the above-mentioned date; that he met appellant at the appointed time and place and paid him \$100 for a can of opium, receiving \$2 in change, and \$60 for an envelope containing some cocaine; that the money which he paid appellant for the opium and cocaine was money which the inspectors had "marked"; that he was searched by the inspectors prior to his going to appellant's apartment; that when he was searched he removed his hat from his head; that he had no narcotics on his person when he met the appellant; that he telephoned appellant and made the purchase of the above-mentioned narcotics from appellant at the suggestion of the inspectors and in the belief that he would receive more lenient treatment in the matter of the charge of possession pending against him if he adopted the suggestion.

In the affidavit which was presented in support of appellant's motion for a new trial, Ng Loon stated that at the time he was arrested for possession of narcotics he requested the arresting officer to help him to secure a light sentence and was told that if he would assist the officer the latter would assist him; that the officer gave him \$160 in marked money; that he took this money and gave it with \$40 additional of his own to appellant in payment of a like sum which he had previously borrowed from appellant; that he did not then or at any other time purchase or receive from appellant any narcotics; that the narcotics which were discovered after he

left appellant's apartment were narcotics which he had concealed on his person at the time he went to appellant's apartment on March 4, 1935; that the testimony which he gave at the trial of appellant was entirely false and was given in the hope and belief that by so doing he would receive leniency at the hands of the court when he should appear for sentence for violation of the State Poison Act, to the commission of which offense he had theretofore entered a plea of guilty.

In support of his contention that the trial court committed reversible error in denying his motion for a new trial, appellant urges that it must be conceded that no evidence was produced during the trial which proved the commission of the offenses specified in the informations other than the testimony of the witness who, by his affidavit, has so effectually repudiated his prior testimony. With this statement respondent takes issue. We are impelled to the conclusion that the respondent is correct and that the above-mentioned concession is not necessary. It may properly be conceded that the testimony of the recanting witness was an important factor in appellant's conviction. It may even be conceded that it was so important that of itself it would have supported verdicts of conviction. It did not, however, stand alone. There was other evidence, circumstantial in character, which was strongly persuasive of appellant's guilt. The giving of "marked" money to the witness Ng Loon, the search of this witness for the purpose of discovering whether or not he had any narcotics concealed on his person immediately prior to his entrance into appellant's apartment, the very brief time that elapsed after he had entered the apartment until his reappearance, the discovery of the narcotics in his possession immediately after he came out from the apartment, the discovery of the "marked" money in the possession of appellant at the same time, are circumstances which, taken together, are highly indicative of appellant's guilt and which certainly preclude the necessity of making the concession which appellant urges must be made. The case of *Sauvain v. United States* (C. C. A.) 31 F.(2d) 732, presents a factual situation strikingly similar to that which is presented by the above-narrated circumstances in the instant case. In the cited case the defendant was charged in two counts with possession and sale of narcotics. He was convicted and sentenced on

both counts and appealed. In discussing the contention that the evidence was insufficient to support the judgment of conviction of the offense of sale, the United States Circuit Court of Appeals said: "The evidence is ample to support the conviction. The officers searched an addict, finding neither money nor narcotics on him. They gave him \$3 in marked money, kept him under their eyes until he went into the defendant's house, from which he emerged shortly with the defendant. When they emerged the addict had narcotics and the defendant had the marked money. There is other evidence, but this is ample."

Appellant stresses the point that, in their search of Ng Loon's person prior to his entrance into appellant's apartment, the officers did not compel him to remove his hat. From this it appears to be argued that it must now be assumed that Ng Loon then had the narcotics which were later discovered in the pockets of his clothing concealed in his hat. Such a contention is useless. It is an argument which could have been made and which doubtless was made to the jury. It must be remembered that Ng Loon testified positively that he removed his hat when he was searched by the officers. Furthermore, both appellant and his wife testified that appellant did not have the narcotics in his possession and that he neither sold nor gave them to Ng Loon. Since it is not denied that Ng Loon had the narcotics in his possession immediately after he emerged from appellant's apartment, it is apparent that the only explanation for this fact which could fit appellant's defense was that Ng Loon had the narcotics in his possession when he entered the apartment. The determination of this question involved the solution of a pure question of fact. Obviously the jury had to discover whether the explanation was true or false. The determination was unfavorable to appellant. It may not now be urged that the jury's rejection of the explanation is unsupported by evidence.

[1] Appellant urges that the great weight of authority in the United States supports the proposition that the denial of a new trial is an abuse of discretion when an important witness who has testified for the prosecution repudiates his testimony and admits that he committed perjury when he gave it. While we entertain very considerable doubt as to

whether the proposition is supported by the weight of authority in the United States, we entertain no doubt that, as stated, it is not the law in California. It is our conclusion that the case of *People v. Tallmadge*, 114 Cal. 427, 46 P. 282, is directly in point and that it has definitely settled the question adversely to the contention advanced by appellant. It is there decided that a new trial is not required to be granted as a matter of law upon the ground of newly discovered evidence when it is shown by the affidavit of the complaining witness that he had committed perjury in giving his testimony during the trial of the action. Appellant endeavors to differentiate the cited case from the present by pointing to the fact that the affidavit of the recanting witness in the Tallmadge Case was met by counter affidavits filed by the respondent, whereas it appears that no counter affidavits were presented by the respondent in the instant case. From this it is argued that, on the motion of appellant for a new trial, the only evidence which the court had before it consisted of the affidavits presented in support of the motion. Concededly the most important affidavit thus presented and the one on which appellant bases its contention that the trial court committed reversible error in denying the motion was the affidavit of Ng Loon. The allegations of this affidavit have heretofore been described in detail.

[2] Since it is urged that the failure of respondent to have filed any counter affidavit traversing the allegations of the above-described affidavit is so vital that its ultimate effect is to render the denial of a new trial error demanding a reversal of the order of denial, it may properly be inquired just what allegations were contained in the affidavit which could have been traversed and which had not already been denied either directly or indirectly by evidence produced during the trial of the action. In this connection, it must be observed that appellant's motion for a new trial specifically stated that it would be made upon the papers, records, and files of the action and upon the phonographic transcript of the evidence produced during the trial. The trial court, therefore, in passing on the motion had before it and was bound to consider all evidence produced during the trial in addition to the affidavits filed in support of the motion.

When, therefore, the affidavit of the recanting witness is examined in the light of the evidence theretofore submitted for the purpose of answering the above-mentioned inquiry, it is apparent that there are only two allegations that could have been controverted by counter affidavits. These are, first, that the arresting officer promised to assist the affiant to secure a light sentence if affiant would help him; and, second, that the affiant, when he entered appellant's apartment, had in his possession, concealed on his person, the narcotics which he testified he purchased from appellant. It is obvious that the inspectors could have made no more efficacious denial of the second of the above-mentioned allegations than they did during the trial. They then testified fully as to the search which they made of the affiant's person immediately prior to his entrance into the building wherein appellant's apartment was located. They admitted that affiant was not compelled to remove every article of his clothing before he entered the building. Manifestly, they could have gone no further than this in counter affidavits which they might have filed in opposition to Ng Loon's affidavit. Yet this they would have had to do in order to make a complete denial of the very general statement contained in Ng Loon's affidavit that he had the narcotics concealed on his person when he entered appellant's apartment. We have no hesitancy in declaring that the officers were not required to go to the length of stripping the clothing from Ng Loon so that there could be no possibility of the man having concealed narcotics on his person.

The allegation as to the promise made to affiant is entirely immaterial so far as the particular matter now under consideration is concerned. We are now considering the effect of respondent's failure to file counter affidavits in opposition to the affidavit of the recanting witness. It is said that this failure left entirely unexplained and undenied the allegations of the affidavit and that therefore the court erred in denying the motion. It may be conceded that, when the trial court passed upon the motion for a new trial, it was bound to assume that the officers had made the promise which the affidavit alleged they had made. We entertain no doubt that the court did indulge in this assumption, particularly since the transcript shows that respondent's witness Evans testified positively during the trial that Ng Loon was employed by the state narcotic department

at the time he went to appellant's apartment. We do not understand that it is contended that, because Ng Loon had been promised leniency if he would assist the officers in uncovering another infraction of the law, therefore the court was bound to grant the motion for a new trial. Such contention, if made, would be utterly lacking in merit. The promise of leniency was a fact that tended to show the interest of the witness. It was a fact that had to do with the question of his credibility. It was a fact to be submitted for the consideration of the jury. While it is true that this fact was not presented to the jury, it is also true that it was shown that this witness was being used as an operator or informer. The fact of his interest was therefore presented to the jury and undoubtedly was considered by it in determining the credibility of the witness.

[3-5] We are finally constrained to observe that the responsibility of weighing the recantation was imposed upon the trial court. Upon this tribunal rested the duty of determining whether the recantation was true or false. It could not properly shift to another jury the responsibility with which, in the proper discharge of its duty, it was burdened (concurring opinion of Justice Cardozo in *People v. Shilitano*, 218 N. Y. 161, 112 N. E. 733, 739, L. R. A. 1916F, 1044). It is too firmly established to require the citation of any authorities that the trial court is vested with a wide discretion in passing upon motions for a new trial and that only when it is clearly made to appear that the trial court has capriciously or arbitrarily abused its discretion its action granting or denying such a motion will be disturbed. We entertain a settled conviction that no such abuse of discretion has here been shown.

In his attack upon the judgments of conviction appellant first contends that the evidence produced during the trial shows that he was "entrapped" into accomplishing the acts of which he was convicted and that public policy estops the state from prosecuting him for the commission of the offenses which the state has deliberately induced him to commit. This contention properly assumes that the witness Ng Loon, at the time he purchased the narcotics, was in the employment of the state narcotic department.

[6-8] The defense of entrapment is recognized as a valid defense available to a person charged with the commission of a

public offense under certain circumstances. The essential and important element which renders the defense available is the fact of inducement. If an officer or some one acting under his direction induces or persuades a person to commit a crime which he would not have committed without such inducement, the law will not punish the person thus lured into commission of the offense. *People v. Malone*, 117 Cal. App. 629, 4 P.(2d) 287. Appellant urges that, under the facts presented by the evidence herein, the burden rested on the prosecution to show that the officers suspected and had reason to suspect that appellant was making illegal sales of narcotics, that appellant was actually engaged in the illicit traffic, and that the offer to buy merely afforded appellant an opportunity to sell, and that there was no unusual pressure placed upon appellant to cause him to make the sales. It is declared that the evidence failed to show that respondent sustained this burden.

With respect to the claim that there was no evidence which tended to prove that appellant was engaged in illegal traffic in narcotics or that he was even suspected of making illegal sales, it may be conceded that there was no evidence of prior sales. Such evidence, if offered, would have been inadmissible and objection to its reception would undoubtedly have been made by appellant if it had been offered. The significant fact that Ng Loon was sent to appellant's apartment by the inspectors of the state narcotic department for the express purpose of discovering whether he could purchase narcotics from appellant is, however, a circumstance that is most strongly persuasive of the fact that appellant was not free from suspicion. *People v. Makovsky* (Cal. Sup.) 44 P.(2d) 536.

As to the argument that the prosecution failed to show that no unusual pressure was placed on appellant to cause him to make the sales, it may be remarked that there is an entire lack of evidence tending to show that any pressure was applied to cause appellant to make the sales. It is our understanding that the defense of entrapment is a positive defense imposing upon an accused the burden of showing that he was induced to commit the act for which he is being prosecuted. The invocation of the defense necessarily assumes that the act charged as a public offense was committed. The record shows that both appellant and his wife testified in his

behalf during the trial. Neither of these witnesses at any time admitted that appellant made the sales or either of them. On the contrary, both denied that any sale was made or that appellant had any narcotics in his possession. There was no intimation that appellant was ever lured or persuaded into making a sale to Ng Loon. The record is bare of any evidence which tends to show that any persuasion or inducement was offered to appellant to make the sales outside the ordinary transaction of purchase and sale between a willing purchaser and a willing seller. *People v. Makovsky*, supra. It is our conclusion that appellant's claim that the evidence established the defense of entrapment is untenable. *People v. Harris*, 80 Cal. App. 328, 251 P. 823; *People v. Rucker*, 121 Cal. App. 361, 8 P.(2d) 938.

[9] Appellant contends that the trial court erred in refusing to permit him to examine Ng Loon as to his understanding of an oath. The record shows that this witness for the respondent was sworn and was interrogated on direct examination by the district attorney. When this examination was concluded, appellant's counsel inquired of the witness what he meant by raising his hand when the oath was administered and whether it meant anything at all to him. An objection to the inquiry thus propounded was sustained. It is now urged that the understanding of a witness as to the nature and meaning of an oath is a question which directly affects the credibility of the witness and is therefore a proper subject for cross-examination. Respondent contends that the question is one which relates solely to the competency of the witness and that no inquiry having been made by appellant when the witness was sworn and no objection having been presented as to his competency, and no suggestion having been made that he did not understand the nature and meaning of an oath at any time during the direct examination, appellant thereby waived the objection and may not now complain of the court's ruling.

It will be assumed for the purposes of this opinion without deciding the question that appellant's contention is correct and that the trial court erred in sustaining respondent's objection to the inquiry whose obvious purpose was to show that the witness did not understand the nature and character of an oath. It will further be assumed that if appellant had been permit-

ted to pursue the line of investigation suggested by the question to which objection was sustained he would have been able to demonstrate that the witness had no understanding of the meaning of the oath administered to him and that the effect of such showing would have been that the jury would not have been justified in believing any of his testimony. Indulgence in the aforesaid assumptions does not, however, require a holding that the error committed by the trial court necessitates reversal of the judgments. As heretofore indicated, we entertain the opinion that, if the testimony of this witness is eliminated in its entirety, sufficient evidence remains to support the verdicts. Since this is true, it necessarily follows that it is our belief that the ruling of the trial court to which complaint is here made and which we assume was erroneous did not result in a miscarriage of justice. This being the case, the error must be regarded as harmless and one which we are at liberty to disregard under the provisions of section 4½, article 6, of the Constitution of California.

[10] Appellant's final contention is that the trial court erred in permitting the witness Ng Loon, over appellant's objection, to narrate a certain conversation which he testified he had with the appellant by telephone. It is urged that there was not a sufficient preliminary showing of the identity of appellant as the person with whom the witness conversed and that therefore appellant's objection to the inquiry should have been sustained. It will again be assumed, with the express proviso that the matter is not to be regarded as decided, that appellant's contention in this regard is correct and that the court erred in allowing the witness to narrate the conversation. We entertain no hesitancy, however, in declaring that the assumed error should be regarded as harmless. This must necessarily follow from the opinion heretofore expressed regarding the refusal of the trial court to permit the same witness to be examined as to his understanding of the nature and meaning of an oath. It was there assumed that the court erred in its refusal and that the entire testimony of this witness could be eliminated without rendering the verdicts vulnerable to attack on the ground of lack of evidentiary support. Since this is true, it follows that, in our opinion, any part of the testimony of this witness may be expunged from the record and yet no miscarriage of justice has re-

sulted. Furthermore, the evidence to which this complaint is directed consisted of an alleged telephone conversation between the witness and appellant wherein the witness testified that he told appellant he wished to buy some opium and cocaine, that appellant said he had the narcotics, and that it was agreed between them that the witness should go to appellant's apartment at a specified time. It is obvious that it was entirely unnecessary for the prosecution to prove that an appointment was made for the purpose of a sale of narcotics which appellant allegedly admitted that he had. Appellant was not charged with offering narcotics for sale or with mere possession. He was charged with selling and was convicted of selling. The conversation was immaterial, and its reception in evidence, assuming that it was erroneous, was manifestly harmless and, in our opinion, did not result in a miscarriage of justice.

For the reasons stated the judgments and orders from which these appeals have been prosecuted are affirmed.

I concur: MARKS, Acting P. J.

BARNARD, P. J., being absent, does not participate in this opinion.



9 Cal.App.2d 174

PEOPLE v. ROSE.

Cr. 2739.

District Court of Appeal, Second District,
Division 1, California.

Sept. 16, 1935.

1. False pretenses ☞39

Where defendant was charged with issuing check without sufficient funds, burden of proving that check was uttered with intent to defraud was on prosecution (Pen. Code, § 476a).

2. False pretenses ☞49(3)

In prosecution for issuing check without sufficient funds, evidence held ample to support judgment of conviction (Pen. Code, § 476a).

3. Criminal law ☞1159(3)

Judgment of conviction of issuing check without sufficient funds which was support-

ed by abundant and ample evidence could not be disturbed by appellate court, even though it might differ as to conclusion of guilt or innocence which might be drawn from conflicting evidence.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

A. E. Rose was convicted of issuing a check without sufficient funds, and he appeals.

Affirmed.

Arthur S. Guerin, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

ROTH, Justice pro tem.

Defendant Rose was charged with and convicted of the crime of issuing a check without sufficient funds in violation of section 476a, Penal Code. The trial was by the court alone, a jury having been regularly waived.

The record shows that on August 6, 1934, defendant asked one MacIntyre, with whom he had had prior business dealings, to cash a check for him in the amount of \$150. At the time of the request, both parties were in the bank with which MacIntyre transacted business, located in Hollywood. The defendant, according to MacIntyre, stated that inasmuch as his bank was in Beverly Hills "it was too far to go to his bank and he wanted to get some cash to pay for something." MacIntyre cashed the check. On that day and for some days prior thereto and thereafter, defendant had practically no balance in his bank, and was in fact on a number of the days immediately preceding and succeeding the date of August 6, 1934, overdrawn at his bank in small amounts. Defendant contended that he told MacIntyre he had no money in the bank and that he was "strapped" for cash and wanted to borrow the \$150 in question. The evidence is in direct conflict, and while the testimony of defendant, which testimony alone constituted his defense, if believed to be true by the trial court, would settle the matter in his favor, the evidence submitted by the people unquestionably sustains the judgment of the court.

[1] It is no doubt settled that the utterance of a check "with intent to defraud"

**CRESTETTO v. LANG TRANSP. CORPO-
RATION et al.**
Civ. 10317.

District Court of Appeal, Second District,
Division 2, California.
Sept. 19, 1935.

must be proved by the prosecution [*People v. Becker*, 137 Cal. App. 349, 351, 352, 30 P.(2d) 562], and defendant was given ample opportunity to prove that he had no such intent. The mere fact, however, that the defendant testified that he had no such intent does not close this phase of the matter. The facts and circumstances were such that the intent could have been easily inferred from the whole evidence, as it undoubtedly was by the trial court. *People v. Becker*, supra, 137 Cal. App. page 352, 30 P.(2d) 562. In pronouncing its verdict upon the close of the evidence, after argument and upon submission of the case, the trial court said: "Well, as the district attorney has said, if the court believes the testimony of the defendant, he has a defense to this action. There is, of course, a very sharp conflict between the testimony of the complaining witness and the testimony of the defendant. To my mind, there is no question at all as to where the truth lies. The court will find the defendant guilty."

[2,3] It would serve no useful purpose to review all the evidence in detail. It is sufficient to say that there not only is evidence to sustain the judgment, but that the evidence in support of the judgment is abundant and ample. It is patent, therefore, that the judgment of the trial court cannot be disturbed, even though we might differ (which we do not) as to the conclusion of guilt or innocence which might be drawn from the conflicting evidence. *People v. Tom Woo*, 181 Cal. 315, 184 P. 389. In the *Woo Case*, 181 Cal. at page 326, 184 P. 389, 393, the court says: "For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground we are discussing, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below."

The record of this case shows "sufficient substantial evidence" to support the hypothesis of guilt.

The judgment and the order denying motion for a new trial are affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

1. Appeal and error ⇨989

Weighing of testimony is function of trial court, and on appeal question is merely whether record contains any substantial evidence to support verdict or findings, and, if so, they are conclusive.

2. Appeal and error ⇨1011(1)

Where record presents conflicting evidence as to automobile accident and court sitting without jury believed evidence favoring plaintiff and concluded that defendants were liable for damages caused solely by their negligence, such decision being supported by evidence is not reviewable by appellate court.

3. Damages ⇨130(1)

\$5,000 for injuries to person and property received in automobile accident held not excessive where damages to plaintiff's automobile amounted to \$250, medical and nursing service \$350, and personal injuries were two fractured ribs, crushed chest, external and internal abrasions with resulting neuralgia, causing loss of four months' earnings at \$140 per month.

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by Giuseppe Crestetto against the Lang Transportation Corporation and J. A. Pettit. From a judgment in favor of the plaintiff, defendants appeal.

Affirmed.

George H. Moore and Gerald O'C. Egan, both of Los Angeles, for appellants.

Henry E. Bianchi, of Los Angeles, for respondent.

FRICKE, Justice pro tem.

[1] Appellants appeal from a judgment allowing damages for personal injuries. Shortly before noon on February 3, 1934, the automobile of respondent, while proceeding easterly on the south side of Fifty-Fifth street in the city of Vernon, was struck near the southwest corner of the intersection by a truck operated by appellants and proceeding southerly on the west side of Santa Fe avenue. Appellants argue in ultimate effect that the weight of

evidence shows contributory negligence and an absence of negligence in the operation of the truck. The weighing of testimony is a function of the trial court. On appeal the question is merely whether there be in the record any substantial evidence to support the verdict or findings, and if there be, the verdict or findings are conclusive on appeal.

[2] Appellants have not, as required by the rule, printed either "in their briefs or in a supplement appended thereto such portions of the record as they desire to call to the attention of the court," other than the medical testimony relative to the nature and extent of respondent's injuries. We have, however, examined the evidence. The statement of appellants to the contrary notwithstanding, there is evidence that respondent did make a boulevard stop before entering the intersection and that, at that time, the truck of appellants was 125 to 150 feet away; that respondent's Ford car had proceeded about 25 feet into the intersection and was going at the rate of 7 or 8 miles an hour when it was hit by the truck; that the speed of appellants' truck was increased between the time it entered the intersection and the collision, and there is evidence fixing the speed of the truck as high as 35 miles per hour. The record presents the customary conflict of evidence in which the court, sitting without a jury, believed the evidence favoring the cause of the plaintiff, and its conclusion that appellants were liable for damages caused solely by their negligence, supported as it is by evidence, is therefore not reviewable here.

[3] Appellants also contend that the allowed damages of \$5,000 is excessive. The court found that the damage to respondent's automobile amounted to \$250, that he incurred indebtedness for medical and nursing services in the sum of \$375, and that his earnings had been \$140 a month. The personal injuries suffered were two fractured ribs, a crushing of the chest, external and internal abrasions, and intercostal neuralgia which developed therefrom; that he suffered severe pain and in the opinion of his medical attendant, was unable to return to his work for four months. The evidence of this physician was evidently believed by the trial court, and we are not here concerned with the other medical testimony which the court chose not to follow. Respondent

himself testified at the trial on November 13, 1934, that he still suffered pain in the region of the heart when working hard at night. We do not find in the record such a condition of facts as would warrant this court in declaring the amount of damages allowed to be excessive.

The judgment is affirmed.

We concur: CRAWL, P. J.; WOOD, J.



9 Cal.App.2d 162

PEOPLE v. JAMES.

Cr. 2778.

District Court of Appeal, Second District,
Division 2, California.
Sept. 13, 1935.

1. Assault and battery ☞48

Terms "violence" and "force" are synonymous when used in relation to assault, and include any application of force even though it entails no pain or bodily harm and leaves no mark.

[Ed. Note.—For other definitions of "Force" and "Violence," see Words & Phrases.]

2. Witnesses ☞53(3)

Act of husband in committing offense on his five year old daughter held an "assault" constituting "criminal violence" within meaning of statute permitting wife to testify against husband in cases of criminal violence by husband on child of wife; hence wife was competent witness against husband in prosecution of husband (Pen. Code, §§ 288, 1322).

[Ed. Note.—For other definitions of "Assault" and "Criminal Violence," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Roy B. James was convicted of a violation of the Penal Code, § 288, and he appeals.

Affirmed.

Joseph A. Spray, of Los Angeles, and Edgar B. Hervey, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

FRICKE, Justice pro tem.

Appeal from judgment and order denying a new trial. Defendant was convicted of a violation of section 288 of the Penal Code, the offense being committed upon his five year old daughter. The sole question presented on this appeal is whether it was error to permit appellant's wife, the mother of the child, to testify against him over objection.

[1,2] While the wife of a defendant in a criminal action is, under section 1322 of the Penal Code, generally not a competent witness against him, that section contains various exceptions to this general rule, among which is in cases of "criminal violence" by the husband upon a child of the wife. This reduces the legal problem before us to the question as to whether the act made punishable by section 288 is one of "criminal violence."

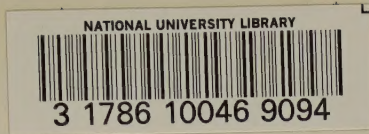
The terms "violence" and "force" are synonymous when used in relation to assault (*People v. Will*, 79 Cal. App. 101, 119, 248 P. 1078), and include any application of force even though it entails no pain or bodily harm and leaves no mark. As stated in *People v. Bradbury*, 151 Cal. 675, 677, 91 P. 497, quoting from Bishop on Criminal Law, "The kind of physical force is immaterial; * * * it [violence] may consist in the taking of indecent liberties with a woman, or laying hold of and kissing her against her will." It follows that the taking of indecent liberties with a five year old child is an act of violence, and if of the type described and made punishable by section 288 of the Penal Code, is "criminal violence." Ap-

pellant cites *People v. Curiale*, 137 Cal. 534, 70 P. 468, 59 L. R. A. 588, in which the court held that an act of sexual intercourse by defendant with his wife before marriage, she being under the age of consent, was not an act of criminal violence upon the wife, since it occurred prior to marriage. The further statement in the opinion that an act of sexual intercourse with a female under the age making the act statutory rape is not an act of criminal violence if she consents was not necessary to the decision, which involved the application of section 1322 of the Penal Code. In the later case of *People v. Babcock*, 160 Cal. 537, at page 540, 117 P. 549, 550, the court says that "it is now so firmly settled in this state as to be no longer open to question that one who lays his hands upon such a female [i. e., below the age of consent], with the intent and for the purpose, then and there, to accomplish an act of sexual intercourse with her, is by so doing guilty of an assault with intent to commit rape, even though he does not use or intend in any event to use any force or violence, and the female in fact offers no resistance whatever, or even expressly consents to all he does." Followed *People v. Parker*, 74 Cal. App. 540, 241 P. 401. In the case at bar the child was but five years of age, and there is no proof of knowledge on her part of the nature of the act committed upon her nor of its wrongfulness, and there was obviously no consent on her part. Clearly the act committed was an assault, and constituted criminal violence within the meaning of section 1322 of the Penal Code, and the wife was a competent witness against the accused.

The judgment and order are affirmed.

We concur: CRAIL, P. J.; WOOD, J.





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